

ADJUDICATION SOCIETY ADJUDICATORS' FEES – WHAT YOU NEED TO KNOW (PART 2)

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INTRODUCTION

On the 17th October 2012, Alan Woolston, in his talk “Adjudicators’ Fees – What you need to know” derived the following conclusions from *Systech v PC Harrington* [2011] EWHC 2722 (TCC):

- Provision of the role of Adjudicator is wider than just the production of a decision – covers discharging other duties the period leading up to it
- Even if the decision is unenforceable services have still been performed - there is not total failure of consideration.
- One should be slow to exclude payment in circumstances where the adjudicator has done their honest best in performing their role
- Position might be different if there is evidence of fraud, dishonesty or bad faith

This decision has now been overturned on appeal: *PC Harrington v. Systech* [2012] EWCA Civ 1371. The above conclusions are no longer correct.

PC HARRINGTON V. SYSTECH: What did the CA decide?

MR: “16. ... Miss Rawley submits that the doctrine of total failure of consideration applies where a party makes a claim in restitution to recover payments made pursuant to a contract and the other contracting party has wholly failed to perform his side of the bargain She submits, however, that the doctrine cannot operate as a defence to an action to enforce a contractual promise to pay the contract price. She says that where the party defending the claim for a sum due under a contract refuses to pay on the grounds that there has not been complete performance, the correct question is not whether there has been a total failure of consideration. Rather, it is whether the contract is an entire contract that requires complete performance as a condition precedent to the liability to pay.

17. I would accept this The present case does not involve a claim in restitution for repayment of money paid by PCH to the adjudicator. The question that arises, therefore, is not whether there was a total failure of consideration. It is whether the contract was (a) an entire contract such that the bargained-for consideration was an enforceable decision or (b) a divisible contract for the performance of a series of "ancillary and anterior functions" (to use the judge's phrase) culminating in the making of a decision. Another way of putting the question is to ask whether the adjudicator has performed any of the contractual functions *in respect of which payment is due*. That is a question of construction of the contract.”

In short, the first instance judge had answered the wrong question.

PC HARRINGTON V. SYSTECH: What did the CA decide?

- “21. ... the judge held that the bargained-for performance was not only the making of a decision. He said that it also involved undertaking the role of adjudicator, which included taking all the steps that he had to take prior to making the decision. ...
22. I agree that the adjudicator was obliged to perform some ancillary and anterior functions and entitled to perform others. He could not simply produce a decision out of the hat. Para 13 of the Scheme specifically empowered him to take certain steps as part of the process of conducting the adjudication culminating in a decision. Miss Rawley points out, for example, that the adjudicator determined the jurisdiction issue... . This preliminary decision had to be made before the adjudicator could proceed with the rest of the adjudication.
23. **But the question is not whether the adjudicator was obliged or entitled to take these steps prior to making his decision. Rather it is whether he was entitled to be paid for these steps if they culminated in a decision which was unenforceable.** I consider that at para 43 of his judgment, the judge conflated these two distinct questions. He seems to have regarded it as axiomatic that the performance of the preliminary steps amounted to partial performance of the bargain *for which payment was agreed to be made*. But he did not explain how he reached this decision. **Whether it was correct depended on the true construction of the contract. ...”**
- The correct test is, on construction of the relevant contract: “what is the bargained for performance”**

PC HARRINGTON V. SYSTECH: What did the CA decide?

After concluding that the adjudicator's terms of engagement had to be read together with the provisions in Part 1 of the Scheme, and considering those terms and provisions, the MR continued:

“32. I return to the question: what was the bargained-for performance? In my view, it was an enforceable decision. There is nothing in the contract to indicate that the parties agreed that they would pay for an unenforceable decision or that they would pay for the services performed by the adjudicator which were preparatory to the making of an unenforceable decision. The purpose of the appointment was to produce an enforceable decision which, for the time being, would resolve the dispute. A decision which was unenforceable was of no value to the parties. They would have to start again on a fresh adjudication in order to achieve the enforceable decision which Mr Doherty had contracted to produce.”

Davis LJ agreed, and added a few observations, the MR agreeing:

41. ... the key nevertheless is to consider what was the contractual bargain actually made. ...

42. To me, what effectively decides the matter in favour of the appellant are the terms of the Scheme itself. ... Nor do the Terms of Engagement employed by Mr Doherty and incorporated into this particular contract indicate any different conclusion.

PC HARRINGTON V. SYSTECH: What did the CA

decide? Davis LJ (continued):

43. I also would attach significant weight to paragraph 20 of the Scheme. That expressly stipulates that the adjudicator shall decide the matters in dispute. But where, as here, an adjudicator delivers a decision which is entirely unenforceable then he will not have decided the matters in dispute.

45. I therefore would conclude in the present case that the adjudicator is not entitled to be paid any fees. He has not produced an (enforceable) decision which determines the matters in dispute: which is what this contract required of him before his entitlement to fees arose.

A special case. Participation after a jurisdictional objection is rejected

44. As to the special situation arising in an adjudication where one of the parties raises a challenge on jurisdiction before a decision is reached and then, having received the adjudicator's ruling on jurisdiction, elects that the adjudicator should proceed to a decision, that situation is in my view correctly addressed by Ramsey J at paragraphs 76 to 79 of his judgment in *Linnett v Halliwells LLP* [2009] EWHC 319 (TCC), [2009] BLR 312. The adjudicator's fees are then – subject of course to any express terms agreed – payable even if the Court subsequently were to declare the initial challenge to the jurisdiction to have been well-founded.

Tracy LJ agreed with both judgments

PC HARRINGTON V. SYSTECH (CA): Other special cases

If a party does not participate after its jurisdictional objection is rejected

Linnett v Halliwells, para. 63, 69, suggests that only the referring party is liable for the adjudicator's fees where a responding party, having raised and lost a jurisdictional objection, declines to take any further part and the Decision is subsequently held not be enforceable on those grounds. The referring party's liability is, paras. 77, 78, either under an implied or express contract or under principles of unjust enrichment. See also *Griffin v. Midas Homes Ltd* [2000] EWHC 182, discussed at *Linnett v Halliwells*, paragraphs 72 ff

If the jurisdictional error first emerges when the Decision is made

If the jurisdictional error that renders the decision unenforceable only emerges in the Decision *Linnett v. Halliwells* is distinguishable, *PC Harrington v. Systech* (CA) applies. Neither party is liable for the adjudicator's fees.

PC HARRINGTON V. SYSTECH (CA): Other special cases

Other matters rendering a Decision unenforceable

In the case of other matters rendering a Decision unenforceable, it is likely that the same principles apply by analogy.

- If the matter that renders the Decision unenforceable is advised by the Adjudicator to the parties during the course of the adjudication and they continue to participate then, even if they do so subject to a reservation, they are requesting the adjudicator to adjudicate on the dispute and will be liable for the adjudicator's fees either under an implied or express contract or under principles of unjust enrichment. *PC Harrington v. Systech (CA)* is distinguishable as, in that case, see paragraph 5, the adjudicator's ruling that lead to his Decision being unenforceable was reached without giving the parties the opportunity to be heard on the point.
- If a party withdraws after the adjudicator advises that matter, only the party that continues to participate will be liable for the Adjudicator's fees.
- If that matter first emerges in the Decision, *Linnett v. Halliwells* is distinguishable, *PC Harrington v. Systech (CA)* applies. Neither party is liable for the adjudicator's fees.

PC HARRINGTON V. SYSTECH (CA): Proving the Decision was unenforceable

The unenforceability of the Decision must be proved in the proceedings concerning the Adjudicator's fees, as was done in *Systech v PC Harrington* (TCC), see para 49; not, apparently, appealed.

- Assuming that the Adjudicator was not invited to and did not participate in the enforcement proceedings, *Systech v PC Harrington* (TCC), para 38, (s)he will not be bound by the judgement in those proceedings. In any case, when the court dismisses an application for summary judgement to enforce an adjudicator's Decision it does so, not on the grounds that that the Decision is unenforceable, but because it is not satisfied that there is no real prospect of successfully defending the claim for enforcement.
- Even if, in fee proceedings brought by an adjudicator, the court does determine the question of enforceability, as opposed to merely refusing summary judgement, such a determination will only bind the parties to the Adjudication if both are parties to the fee proceedings.

PC HARRINGTON V. SYSTECH: Other adjudication rules

The test applied in PC Harrington v. Systech (CA) is: on construction of the relevant contract, what is “what is the bargained for performance”. Does applying that test to other adjudication rules lead to the same conclusion as the CA reached construing the terms contractually implied from the Scheme.

TeCSA Rules:

22 If a Party shall request Adjudication, and it is subsequently established that he was not entitled to do so, that Party shall be solely responsible for the Adjudicator's fees and expenses.

23 Save as aforesaid, the Parties shall be jointly and severally responsible for the Adjudicator's fees and expenses including those of any specialist consultant appointed under Rule 18.8. In his decision, the Adjudicator shall have the discretion to make directions with regard to those fees and expenses.

If no such directions are made, the Parties shall bear such fees and expenses in equal shares ...

24 The Adjudicator's fees shall not exceed the rate of £1,750 per day plus expenses and VAT.

PC HARRINGTON V. SYSTECH: Other adjudication rules

CIC Rules

“25. If the Adjudicator fails to reach or issue a decision in accordance with paragraph 24 (which states that it must be reached within the relevant time limits), he shall not be entitled to any fees or expenses (save for the cost of any legal or technical advice subject to the Parties having received such advice).”

ICE Rules

6.1 The Adjudicator shall reach his decision and so notify the Parties within the time limits in Rule 5.1 ...

6.3 Should the Adjudicator fail to reach a decision and/or he notifies the Parties of his inability to reach a decision, then either Party may give seven days notice of its intention to refer the dispute to a replacement adjudicator appointed in accordance with the procedures in Rule 3.3.

6.4 If the Parties are not notified in accordance with Rule 6.3 then the Adjudicator shall not be entitled to any fees or expenses but the Parties shall be responsible for the fees and expenses of any legal or technical adviser appointed under Rule 5.6 subject to the Parties having been notified of such appointment.”

PC HARRINGTON V. SYSTECH: Claims in restitution

“ ... when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is generally speaking, not the promise which is referred to as the consideration, but the performance of the promise.” *Fibrosa Spolka v Fairbairn Lawson* [1943] AC 32, 48.

“ ... the test is not whether the promisee has received a specific benefit, but rather whether the promisor has performed any part of the contractual duties in respect of which the payment is due.” *Stoczniia Gdanska SA v Latvian SS Co* [1998] 1 WLR 574, 558.

Thus, the claim for restitution on the grounds of total failure of consideration involves the same question as the claim for payment in *PC Harrington v. Systech (CA)*: What, on construction of the relevant contract, was the bargained for performance”. If it is, as in that case, “an enforceable decision” then, unless principles derived from *Linnett v Halliwells* apply on the facts, and subject to any available defences, there is a possible claim for repayment of fees paid to an adjudicator whose Decision was unenforceable.

PC HARRINGTON V. SYSTECH: Claims in restitution

What the claimant must prove

In addition to establishing the construction point, the Claimant must establish that the Decision is unenforceable. Generally, it will not be sufficient that such a conclusion was reached in enforcement proceedings. In the case of stale claims, a claim for repayment of money paid under mistake of law may be possible, *Kleinwort Benson v. Lincoln CC* [1999] 2 AC 349 (HL).

What are the Defences

The principal defences to restitutionary claims are change of position, settlement of an honest claim and compromise and limitation; *Kleinwort Benson v. Lincoln CC* (HL), 412-3 (considered in the context of restitutionary claim for return of money paid under mistake of law) and estoppel.

• Change of position

Detrimental reliance on a payment received in good faith; for instance using the money or part of it to make a purchase that would not have been made but for its receipt, using the money to cover expenses that would have been incurred in any event is not sufficient.

PC HARRINGTON V. SYSTECH: Defences to claims in restitution

- **Settlement of an honest claim and compromise**

If the payee knew or believed that the money was not due but paid anyway; if the claim for payment was initially disputed, but payment was then made; if there was an accord and settlement. Something more than payment following a simple demand is required.

- **Estoppel**

There must be a representation for which the payer is responsible which lead the payee to believe that he was entitled to treat the payment as his own and a change of position based on that belief making it inequitable for the money to be repaid; expenditure which would not have been incurred but for the payment may be sufficient. The making of the payment is not, itself, enough to found the estoppel.

- **Limitation**

Claims of this type are subject to a six year period, s. 5 LA 1980. But does this run from the date of unjust enrichment or the date of a repayment demand. If the claim is for payment made under a mistake time does not run until the mistake was known or ought, with diligence, have been discovered, s. 32(1)(c); *Kleinwort Benson v. Lincoln CC* (HL).

PC HARRINGTON V. SYSTECH: Practical considerations

For the Adjudicator

Seek to agree terms which provide for fees to payable for conducting the adjudication irrespective of whether the Decision is enforceable or not, perhaps with a bad faith exception. This is the solution suggested in *PC Harrington v. Systech (CA)*, para. 46 (or get nominating bodies to amend their rules).

Advise conclusions on all jurisdictional issues well before the Decision is reached and, in any event, before last submissions are due.

Advise rulings on procedural issues and other matters that might give grounds for challenging the enforceability of the Decision well before the Decision is reached and, in any event, before last submissions are due.

If fees are disputed, consider the relationship between any proceedings for those fees and any proceedings to enforce the Decision.

If you have been paid for past Decisions that were not enforced by the court consider the grounds on which you would resist a restitutionary claim.

PC HARRINGTON V. SYSTECH: Practical considerations

For the Parties

If it is contended that a Decision is unenforceable consider:

- Whether, under the applicable rules and adjudicator's agreed terms, if any, the bargained for performance was an enforceable award.
- Whether the grounds for the Decision being unenforceable concern matters advised to the parties during the course of the Adjudication or only in the Decision and, if the former, whether there was participation after that time.
- How, if the Adjudicator's fees are to be disputed on this basis, the question of whether the Decision is unenforceable should come before the court and be determined in a cost effective manner binding all concerned.

If a claim to recover fees previously paid to an Adjudication is proposed, consider:

- The basis for the restitutionary claim: total failure of consideration/money paid under mistake of law.
- Whether the question of enforceability will have to be re-litigated with the adjudicator and what that involves.
- Defences available to the Adjudicator.

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ADJUDICATORS' FEES – WHAT YOU NEED TO
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THANK YOU

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