



PC Harrington Contractors Limited v Systech International Limited - there is nothing for adjudicators to fear (well almost...)

by Jon Miller, Partner

According to some less well informed observers the *Systech* case is authority that there is no need to pay an adjudicator who exceeds his jurisdiction. This is not what the Court of Appeal decided, but to understand and appreciate the implications of the *Systech* case, it is necessary to look at the law relating to adjudicators' fees leading up to the decision.

Christopher Michael Linnett v Halliwells LLP (2009) EWHC 319 (TCC)

1. To recap:
 - 1.1. the Respondents and the Adjudicator received the Referral within seven days of the Notice of Adjudication. However, the Adjudicator did not receive the attachments within the seven day period and the Respondent objected;
 - 1.2. there was a further objection to the Adjudicator's jurisdiction based on the underlying contract – it was claimed that not all of its terms were writing;
 - 1.3. The Adjudicator sent out a set of terms which made both the Claimant and Respondents jointly and severally liable for his fees. In view of their objections to jurisdiction the Respondents could not agree to the terms;
 - 1.4. The Respondent took part in the adjudication but maintained their reservations throughout.
2. Interestingly on the merits the Court found that failure to give the attachments to the Adjudicator just outside the seven day period did not render his decision invalid. Further all of the terms of the contract did not have to be in writing, as there was a written contract in existence which contained an adjudication clause. For these two reasons alone the Court could have awarded the Adjudicator his fees.
3. Crucially the Court went further and found that by participating in the adjudication and requesting the Adjudicator to act, the Respondent entered into a contract with the Adjudicator formed by the Respondent's conduct. Accordingly, the Adjudicator was entitled to payment of his fee.
4. In a precursor to *Systech* the Court added, '*if there is a valid jurisdictional challenge and if a party has not participated in the adjudication then ... that party can have no liability for the fees and expenses of the Adjudicator*'. (Emphasis added)

PC Harrington Contractors Ltd v Systech International Ltd (212) EWCH Civ 1371

5. This case concerned the same parties who entered into three separate contracts. Claims for retention on all three projects were the subject of three separate

adjudications before the same adjudicator. During the course of the adjudication a defence put forward alleging an overpayment of £225,000 on one of the projects should be set off against the retentions.

6. The Adjudicator decided that retention monies had to be paid to the Claimant on each subcontract. However, he did not in any of the adjudications to deal with the defence that no retention monies were due because there had already been an overpayment.
7. PC Harrington took the view that all three decisions were not enforceable by reason of breach of the rules of natural justice – the Adjudicator had failed to consider a key issue. It was found that the Adjudicator had *'unwittingly [fallen] below the standards which are required to enable the decision or decisions to be enforced'*. (There was no question that the Adjudicator had acted in bad faith etc.)

However, failure to consider a key point in the defence meant the decisions were unenforceable.

8. One of the main issues was what is an adjudicator contracted to do? The Scheme gives the Adjudicator a number of powers which he exercises during the course of an adjudication. Essentially the points were:
 - 8.1. Was the Adjudicator's contract with a party a divisible contract whereby the Adjudicator was entitled to be paid for the actions taken throughout the adjudication process?
 - 8.2. Alternatively, was the agreement an *"entire"* contract which required complete performance and the delivery of an enforceable decision as a condition precedent to payment?
9. In the first instance the TCC found that the agreement between the Adjudicator and the Parties was not only for the issue of an enforceable decision, but was also for the steps that were necessary in undertaking the role of acting as an adjudicator – therefore the Adjudicator was entitled to be paid.
10. The Master of the Rolls accepted that the Adjudicator was indeed obliged to perform some ancillary functions and carry out other discretionary acts throughout the adjudication process. However, the Contract with the Adjudicator did not contain any provision for payment of Adjudicator's fees for the discrete parts of the adjudication process – there were no instalment or periodic payments.
11. Paragraph 9(1) of the Scheme provides that the Adjudicator may resign at any time on notice. Paragraph 9(2) adds that he must resign where a dispute is the same or substantially the same as one that has been previously referred to adjudication. More significantly if the Adjudicator resigns by giving notice under paragraph 9(1) he is not entitled to any remuneration. The Master of the Rolls said:

'It can, therefore, be seen that the Scheme carefully defines the circumstances in which the adjudicator is entitled to remuneration where his appointment comes to an end before he has made a decision'.

Judges, arbitrators and adjudicators

12. In *Systech* comparisons were made in the TCC to an adjudicator and the roles of judges and arbitrators. In relation to the comparison made with judges, this was not relied upon in the Court of Appeal as a judge has inherent jurisdiction - essentially his authority does not derive from any contract with the Parties.
13. Arbitrators in part derive their authority from a contract, which again is entered into with the Parties. However, the Master of the Rolls accepted there were significant differences between an arbitrator and an adjudicator. Firstly, when ancillary functions are carried out by an arbitrator they are binding on the Parties and therefore the Arbitrator gives value in performing them. Another significant difference is that an arbitrator has an inherent jurisdiction and power to make a binding decision on his own jurisdiction – Section 30 of the Arbitration Act.

Policy

14. The Master of the Rolls also dealt with policy considerations such as it was clearly Parliament's intention to develop adjudication as rough ready and temporary resolution of construction disputes. This is why courts can enforce decisions even when they are wrong on the facts or the law - an erroneous decision is still enforceable in many circumstances. It was found that a decision which is unenforceable as the Adjudicator had no jurisdiction because of a breach of the rules of natural justice is another matter. An unenforceable decision does not further the policy of encouraging parties to find a temporary resolution of their dispute – an unenforceable decision in many circumstances '*... has quite the opposite effect*'.
15. The Master of the Rolls found that the contract with the Adjudicator was for an enforceable decision and failure to provide one, albeit inadvertently, meant that the Adjudicator was not entitled to be paid.
16. Davis LJ however made clear that if having received the Adjudicator's ruling on jurisdiction, but the Responding party goes on to confirm that the Adjudicator should proceed to a decision, the Adjudicator is still entitled to be paid as per *Linnett*. In these circumstances the Adjudicator's fees are payable but '*... subject of course to any express terms agreed*'.
17. Davis LJ concluded '*I doubt if the present decision should have any very great ramifications*'.

The implications of Systech

18. Much has been written about the *Systech* case. Some have suggested it will lead to even more challenges to the jurisdiction. The key issues arising out of the *Systech* case as far as I am concerned are as follows:
 - 18.1. Adjudicators will be reviewing their terms. *Systech* and *Linnett* emphasised the importance of the contract between the Adjudicator and the Parties. Many of the points raised in *Systech* were subject to the express terms of the Adjudicator's contract;

For example, an adjudicator's terms conditions may now make it clear that the Parties are entering into a divisible contract, and that the Adjudicator will be entitled to be paid for the steps he takes throughout the process of an adjudication.

- 18.2. There may be more payments on account of the Adjudicator's fees as Adjudicators get more nervous about being paid.
- This raises an issue if just one of the Parties objects to the Adjudicator's terms or refuses point blank to pay fees on account. It is more than likely to be the Respondent who refuses while at the same time will be making the objection to the Adjudicator's jurisdiction.
- 18.3. Could the *Systech* case give rise to bolder Respondents? Respondents who object to jurisdiction but do not take part in the adjudication may not enter into a contract with the Adjudicator for his fees.
- 18.4. In the past I have objected to jurisdiction but also confirm that my client has not accepted the responsibility for the Adjudicator's fees. Is this sufficient if I continue to take part in the adjudication?
- 18.5. If an Adjudicator insists on standard terms, could they become his standard terms of business and unenforceable under section 3 of the Unfair Contract Terms Act 1977? My first reaction to this proposal is that it seems to be fanciful, but you never know.....
- 18.6. What is the position with Adjudicators who have been paid in advance despite not giving an enforceable decision? Are they now liable to repay the fees?
- 18.7. A large part of the *Systech* analysis was concerned with the Scheme. A difference conclusion may be reached by a different court if a different adjudication procedure is in place.
- 18.8. How are an adjudicator's fees to be assessed if the Court severs an adjudication decision?
19. The key point I believe is how recovery of Adjudicator's fees will operate in practice. If an Adjudicator sues for his fees, will a Defendant be able to raise the point that the decision is unenforceable in these proceedings? Could this lead to the Small Claims Court or County Courts re-examining the conduct of an adjudication to decide whether the decision was enforceable or not? Alternately could it mean that claims for adjudicators' fees will be transferred automatically to the TCC if this defence is raised?