Case No: HT-11-270

Neutral Citation Number: [2011] EWHC 2722 (TCC)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 October 2011

Before:

MR JUSTICE AKENHEAD

Between:

SYSTECH INTERNATIONAL LIMITED                          Claimant
- and -
PC HARRINGTON CONTRACTORS LIMITED                        Defendant

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Dominique Rawley (instructed by Systech Solicitors) for the Claimant
James Bowling (instructed by Speechly Bircham LLP) for the Defendant

Hearing date: 13 October 2011

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JUDGMENT

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Mr Justice Akenhead:

1. This case involves an interesting and important issue relating to the recoverability of adjudicators’ fees in circumstances where the decision of the adjudicator is said to be unenforceable by reason of a failure to comply with the rules of natural justice. The question as to whether there has been a total failure of consideration arises in these circumstances.

The Background

2. Much of the factual background can be found in the judgement of this Court in PC Harrington Contractors Limited v Tyroddy Construction Limited [2011] EWHC 813. PC Harrington Contractors Ltd (“Harrington”) was a contractor engaged by others to carry out various works at three separate projects at Wembley Stadium, at Kings Waterfront, Liverpool and Kingsmill Hospital, Mansfield. By way of three separate sub-contracts, Harrington employed Tyroddy Construction Ltd (“Tyroddy”) to carry out works in relation to reinforcement on these three projects. As in the earlier case, it has been agreed for the purposes of today that the Wembley history, contract, adjudication and issues are representative of the other two. It is, therefore, unnecessary to go into any detail on the Mansfield and Liverpool contracts and adjudications. This is, however, to be a judgement in relation to all three adjudications, but, by looking at the Wembley adjudication, I can deal with all the issues on the other two as well.

3. It is clear that at some stage prior to 6 June 2003, Harrington had approached Tyroddy with a view to them quoting for the provision of labour and small tools in relation to the fixing of steel reinforcements for various parts of the Wembley project. Thus it was, on 6 June 2003, that Harrington effectively sent an order by way of letter confirming rates:

"for providing all labour and small tools necessary to offload, check, distribute and fix steel reinforcement on the above contract from your commencement on this project on 9th June 2003."

There then appears this, after reference to various money rates:

"The above rates are fixed for the duration of our works. Valuations will be weekly and subject to 5% retention for a period of six weeks from your Commencement Date and will then be twice monthly, subject to 5% retention."

Other matters were called for in this letter, but it seems clear that Tyroddy started their work thereafter. This letter evidences the contractual terms between the parties. Following the commencement of work, there was an agreement between the parties by which the retention was to be reduced to 3%. For the interim valuations issued by Harrington retention of 3% was used.

5. The first valuation took place for the period ended 15 June 2003. Harrington issued what was called a "Subcontractor's Payment Certificate" and the form
of that certificate was to identify a figure for the value of measured works, day works and materials on site, and on this Certificate No. 1 £41,400 was identified. The words "On Account" are handwritten beside this figure. That was subject to a retention of 3%, which reduced the gross amount to £40,158. There were then deductions of 18% to reflect an income tax reduction. That may have something to do with labour only subcontracts. To the net resulting figure VAT is added and payment of, in this case, £39,957.21 was said to be due and payable to Tyroddy by Harrington. Indeed, the box says "Cheque enclosed". It is clear that the works proceeded over the next year or two and thus it was that what was apparently the last certificate from Harrington was issued on 28 May 2006. It is said to be Payment No. 111 and it may be that payments had been made previously on a weekly or fortnightly basis. Again, the format is identical and, as before, against the value of "measured works, day works and materials on site" there has been written in hand the words "on account". That identified a retention at 3% of £66,628.50.

6. For various reasons, following the completion of their work by Tyroddy, no final accounting process was embarked on. There is no evidence that Tyroddy made a claim for any more money, but the position was that, on this project as on the other projects, the retention remained as retention. Thus it was that, four and a half years later, Tyroddy decided that it wished to refer a number of these contracts to adjudication, in effect, to claim for the outstanding retentions. In so far as the Wembley project was concerned, that adjudication was instituted by a Notice of Intention to Adjudicate on 17 January 2011. By 31 December 2010, Tyroddy had written to Harrington informing them that it had ceased trading due to cash flow problems and the withdrawal by the bank of its overdraft facility.

The Appointment of the Adjudicator

7. The Notice of Adjudication was relatively simple in form:

"2. The Contract provided for the deduction and retention at 5%. There was no express provision for the release of such retention.

3. PCH have failed to repay any or all of the retention. As a consequence, a dispute exists as to the method and timing in which the retention should have been repaid…

6. The Adjudicator is asked to decide that the retention should have been repaid by reason of an implied term and what that term shall be.

7. The Adjudicator is asked to decide the final dates or date that the retention should have been repaid.

8. The Adjudicator is asked to decide that the total retention of £66,628.50 or such other sum as the Adjudicator shall decide is to be repaid forthwith…
10. The Adjudicator is asked to decide that the responding party **are** liable for the Adjudicator’s fees and expenses.”

8. Mr Philip Doherty was, properly, appointed by the RICS to act as Adjudicator. He was employed by a company called Systech International Limited ("Systech"), the Claimant in these proceedings. On 20 January 2010, he wrote to the parties in the following terms:

“I confirm my appointment by the RICS to act as Adjudicator in the above dispute and enclose my terms and conditions.

Following receipt of the Referral, which I now invite, I will provide my programme of directions.”

9. The attached "Terms of Engagement of the Appointment as Adjudicator" were as follows:

“1. My charges are calculated as follows:

   a) all time incurred by reason of my appointment, including meetings with the Parties, travelling and waiting time, will be charged at £210 per hour; and

   b) all expenses and/or disbursements incurred by reason of my appointment, including travel and obtaining such legal or other advice as in my absolute discretion I consider it desirable to take, shall be charged at cost.

2. Notwithstanding that this appointment is personal to me, all payments are to be made to my employer, Systech International Ltd…

4. The Parties are jointly and severally liable for payment of my charges.

5. All outstanding charges are due when my decision in respect of the matter referred to adjudication is reached. Notwithstanding the fact that I may apportion charges between the Parties, in the first instance unless otherwise directed, the contracting parties shall each pay 50% of the interim fee account on or before the final date for the reaching of the final Adjudicators Decision. A final fee account shall be issued with the Decision setting out final fees and expenses incurred.

6. Demands for interim payment in respect of my charges may be made at any time prior to reaching my decision, at my absolute discretion.

7. Any charges not paid within the time limit specified above shall be subject to the addition of simple interest at 8% above the current Bank of England Rate, from the expiry of the time limit until receipt of payment…"
8. I shall not be liable for anything done or omitted, including but not limited to negligent acts in the discharge or purported discharge of my role as adjudicator, unless the act or omission is in bad faith…”

10. It is accepted by both parties to this litigation that both Tyroddy and Harrington accepted these terms and conditions, in the case of Tyroddy by way of their claims consultant’s letter dated 20 January 2011 and by Harrington effectively by conduct.

11. The Referral was served on behalf of Tyroddy on 20 January 2011 and it broadly sought payment of the outstanding retention, which in the case of Wembley was £66,628.50.

12. On 21 January 2011, Harrington’s claims consultants wrote to the adjudicator asserting that the adjudicator had no jurisdiction because there was no dispute between the parties; this was put forward on the basis that there had been agreement on a fourth contract relating to “Crossharbour” whereby it was said to have been agreed between the parties that payments of all retentions due or becoming due to Tyroddy should be put on hold until the question of an alleged overpayment of £300,000 on the Crossharbour project was resolved. Tyroddy’s consultant responded on 24 January 2011 giving detailed reasons as to why this jurisdictional challenge was unjustified and asking Mr Doherty to proceed. On 24 January 2011 the Adjudicator e-mailed the parties giving directions as to the further conduct of the adjudication. The parties exchanged at least three more letters on the subject of jurisdiction including a letter dated 26 January 2011 which enclosed a witness statement from Mr Wood, a commercial director of Harrington. On 27 January 2011, Mr Doherty e-mailed the parties indicating that, having reviewed the jurisdictional issue, he considered that he had been properly appointed and would continue with the adjudication.

13. The Response submitted by Harrington on 4 February 2011 reserved Harrington's position on jurisdiction but also dealt in detail with the merits. Harrington relied on the Crossharbour point (supported by the witness statement of Mr Wood and Mr Edey) but also sought to argue that there was no sum due and indeed that there had been an overpayment on the Wembley contract. This latter exercise was supported in detail by a witness statement from a Mr McGann which itself had some two files’ worth of contemporaneous and other evidence attached. Essentially what he tried to show was that, in the light of a total re-measurement done by him or under his direction in relation to all the work done by Tyroddy, Harrington had already overpaid Tyroddy on the Wembley project by about £225,000; thus it was asserted that amongst other things no retention could be payable. The Response also indicated by way of a counterclaim that this overpayment was
claimed back from Tyroddy. Harrington also argued that since no final account had been submitted by or agreed with Tyroddy, the time for the release of the retention had not yet arisen.

14. Tyroddy served a Reply on 11 February 2011 essentially challenging all these defences, arguing that the retention was due, that it was due irrespective of the absence of any formal final accounting, and that the Crossharbour dispute was outside the jurisdiction of Mr Doherty. A particularly firm attack was made on the evidence of Mr McGann. Whilst no point was made about whether or not Mr Doherty had jurisdiction to decide what the true final account value was as between Harrington and Tyroddy, the following was asserted:

“5.3. It is to be inferred from paragraph 16 that PCH issued 111 certificates without once checking that the total being certified was correct. These 111 presumably were prepared by Mr McGann and authorised by Mr Wood …if this is correct then it would appear that PCH are author of their own misfortune by reason of their mismanagement and incompetence …5.10 Two possible conclusions may be drawn from Mr McGann's statement:

1. That he has been either grossly negligent or grossly incompetent having overvalued the work on the Wembley contract by over £¼ million at 2005 values.

Or

2. That his revaluation is a complete fabrication.

Whichever of the above is correct and Mr McGann having been employed by PCH for 8 years suggests that he is not regarded as being incompetent, the Adjudicator must find Mr McGann's evidence unreliable and reject it.”

In Paragraph 5.6 in a chapter headed "The Decisions Requested by P.C. Harrington”, Harrington stated as follows:

“The Adjudicator is asked to decide the amount of the final accounts under the Contract and from which to the side the amount of retention, if any, becoming due to Tyroddy.”

15. Harrington submitted on 14 February 2011 a 27 page Rejoinder, taking issue with much of the Reply. Following this there was no hearing between the parties. On 21 February 2011, Mr Doherty issued his decision to the parties coupled with an invoice for his fees in the total sum of £18,144 made up of £15,120 (72 hours at £210 per hour) together with VAT. This invoice was addressed to Harrington because in his decision he ordered that those fees were to be paid for by Harrington.
Material parts of his decision are as follows:

“THE DISPUTE

8. The Notice of Adjudication states that: - "PCH have failed to repay any or all of the retention withheld. As a consequence a dispute exists as to the method and timing in which the retention should have been repaid."

9. The Referral specifically requests my decision(s) on the implied term governing when

a. retention should be paid;

b. The final date(s) of payment;

c. the sum that is payable forthwith;

d. the interest due; and

e. that the Responding Party is liable for my fees and expenses…

MY DECISION

14. I decide that the retention should have been repaid in accordance with an implied term of half of the retention monies should have been paid at completion of the subcontract works and the remainder 12 months later.

15. I decide that the final dates of payment were: 14 June 2006 for the first moiety; and 14 June 2007 for the remainder.

16. I decide that the total retention of £66,628.50 is to be paid forthwith by PCH to TCL…

REASONS

22…My reasons follow.

23. The matters to be considered in my Decision include:-

- Does a Dispute exist?
- Was the matter resolved by a Settlement Agreement?
- What is the Dispute?...
- What is the correct quantification of Retention?
- To whom does the Retention belong?
- What is the purpose of Retention?
- When is retention due for release?...
- Is set-off allowed under this contract claims on another contract?...
27. The dispute, as described in the 'Notice of intention to refer a dispute to adjudication' concerns the release mechanism for the retention monies held on this contract in the sum of "... £66,628.50". The directions requested from the Adjudicator, in my opinion, merely categorise the stages in the release of that retention, or such other sum-if it is considered due.

28. The alternative arguments put forward by the parties do not alter this basic premise. There is only one dispute. This involves the release of the retention certified by PCH on Certificate 9171 for work up to 28th May 2006 which remains unpaid. TCL requesting my directions for "... method and timing in which the retention should have been repaid" are no more than highlighting the steps I must investigate, review and then decide upon before making my Decision. 

What is the correct quantification of retention?

29. The retention was quantified by PCH, on the Certificate 9171 for "... Period Ending 28th May 2006" and that is the sum requested by TCL, "... or such other sum is the Adjudicator shall decide ..." PCH aver that this is an "On-Account" sum, only becoming due when there is an agreed final account. PCH further complain that TCL never made any applications or produced a final account that could be checked and agreed-this appears to be the reason no agreed final account exists. PCH aver that this is what was expected of TCL but PCH fail to show any contractual obligation on TCL to provide any such application.

30. PCH has a contractual duty to carry out valuations of the works but has only now, in the Response, produced a "Final Account". PCH aver, in the alternative, that monies only become due when released on a "back-to-back" basis with the principal subcontract. I have found that none of these scenarios satisfy the requirements of Section 110 of the Housing Grants, Construction and Regeneration Act 1996... in not providing the certainty of an adequate mechanism for when payments become due. I am satisfied that PCH quantified retention on 28 May 2006 and has had adequate time since to provide and agree a Final Account-their failure to do so is unfortunate. The "Final Account" now produced is not 'agreed' and is not based upon the terms of the contract, examples being the remeasure of reinforcement "fixed" as opposed to the contractual agreement to "...offload, check, distribute and fix..."...PCH also now introduce other contractors claimed 'costs' as 'contracharges' all of which impact on the remeasure. This is a new claim, unsubstantiated and not having been crystallised as a dispute. These points have not been argued through by the parties. TCL dispute this 'final account' and as such I consider that any eventual final account dispute is another dispute outwith this matter....

32. TCL dispute that this new 'final account' is a proper valuation of the works and avers that Certificate 9171 was correct. I consider any dispute as to the value of the works produced by 'the new final account' to be another dispute outwith this matter. I am also swayed by the draft statement of account prepared by PCH "...at 15th July 2010..." which
33. I do not accept the abatement to value exercise carried out by PCH, primarily because it is not agreed but also contractually flawed and outwith this dispute. I accept the interim value of retention as that certified by PCH on certificate 9171 as £66,628.50.

35. This dispute concerns the release of retention as measured and certified by PCH on an interim basis—it is neither 'final' nor to be considered as evidence of any 'final' figure in this matter. It is not necessary, nor within my remit in this matter, to decide on a final account value.

45. I have considered the cross-claim from PCH of the claimed overpayment on the project, on the Crossharbour project and on the other 'overpaid' projects— and in the absence of an 'Agreed Settlement' have reviewed the principles to be satisfied, as set out in Keating 18-050:-

b. Abatement ". . . applies only to matters that go to reduce the value of the work performed. . ." The claimed final account exercise is not agreed nor do I [sic] accept that it abates the value in relation to this dispute at this time.

17. Thus it was that Tyroddy "won" the Wembley adjudication. The decisions on the Mansfield and Liverpool disputes also went in favour of Tyroddy on similar grounds and with similar defences.

The Enforcement Proceedings

18. Harrington sought, ultimately successfully, to pre-empt questions of enforceability by issuing Part 8 proceedings in the TCC in March 2011 to seek a declaration that these three decisions relating to Wembley, Mansfield and Liverpool were not enforceable by reason of breaches of natural justice on the part of the Adjudicator. These were said to relate to the failure or omission by the Adjudicator actually to address the defence put forward in each adjudication that no retention could be due because Harrington had already overpaid Tyroddy on each of the three subcontract projects. Mr Doherty was given notice that these proceedings were to be commenced but he was not made a party and was not sent the court documentation or otherwise invited to participate or intervene. Given the urgency, the hearing took place and judgement was given on 25 March 2011 in favour of Harrington. Shortly after, Tyroddy indicated that it would not appeal and in effect, given that it had already ceased trading, it had no funds to continue.

19. Essentially, as the judgement explains, the Adjudicator had "unwittingly [fallen] below the standards which are required to enable the decision or decisions to be enforced", essentially on the grounds that, by ruling wrongly that issues relating to the final account were outside his jurisdiction, he had put
himself in the position that he could not and would not deal with a defence, namely that no sums were due to Tyroddy because, as Harrington asserted, it had already been paid more than was due to it. Additionally, the Adjudicator took it upon himself to deal with the final account exclusion as a matter of jurisdiction without giving either of the parties the opportunity to be heard on that point. The reasons for this decision are given at Paragraph 21 of the judgement, which concluded as follows:

“The consequence of the above is that on this ground the decisions of the Adjudicator should not be enforced. The findings which I have made are not intended to suggest that the Adjudicator is in some way inherently unfit to adjudicate on other disputes between the parties. This is because the breaches of natural justice here are technical, albeit important, and do not involve any personal condemnation, because the Adjudicator clearly acted honestly and transparently, albeit wrongly”.

20. So far as is material, the Court issued an order following this judgement declaring as follows:

“1. In refusing to consider the question of the final account and its ascertainment - of which the retention claimed by Tyroddy…formed part - and in refusing to consider the defences of set off, abatement and retainer which were available to Harrington…in the Wembley, Mansfield and Liverpool Adjudications the Adjudicator failed to produce Decisions within the meaning of the Scheme for Construction Contracts (England & Wales) 1998…and in each Adjudication committed a material breach of natural justice, in consequence of which each of the Adjudicator’s Decisions in the Wembley, Mansfield and that Liverpool Adjudications is unenforceable.”

It is common ground, and indeed I recall, that this wording was prepared by Counsel for Harrington; Counsel for Tyroddy did not actively participate in this exercise albeit that he sent an e-mail, referred to on the face of the order, explaining that he was no longer instructed in effect by reason of his client’s financial position. I certainly indorsed the order with my signature but I did not cross-check it against the handed down judgement. So, for instance, the judgement did not as such decide that the Adjudicator did not produce "Decisions within the meaning of the Scheme”.

These Proceedings

21. Initially Systech issued five sets of proceedings through the online County Court service via Northampton County Court, seeking payment from Harrington for Mr Doherty’s fees. Two of these related to the Crossharbour project and have since been settled between the parties. The other three sets of proceedings, dealing with the Wembley, Mansfield and Liverpool adjudications respectively, were transferred to the TCC in the High Court and I gave directions that they should be consolidated with consolidated pleadings. No point is now taken that it is Systech seeking payment of these fees rather than Mr Doherty himself.
22. It is unnecessary to analyse the pleadings in any detail. The Substituted Particulars of Claim set out the terms of the respective contracts entered into between the Adjudicator, Harrington and Tyroddy, which are now admitted at least as between Mr Doherty and Harrington. A sum of just over £30,000 plus VAT is claimed in total in relation to the three adjudications. Quantum is no longer in issue, the parties having come to an accommodation partway through the hearing; it is now agreed that £22,000 plus VAT is due, subject to there being any liability and with no point being taken by either party that this quantum, sensibly agreed, reflects on liability in any way. The consolidated "Substituted" Defence of Harrington asserts that there was on each of the three contracts of engagement of the adjudicator a total failure of consideration and that the Adjudicator had failed to issue "Decisions" in accordance with the Scheme. This was on the basis that he had produced decisions which were unenforceable by reason of breaches of natural justice. At least part of this argument is based on there being an implied term of the contract of engagement that the Adjudicator was obliged to conduct the Adjudications in accordance with the principles of natural justice. It is said also that the declarations granted in the earlier enforcement proceedings are to be "in rem", that is in effect binding on Systech and Mr Doherty even though they were not parties to that litigation as such.

23. I did hear from Mr Doherty, who gave evidence to the effect that he did or intended to address the final accounting issue and that he had not committed any breach of the rules of natural justice. He emphasised that he did not believe that he had been asked or was required "to value the final accounts", albeit that he did consider all the documents and evidence put before him. In oral evidence, he said that he had particular regard to the Notice of Adjudication in the determination of what he believed his jurisdiction was and that he did not have to decide what the final account was to determine the retention. He did not believe that the Response did or could widen his jurisdiction; he felt that he had jurisdiction to look at the final accounting evidence proffered but that he did not have to decide what the final account was; he decided that he was not going to deliver a final account but he would look at “the abatement to value” argument. He was also extensively cross-examined about the reasonableness of his fees and the hours recorded but, following that, the parties agreed on a figures as figures basis the quantum.

24. Essentially, the pleaded arguments have been maintained, with each party asserting what they believed the contract of engagement meant. Systech argue that Mr Doherty was engaged to act as adjudicator and that he was not simply engaged to produce a decision; he denies that he was in truth breaching the rules of natural justice and asserts that the earlier judgement does not bind him. In any event, it argues that there has not been a total failure of consideration and that the terms of the contract of engagement are such that it
is entitled to payment from Harrington. Harrington essentially argues that what it has pleaded, for which see above.

The Law

25. The editors of *Chitty on Contracts* (30th ed.) address the general principles of failure of consideration:

“29-054 General principles. Where money has been paid under a transaction that is or becomes ineffective the payee may recover the value of the money provided that the consideration for the payment has totally failed...most of the cases are concerned with failed contracts. In that context failure of consideration occurs where there has been a complete failure of the performance for which the payee has bargained. Thus, the failure is judged from the payee's point of view and:

"...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 Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 48 annotated]

The failure has to be total because the consideration is "whole and indivisible", and the courts will not divide or apportion it unless the parties have done so. This is partly because one cannot assume that all parts of the payee’s performance are equally valuable and that the contract price is earned incrementally. Thus, any performance of the actual thing promised, as determined by the contract, is fatal to recovery under this heading. As Lord Goff said in *Stocznia Gdanska SA v Latvian SS Co*:

“...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.”

29-055. Total failure of consideration and detrimental reliance. At common law a total failure of consideration may occur even though the payee has incurred expense in partly performing his side of the contract, though this will turn on whether that performance can be considered to have been "bargained for"...What is relevant is the bargained-for performance and not a formal classification of the contract as one for sale or sale and services…”

26. Having considered a number of the authorities referred to by the parties, these quotations from Chitty represent a fair summary of the law. Thus it is that one can draw the following general conclusions, relevant to the current case, in relation to how the doctrine of total failure of consideration can arise:
(a) In relation to contracts, it is the law relating to quasi-contract and restitution to which one must have regard in addressing total failure of consideration.

(b) One must determine as a matter of ordinary principles of contractual interpretation what the essential contractual performance bargained for was.

(c) Where the bargained for performance is on analysis the provision of one or even a number of services or things, there must on analysis, on the facts, be a total or complete failure to perform on the part of the provider.

(d) Where there has been a total or complete failure to provide any of the services or things bargained for, there will be a total failure of consideration. Where some of the services or things bargained for have been provided, there has not been a "total" failure of consideration.

27. It will be more difficult to apply the doctrine of total failure of consideration to a contract for the provision of services but that difficulty applies not so much as a matter of construction of the contract but as a matter of fact. If the contract, properly construed, involves the provision of a raft of services, or at least more than one service, it will be difficult to say that there has been a total failure of consideration where some of the services have been provided but not all of them. Of course, depending on the terms of the contract and the contractual entitlements to payment for the services, the service provider may well not be entitled to payment for those services which it has not provided, but that has nothing to do with the doctrine of failure of consideration and more to do with straight contractual entitlement.

28. There are no authorities as such relating to an adjudicator’s entitlement to fees in circumstances where there has been produced a decision, which has proved to be unenforceable by reason of a breach of the rules of natural justice. There are some obiter remarks and there is at least one judgement which deals with the recoverability of fees where a decision may be unenforceable on jurisdictional grounds. In Limett v Halliwell LLP [2009] BLR 312, Mr Justice Ramsey had to deal with a case where there was a challenge to the jurisdiction of an adjudicator during the course of the adjudication with the objecting respondent asking the adjudicator to make a non-binding decision as to jurisdiction but thereafter to adjudicate on the merits. He decided that there was effectively a contract formed by contact between the objecting respondent and the adjudicator in relation to fees. Material parts of the judgement are as follows:

“60. In general terms, absent any jurisdictional objections, I consider that if an adjudicator is appointed and neither party makes a contract with the adjudicator, the parties by participating in the adjudication and thereby
requesting the adjudicator to act, enter into a contract with the adjudicator who acts in that capacity as a result of that request. Such a contract would be formed by conduct. There would, I consider be implied terms that the party would be liable to pay the reasonable fees and expenses of the adjudicator and would be jointly and severally liable with the other party to do so. There would also, I consider be an implied term that the adjudicator would act in accordance with the terms of the Adjudication Agreement between those parties.

61. In principle, I can see no reason why the position should not be similar where only one party makes a contract with the adjudicator but the other one does not. In those circumstances, the party who does not make a contract but participates in the adjudication thereby requests the adjudicator to act and there is a contract made by conduct with the adjudicator who acts in that capacity as a result of that request. There would, similarly be implied terms that the party would be liable to pay the reasonable fees and expenses of the adjudicator, that the party would be jointly and severally liable with the other party to make payment and that the adjudicator would act in accordance with the terms of the Adjudication Agreement between those parties…

63. Whilst the position as set out above would apply where there is no jurisdictional issue, as I have stated above, such issues are frequently taken and some succeed. What then is the position? It seems to me that where a party wishes to raise a jurisdictional argument, as has now become common in adjudications, it has one of two options.

64. First, it can make an assertion of lack of jurisdiction and withdraw, taking no further part in the adjudication proceedings and leaving the adjudicator and the other party to proceed at their risk. It might then seek an urgent declaration as to jurisdiction from the court or seek to challenge any decision on the grounds that the adjudicator had no jurisdiction. In such circumstances in the absence of any agreement with the adjudicator, there would be no request for the adjudicator to do anything and it would, in my judgment, be difficult to make that party liable for the fees and expenses of the adjudicator…

71. If, however, a party has participated in the adjudication process, albeit without prejudice to its contention that the adjudicator did not have jurisdiction, then in principle by participating and thereby requesting the adjudicator to adjudicate on the dispute I consider that the party will generally be liable for the reasonable fees and expenses of the adjudicator on the same basis as set out above.

76. In this case it is evident that Halliwells took the second route which I have identified above. They asked the adjudicator to withdraw but, in the alternative asked him to adjudicate the merits, albeit reserving the position on jurisdiction. In doing so, I consider that they asked the adjudicator to proceed and carry out work and, in my judgment, whatever the correct position on jurisdiction, there was an acceptance by Halliwells that, if the
Adjudicator rejected the jurisdictional argument, he would carry out work in dealing with the merits which would involve considering the arguments of both sides. The Adjudicator then rejected the jurisdictional argument and proceeded to consider the merits, including Halliwell's arguments.

77. In such circumstances, the Adjudicator proceeded both in compliance with the request of Halliwell and pursuant to the agreement with ISG. In relation to Halliwell the adjudicator proceeded at their request and did so without any express agreement as to fees. I consider that, as submitted by Ms Monastiriotis, the request from Halliwell and the fact that the Adjudicator proceeded with the adjudication gave rise to a contract formed by conduct with an obligation by Halliwell to pay the Adjudicator's reasonable fees and expenses.

78. If that be wrong or if, in a particular case, the matter could not be characterised in terms of a contract, I consider that Ms Monastiriotis would be correct in her submissions that the principles identified by Lord Steyn in Banque Financiere de la Cite v Parc (Battersea) Ltd [1999] 1 AC 221 at 227 apply. First, a responding party such as Halliwell has benefited or been enriched by having a decision on the merits which it can seek to rely on if it wishes. Secondly, that enrichment was at the expense of the adjudicator who spent time and incurred cost in dealing with Halliwell's submissions and the arguments raised. Thirdly, that enrichment was unjust where a party accepts the benefit of the adjudicator's services without payment. Fourthly, there are no specific defences to the payment of the fees in this case.”

29. This authority is therefore not directly on point but it underlines the importance of considering the contract, whether it arises by way of express agreement or in consequence of the conduct of the parties. It was obviously not concerned with any argument about a total failure of consideration, which had not been raised.

30. In adjudication, unlike in arbitration, there is no statutory provision which dictates what the adjudicator's fees might be; for instance there is no provision for any "taxation" of the adjudicator’s fees (see generally Paragraphs 24 to 26 of the judgement of HHJ Waksman QC in this Court in Fenice Investments Inc v Jerram Falkus Construction Ltd [2011] EWHC 1678 (TCC)). This latter case involved the recovery by one party to the adjudication from the other of the fees paid to an adjudicator which had been ordered to be paid by the defendant. Again, this does not address the issue of total failure of consideration.

31. In Griffin v Midas Homes Ltd (2000) 78 Con LR 152, HHJ Humphrey Lloyd QC sitting in the TCC was primarily concerned with an issue of the severability of an adjudicator’s decision where he had partly exceeded his
jurisdiction in his decision. In that decision he had also directed that the losing party should pay his fees and the question arose as to whether the whole of the fee should be paid. He decided that it was payable in part on a proportionate basis. The issue was raised belatedly and the learned judge set out his initial conclusions which are reported; it does not appear that he heard full argument on the point but he referred to the statutory scheme at Paragraph 3 on Page 159:

“3. The scheme apparently implicitly confers on the adjudicator power to apportion his fees and to decide who should pay the apportionment. The adjudicator has done so on the basis of all the work that he carried out. However in the light of my decision [on jurisdiction and severability] it is clear some of that work was unauthorised as it was beyond his jurisdiction and accordingly the defendant cannot be liable for it. Only the party that sought adjudication is liable for the fees, expenses and costs incurred by asking for a decision which the adjudicator had no authority to make and to which it was not entitled under the contract and which in breach of contract it sought…”

I do not think that this case helps very much. It does not deal with any failure of consideration and it is dealing with the position as between the two parties to the underlying contract and the adjudication and not to the contractual or quasi-contractual position as between the parties and the adjudicator.

32. In an unreported decision, HHJ Gilliland QC dealt with a case, **Rankilor and another v Igoe (M) Ltd** (21 January 2006) which involved an adjudicator seeking to recover part of his fee from the unsuccessful referring party. That party alleged that the adjudicator had acted in breach of the rules of natural justice. The judge rejected that on the facts and upheld the adjudicator's claim for his fee. However at Paragraph 33 of the judgement he said this:

“In the circumstances, I do not need to consider Dr Rankilor’s claim that even if his decision had been vitiated by a breach of the rules of natural justice, he would still have been entitled to recover his fee under the terms of the adjudication contract which had been entered into. It is, I must say, a surprising submission that if an adjudicator’s decision has been reached in serious breach of the rules of natural justice and thus would not be enforced by the court, the adjudicator should nevertheless be entitled to claim payment for producing what was in fact a worthless decision without even any temporary binding legal effect. I prefer however to leave that question for determination in a case where it is necessary to do so. The present is not such a case.”

Thus, it is a wholly obiter remark and it is unclear from the judgement what arguments were being propounded by each side. It is unclear for instance whether any argument about total failure of consideration had been put forward and it is unclear indeed what the terms of the contract between adjudicator and parties were. It follows that this paragraph, albeit from a much respected TCC judge, does not assist, particularly in circumstances where the judge made the point that the question should be left over.
33. An issue has arisen as to whether a decision reached in breach of the rules of natural justice is a nullity or, put another way, not a decision at all. In the Outer House decision in the Scottish Court of Session, **Ballast plc v Burrell Company (Construction Management) Ltd** [2001] BLR 529, an adjudicator’s decision was challenged under the Scottish judicial review procedure in circumstances where the adjudicator expressly in a "decision" declined to determine the dispute referred to him. It is true that at Paragraph 42 of Lord Reid’s judgement he does say that the adjudicator’s error in his decision document not to deal with the referred dispute led to his decision being "therefore a nullity". However this case again adds little because it is clear that the focus of the case was on the adjudicator’s failure to address and deal with a dispute referred to him and it was not concerned with what the essential nature of the decision actually was.

34. HHJ Peter Coulson QC (as he then was) addressed the issue obiter in **Cubitt Building & Interior Ltd v Fleetglade Ltd** [2006] EWHC 3413 (TCC). The case was between the parties to the construction contract in question and related to whether an adjudicator had the necessary jurisdiction; one of the issues related to the timing of an adjudicator's decision. On this latter topic, the judge stated that, having reviewed the authorities, at paragraph 76 that "a decision which is not reached within 28 days or any agreed extended date is probably a nullity". He said atParagraph 91 on the facts of the case that if he had not "completed his decision in time, the decision would probably have been a nullity...".

35. I have formed the view that these cases are not reviewing the contractual position as between adjudicator and the parties and I should be cautious, in a case involving an adjudicator seeking payment of fees, about relying upon them to determine whether an unenforceable decision is as such a "nullity". That term suggests that it is as if the decision never was and does not necessarily reflect the fact that, even if the decision is unenforceable for one reason or another, the adjudicator will, usually in good faith, have expended time and resource in doing what he believed he was employed to do. I do not consider that the terms "nullity" or “null” assist in determining what if anything is due to an adjudicator under any contractual or quasi contractual relationship which he or she may have with either or both of the parties to the adjudication. What one needs to determine is what the adjudicator has contractually or otherwise undertaken to provide and, unless there has been a total failure of consideration or bad faith on the part of the adjudicator, the adjudicator will be entitled to payment pursuant to the relationship.

36. Finally, I come to consider the issue as to whether or not that the judgement given by me in March of this year is conclusive “in rem” such that it binds Systech even though it was not a party to or even represented in the

“The term ‘judgement in rem’ has been judicially described as ‘a specialised and somewhat misleading term of art limited to judgements concerned with status’. A judgement in rem may be defined as the judgement of the court of competent jurisdiction determining the status of the person or thing, for the disposition of the thing, as distinct from a particular interest in it of a party to the litigation. Apart from the application of the term to persons, it must affect the subject matter of the proceedings in the way of condemnation, forfeiture, declaration of status or title, or order for sale or transfer.”

37. Spencer Bower and Handley (4th Ed) considers the matter at Paragraph 10.18:

“An English decision which affects a disposition of the thing order determines its status is conclusive in rem, four, or against any member of the English public. An order setting aside an alienation of property to defeat creditors or a spouse is in rem. A decision can only operate in rem if the thing was within the territorial jurisdiction of the court…”

38. I very much doubt whether the concept of a judgement in rem can be said to apply to a judgement between two parties to a construction contract. All that the judgement is deciding, usually and in this case, is whether or not as between those two parties a decision of an adjudicator is enforceable. This would be particularly so in circumstances in which the adjudicator is not invited to participate either as a party or in some other way, for instance unlike an arbitrator in proceedings challenging his or her conduct who will be invited to contribute, for instance by making a written statement to the court.

**Discussion**

39. The first thing which needs to be addressed is: what was the bargained-for performance called for from the Adjudicator. That is to be found in the Adjudicator’s letter (in the Wembley case) dated 20 January 2010 and the enclosed “Terms of Engagement for Appointment as Adjudicator”. There is no doubt from the terms of the letter that he was engaged by the parties “to act as Adjudicator” in the dispute to be referred to him. Leaving aside for one moment the few pointers in the Terms, the role of an adjudicator in a construction contract subject to the statutory adjudication provisions of the Housing Grants, Construction and Regeneration Act 1996 (“HGCRA”) can be discerned at least partly from the Act itself and the Scheme. Section 108 deals with adjudication:

“(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section…

(2) The contract shall—
(a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;
(b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;
(c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;
(d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;
(e) impose a duty on the adjudicator to act impartially; and
(f) enable the adjudicator to take the initiative in ascertaining the facts and the law.

3. The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined…

4. The contract shall also provide that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability.

5. If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply.”

Thus, the Act does set a timetable for the adjudication and it is obvious that the ultimate object of adjudication pursuant to the Act is the production of a decision. However, in passing, Sub-section 4 clearly envisages that there will be a number of functions to be performed by the adjudicator. Subsection 2 (f) envisages that the adjudicator can take steps, obviously prior to the issue of a decision, to ascertain the facts and the law.

40. The Scheme sets out a substantial raft of powers which the adjudicator has, for instance, Paragraphs 13 and 17 state:

“13. The adjudicator may take the initiative in ascertaining the facts and the law necessary to determine the dispute, and shall decide on the procedure to be followed in the adjudication. In particular he may—
(a) request any party to the contract to supply him with such documents as he may reasonably require including, if he so directs, any written statement from any party to the contract supporting or supplementing the referral notice and any other documents given under paragraph 7(2),
(b) decide the language or languages to be used in the adjudication and whether a translation of any document is to be provided and if so by whom,
(c) meet and question any of the parties to the contract and their representatives,

(d) subject to obtaining any necessary consent from a third party or parties, make such site visits and inspections as he considers appropriate, whether accompanied by the parties or not,

(e) subject to obtaining any necessary consent from a third party or parties, carry out any tests or experiments,

(f) obtain and consider such representations and submissions as he requires, and, provided he has notified the parties of his intention, appoint experts, assessors or legal advisers,

(g) give directions as to the timetable for the adjudication, any deadlines, or limits as to the length of written documents or oral representations to be complied with, and

(h) issue other directions relating to the conduct of the adjudication.

17. The adjudicator shall consider any relevant information submitted to him by any of the parties to the dispute and shall make available to them any information to be taken into account in reaching his decision.”

41. It has long been accepted that adjudicators are under a duty in broad terms to act fairly and in accordance with the rules of natural justice. In the context of this obligation, adjudicators would be required to give directions to enable each party to present its case, defence, arguments and evidence and generally to handle the adjudication procedurally. In practice, they would be required to address any correspondence from the parties and to consider all submissions evidence. In reality, adjudicators would also have to consider any jurisdictional objections which either party might make. Of course, the Act and the Scheme require the adjudicator to decide the matters in dispute and to publish the decision within the requisite timescale. However, the production of the decision is not the only function which the adjudicator is required to provide.

42. There are some pointers in the Terms of Engagement in this case which give some assistance in determining what the bargained-for performance was mutually intended to be:

(a) Clause 1(a) envisages that the Adjudicator is to be paid for "all time incurred by reason of [his] appointment". This sub-clause is not simply one which identifies a charging rate per hour. Thus, this points to the fact that the parties are agreeing without apparent qualification to pay the Adjudicator for all time incurred by reason of his appointment.

(b) Clause 4 indicates that both parties to the adjudication are to be "jointly and severally liable for payment of" the Adjudicator’s charges. Again, this supports Clause 1.
(c) Clauses 5 and 6 strongly suggest that the Adjudicator may levy interim charges and secure payment of fees even before the decision is issued. That is why in Clause 5 provision is made for addressing "all outstanding charges" and why Clause 6 expressly contains the words that it does. This is not in any absolute way determinative of what the bargained-for performance was but it does support the proposition that it was mutually expected that services would be provided and time incurred prior to the production of the decision.

(d) Clause 8, albeit an exclusion of liability clause, is related to the “role” of the Adjudicator. That relatively neutral noun covers his general role which undoubtedly includes the production of the decision but must cover the provision of all his services as an adjudicator beforehand.

43. In practice and in reality, it is my judgement in the light of the above that in this case the bargained-for performance was the provision of the role of adjudicator which itself covers not only the production of the decision but also the discharge of the remaining aspects of the role which involves the conduct of the adjudication in the period leading up to the decision. In the same way that it is not the function of a judge or arbitrator merely to produce a judgement or an award but also to provide all the necessary and important ancillary and anterior functions, so it is, generally, with an adjudicator.

44. In construction contracts, as in this case, it is difficult wholly to avoid considerations of policy. Adjudicators under construction contracts are effectively performing a statutory role, albeit that in many cases the parties will have agreed terms which satisfy Section 108 of the HGCRA so that they will be performing the role which the parties have actually agreed he or she should perform. Parliament has thus procured by legislation that there is to be an available adjudication procedure and, subject to specific terms being agreed otherwise, an adjudicator who undertakes the role of adjudicator is not merely being employed to produce a decision but in broad terms to put into effect Parliament’s intentions. One should therefore be somewhat slower to infer that what parties and adjudicators intended in their unexceptionably worded contracts was something which excluded payment in circumstances in which the adjudicator has done his or her honest best in performing his or her role as an adjudicator, even if ultimately the decision is unenforceable. The position might well be different if there was to be any suggestion of dishonesty, fraud or bad faith on the part of the adjudicator in any given case, albeit no one has suggested here that the Adjudicator’s behaviour begins to approach this.

45. It therefore follows from this reasoning that it cannot be said that there has here been a total failure of consideration by the Adjudicator in this case. As the breakdown of his timesheets indicate, he spent a not insignificant time dealing with jurisdictional objections raised by Harrington itself (which Harrington asked him to deal with), reviewing the Referral, the Response, the
Reply and the Rejoinder and the very substantial amount of documentation and evidence attached to some of those documents as well as communicating with the parties. All of this was a partial discharge of his role as adjudicator. There has not been a “total” failure and the consideration or bargained-for performance is not "whole and indivisible" and there has been in effect at the very least partial performance by the Adjudicator.

46. I doubt very much whether there would be an implied term in the contract of engagement between Harrington and the Adjudicator in effect that the Adjudicator would act in accordance with the principles of natural justice. It is not necessary to imply such a term in circumstances in which the law already secures that an adjudicator's decision reached in breach of the rules of natural justice, if serious and significant enough, will be unenforceable. It is not necessary to imply it simply to establish that there has been a total failure of consideration. The idea that adjudicators could be sued for breach of such an implied term is contrary to Section 107 (4) of the HGCRA.

47. I am wholly satisfied that I was right in saying in the earlier judgment that there were here breaches of the rules of natural justice and, as before, it is now even clearer (than it was before) that the Adjudicator honestly and unwittingly misunderstood what his jurisdiction was, and, in declining to deal with the final accounts issues directly or at all, he put himself in a position in which he was in significant breach of the rules of natural justice. The Court has emphasised on a number of occasions, and I re-emphasise, that whilst the Notice of Adjudication defines the outer ambit of the dispute, it is incumbent on the adjudicator to adjudicate on the defences which are put forward. An example might be a contractor who claims £100,000 on an interim application for payment, that application being ignored and in any event not paid within the requisite period; after the lapse of some time, it will be clear that there is a dispute between the parties as to whether the £100,000 is due, even though the employer has not given reasons why it will not pay. If this dispute is referred to adjudication, it is and must be right and fair for the employer to put up any reasons as a defence on law or on fact (even if not expressed beforehand) and the adjudicator must rule upon them, because these after all will be the reasons, good bad or indifferent, why the employer has not paid. Of course, the adjudicator can take into account in assessing the weight of these defences the fact that they were not raised before; in a construction contract context, the adjudicator will as a matter of law have regard to the fact that there has not been a withholding notice, which may well be fatal to the employer’s prospects of advancing set-offs or cross claims.

48. In this case, and based upon the evidence which the adjudicator actually gave, is clear that he made two basic mistakes. The first one was to assume that he was limited in what he could decide by the four walls and wording of the
Notice of Adjudication; for the reasons given above, he had to consider the defences put forward. Secondly, he clearly got into a muddle about what his jurisdiction was in relation to the final account evidence and arguments put forward by Harrington. He thought, probably rightly, that he was not required in effect and as such to produce a final account but he thought, wrongly, that he could not therefore deal with the basic defence which was that no retention was due because in effect Tyroddy had already been paid more than it was entitled to. He also was, with respect to him, confused between the final accounting exercise and the abatement to value exercise; he said in evidence both that he did have jurisdiction and did not have jurisdiction to deal with the abatement to value exercise. Be that as it may, it is clear from the paragraphs of his decision set out above (Paragraphs 30, 33 and 34) that he declined in effect to deal with either of them. This approach was inconsistent with his then going on to deal with the Crossharbour point.

49. It is therefore, strictly speaking, unnecessary to determine whether my earlier judgement was “in rem” because in my view I decide the enforceability point anew, albeit exactly as before, in these proceedings between the Adjudicator and Harrington. As indicated above, if I had had to decide the “in rem” point, I would have decided it against Harrington in any event.

Decision

50. It follows from the above that there has not been a total failure of consideration on the part of the Adjudicator under or in connection with his contracts with Harrington for him to act as adjudicator in relation to the disputes referred to him. This is notwithstanding that the decisions which he issued were unenforceable by reason of his albeit honest and unwitting breaches of the rules of natural justice. In those circumstances, the Adjudicator is entitled to his fees on all three adjudications, which had been agreed between the parties in the relatively modest sum of £22,000 plus VAT and there will be judgement for the Adjudicator in that sum.