



## PC Harrington Contractors Ltd v Systech International Ltd [2012] EWCA Civ 1371 - An adjudicator is not entitled to payment if the appointment is revoked as a result of 'default or misconduct'

by Nicholas Gould, Partner

*Nicholas Gould, Partner, Fenwick Elliott LLP, Visiting Senior Lecturer, King's College London, and chair of the PSC Adjudication Subcommittee, reviews the recent decision on Adjudicators' fees.*

An adjudicator's right to recover his fees has become an important issue after the recent Court of Appeal ruling case of *PC Harrington Contractors Ltd v Systech International Ltd*<sup>1</sup> (judgment issued in October 2012).

In this case, a dispute between a sub-contractor and its sub-sub-contractor was referred to adjudication. It was later held that the decision was unenforceable on the grounds that the adjudicator had breached the rules of natural justice. Systech, the adjudicator's employer, commenced proceedings against PCH to recover the adjudicator's outstanding fees.

The Court of Appeal overturned the High Court's decision and decided that Systech were not entitled to the fee. The Court of Appeal considered the terms of the adjudicator's contract and the provisions of the Scheme for Construction Contracts (England and Wales) Regulations 1998 ("the Scheme"). They determined that the parties' bargain with the adjudicator was for an enforceable decision. They also concluded that paragraphs 8, 9 and 11 of the Scheme clearly showed that Parliament had not intended for an adjudicator to be paid in cases where he did not perform all of his obligations, and this included making an enforceable decision. An unenforceable decision meant that the adjudicator had not performed his obligation at all.

In particular, paragraph 11(2) of the Scheme provides that an adjudicator is not entitled to payment if his appointment is revoked as a result of "default or misconduct". The Court considered that a breach of the rules of natural justice by the adjudicator constituted a 'default' or 'misconduct': it was "*a serious failure to conduct the adjudication in a lawful manner*".

The Court of Appeal also looked at policy considerations behind adjudication, concluding that the statutory provisions for adjudication reflected a Parliamentary intention to provide a scheme for a rough and ready temporary resolution of construction disputes. This is why the Court will enforce decisions which are shown to be wrong on the facts or in law. An erroneous decision was nevertheless an enforceable decision within the meaning of the Housing Grants, Construction and Regeneration Act 1996 and the Scheme. However, a decision that was unenforceable through lack of jurisdiction or breach of the rules of natural justice was quite another matter. The Court of Appeal said that their judgment should not have any very great ramifications: adjudicators can simply incorporate into their terms of engagement a provision covering the payment of fees and expenses if a decision is not delivered or is unenforceable. Whether the Court will in fact enforce such a term when the time comes remains to be seen.

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1. [2012] EWHC Civ 1371

A successful challenge to an adjudicator's jurisdiction will not only avoid paying any amount ordered in the decision, but will also avoid the need to pay the adjudicator. This decision does not deal with a situation where the referring party requests the adjudicator to proceed despite the challenge. In that circumstance the referring party will most likely still be liable for the adjudicator's fees. However, adjudicators should, as a result of this case, consider amending their terms now in order to provide for payment in the event that their decision turns out to be unenforceable.

#### November 2012

##### **Nicholas Gould**

Fenwick Elliott LLP  
Aldwych House  
71-91 Aldwych  
London  
WC2B 4HN  
[ngould@fenwickelliott.com](mailto:ngould@fenwickelliott.com)

Tel: +44 (0) 20 7421 1986

Fax: +44 (0) 20 7421 1987