

## Adjudicator's decision in liquidated damages dispute not tainted by breaches of natural justice (*Bilton & Johnson v Three Rivers*)

21/01/2022

**Construction analysis:** The Technology and Construction Court (TCC) dismissed two challenges to the enforceability of an adjudicator's decision, based on alleged breaches of natural justice. It found that the adjudicator had been entitled to reach a view on which contractual terms applied to the dispute without adopting the precise arguments made by either party, and that he had not failed to determine a rectification defence raised by the employer.

*Bilton & Jonhson (Building) Co Ltd v Three Rivers Property Investments Ltd* [\[2022\] EWHC 53 \(TCC\)](#)

### What are the practical implications of this case?

This case is a useful reminder of the principles that the courts will apply, when faced with arguments that an adjudicator's decision is unenforceable on account of a breach of the rules of natural justice. The particular points emphasised in the court's judgment are that:

- where an adjudicator proposes to adopt a methodology, or a route to resolving a dispute, that was not advanced by either party, it should give the parties an opportunity to comment on its approach. However, the adjudicator need not consult the parties on all aspects of its reasoning
- if the adjudicator fails to consider a line of defence raised by one party, that failure may amount to a breach of the rules of natural justice—however, the failure must be both deliberate, and have a material effect on the outcome of the dispute

### What was the background?

Three Rivers Property Investments Ltd (Three Rivers) appointed Bilton & Johnson (Building) Co Ltd (Bilton) to carry out refurbishment works at an industrial estate.

The parties' contract was initially based on a form of tender prepared by Three Rivers' agents (the court referred to this as the 'Original Contract'). Shortly after the works commenced, Three Rivers' agents issued Bilton with another contract, based on the JCT Design and Building Contract 2016, which Bilton signed and returned (the court called this the 'Signed Contract').

A dispute arose between the parties in respect of delays to the works, and Three Rivers' entitlement to liquidated damages (LADs) for late completion. A key issue was that the Original Contract had provided for sectional completion of the works, with LADs payable at £2,500 per week of delay in respect of each section. However, the Signed Contract specified a single date for completion of the whole works, with LADs payable at £2,500 per week of delay.

The dispute was referred to adjudication. The adjudicator determined that the Signed Contract had superseded the Original Contract. The result was that Three Rivers was liable to pay Bilton around £230,000, because it had wrongly deducted LADs at the higher rate stated in the Original Contract. The adjudicator dismissed a rectification argument raised by Three Rivers, in terms of which it argued that it had been entitled to proceed as if the LADs provisions of the Original Contract applied.

Three Rivers refused to pay Bilton the sum ordered by the adjudicator, and Bilton raised enforcement proceedings. Three Rivers sought to resist enforcement on the basis that the adjudicator had breached the rules of natural justice, so far as:

- his findings on the applicable contract terms were not based on arguments made by either party
- he had failed to determine the rectification defence, and therefore not exhausted his jurisdiction

## What did the court decide?

The court enforced the adjudicator's decision.

### References:

*Balfour Beatty Construction Ltd v London Borough of Lambeth* [\[2002\] EWHC 597 \(TCC\)](#)

The court recounted that, in terms of the principles of natural justice, parties to adjudication are entitled to be 'confronted' with, and given a fair opportunity to respond to, the main points relevant to the dispute and the adjudicator's decision (*Balfour Beatty v London Borough of Lambeth*). It considered several authorities relevant to this principle, noting that:

- *References:*  
*Primus Build Ltd v Pompey Centre Ltd* [\[2009\] EWHC 1487 \(TCC\)](#) *Corebuild Ltd v Cleaver* [\[2019\] EWHC 2170 \(TCC\)](#)  
an adjudicator is not required to consult the parties on every element of its thinking. However, if it intends to adopt some method or route to resolving the dispute that was not put forward by either party, or make good a deficiency in one party's case, it should normally raise this matter with the parties in advance of its decision
- *References:*  
*Pilon v Breyer Group Ltd* [\[2010\] BLR 452](#)  
an adjudicator's failure to consider part of a defence to a claim could render its decision unenforceable, if the failure was deliberate and material to the outcome of the case

## Applicable contract terms

The court found that the adjudicator had 'not come close' to breaching the rules of natural justice, in relation to his decision on the applicable contract terms.

The core of the dispute was the extent of Three Rivers' entitlement to LADs, and the necessity of resolving the matter of which contract terms applied was reflected in both the Notice of Adjudication and Referral Notice. In the proceedings, Three Rivers had argued that the Original Contract was the only contract that bound the parties. By contrast, Bilton had submitted that the time provisions of the Original Contract were never binding or enforceable, and so the only applicable LADs clauses were those of the Signed Contract.

### References:

*Primus Build Ltd v Pompey Centre Ltd* [\[2009\] EWHC 1487 \(TCC\)](#)

The adjudicator's reasoning did not precisely follow either party's case: he concluded that the Signed Contract had superseded the Original Contract. However, in the court's view, this was a case where the adjudicator's reasoning was derived, even if not expressly taken, from the parties's submissions, and so did not have to be canvassed with the parties in advance of his decision (*Primus v Pompey*). The court added that, in any event, the adjudicator's reasoning on this point was not material—his key finding was that the applicable terms were those in the Signed Contract, and that finding was not undermined by the precise approach he had taken. A breach of the rules of natural justice will only invalidate an adjudicator's decision if it is material, and more than peripheral.

## Rectification

In the adjudication, Three Rivers had argued that the LADs provisions of the Signed Contract had been included by mistake, and should be rectified to allow for the deduction of LADs at a higher rate. Three Rivers submitted that the adjudicator had failed to determine this line of argument, thus taking an erroneously narrow view of his jurisdiction. However, the court noted that, as the adjudicator's decision in fact contained a

section titled 'Rectification', which spanned more than four pages, Three Rivers' argument proceeded from an 'unpromising starting point'.

On review of the adjudicator's decision, the court held that he had not failed to address the rectification defence, or done so in an unfair manner. He had considered and ruled upon the issue. Further, his main reasons for rejecting the defence was not that he had no jurisdiction to rectify the Signed Contract, but that Three Rivers could not have been entitled to LADs at a higher rate at the time the deductions were actually made (because the contract had not, at that time, been rectified), and the higher rate would amount to an unenforceable penalty. It was irrelevant to consider whether those reasons were correct as a matter of law, and there was no other respect in which the adjudicator's approach to the rectification defence had been unfair.

### **Case details**

- Court: Technology and Construction Court (QBD), Business and Property Courts, High Court of Justice
- Judge: Jason Coppel QC
- Date of judgment: 14 January 2022