Neutral Citation Number: [2012] EWCA Civ 1371
Case No: A1/2011/3025

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE,
QUEEN'S BENCH DIVISION, TECHNOLOGY AND
CONSTRUCTION COURT
MR JUSTICE AKENHEAD
1QT31203/QT31207

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/10/2012

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE DAVIS
and
LORD JUSTICE TREACY

Between:

PC HARRINGTON CONTRACTORS LTD Appellant/Defendant

- and -

SYSTECH INTERNATIONAL LTD Respondent/Claimant

Mr James Bowling (instructed by Speechly Bircham LLP) for the Appellant
Ms Dominique Rawley QC (instructed by Systech Solicitors) for the Respondent

Hearing date: 8 October 2012

Judgment

Master of the Rolls:

1. As Akenhead J said, this case involves an important issue as to the recoverability of fees by an adjudicator appointed pursuant to the Scheme introduced by the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act"), where the adjudicator’s decision is unenforceable by reason of a failure to comply with the rules of natural justice. There is said to be no authority which is directly on the point.

The background

2. PC Harrington Contractors Limited ("PCH") was a contractor employed to carry out works at three projects, namely Wembley Stadium, King’s Waterfront, Liverpool and Kingsfield Hospital, Mansfield. It engaged Tyroddy Construction Limited ("Tyroddy") as subcontractor in relation to each of the projects. Disputes arose
between PCH and Tyroddy as to whether Tyroddy was entitled to the release of retention monies held by PCH under each subcontract. These were referred to adjudication by Mr Doherty (who was employed by Systech International Limited) was appointed as adjudicator in each case. The contracts between PCH and Tyroddy, and the adjudications before Mr Doherty were all governed by the relevant parts of the 1996 Act and the Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998 No. 649) in their original form, i.e. prior to the recent amendments made by the Local democracy, Economic Development and Construction Act 2009.

3. In the Wembley adjudication, on 21 January 2011, PCH’s claims consultants wrote to the adjudicator saying that he had no jurisdiction. Their argument was that the parties had agreed that payment of retention monies should be put on hold until the question of the alleged overpayment of £300,000 on another project was resolved. On 27 January, the adjudicator notified the parties that, having reviewed this jurisdiction issue, he had decided that he had been properly appointed and would continue with the adjudication.

4. PCH reserved its position on the jurisdiction issue and addressed the merits of Tyroddy’s claim in the adjudication. Its principal defence was that no sum was due to Tyroddy because it had been overpaid by about £225,000 on the Wembley project. On 21 February 2011, Mr Doherty issued his decision to the parties together with an invoice for his fees in the total sum of £18,144, which comprised £15,120 (72 hours at £210 per hour) plus VAT. The invoice was addressed to PCH because in his decision he ordered PCH to pay his fees. He decided that the retention monies were due to Tyroddy under each subcontract. Mr Doherty failed to deal in any of the adjudications with the defence that no retention monies were due because PCH had already overpaid. A materially identical series of events occurred in the King’s Waterfront and Kingsfield Hospital adjudications. The adjudicator claimed further fees of £7,686 and £10,216 inclusive of VAT for these two adjudications.

5. In view of this failure to deal with its principal defence, PCH issued Part 8 proceedings in March 2011 seeking a declaration that the three decisions were not enforceable by reason of a breach of the rules of natural justice. This claim was heard by Akenhead J who gave judgment in favour of PCH on 25 March 2011: see PC Harrington Limited v Tyroddy Limited [2011] EWHC 813 (TCC). He held that Mr Doherty had “unwittingly [fallen] below the standards which are required to enable the decision or decisions to be enforced” 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. Moreover, he had reached this decision without giving the parties the opportunity to be heard on the point. He concluded, therefore, that the adjudicator’s decisions were not enforceable. He declared that the adjudicator:

“failed to produce Decisions within the meaning of the Scheme for Construction Contracts (England and 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 Liverpool Adjudications is unenforceable.”
The appointment

6. Like the judge, I shall focus on the Wembley adjudication. The same issues arise in relation to the other adjudications. The notice of adjudication stated that a dispute existed between PCH and Tyroddy as to whether the retention should have been repaid. The adjudicator was 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…”

7. Mr Doherty wrote to the parties on 20 January 2010:

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

8. The enclosed terms and conditions included the following:

“1. My charges are calculated as follows:

   a) all time incurred by reason of my appointment, including meeting with the Parties, travelling and waiting time, will be charged at £120 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.

   …………..

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 the 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.

   …………..

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 …”

9. Section 108(1) of the 1996 Act confers on a party to a construction contract the right to refer a dispute arising under the contract for adjudication under a procedure complying with the section. Section 108 further provides:
“(3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.

(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.”

10. So far as material, the Scheme for Construction Contracts (“the Scheme”) provides:

“2.—(1) Following the giving of a notice of adjudication and subject to any agreement between the parties to the dispute as to who shall act as adjudicator—

(a) the referring party shall request the person (if any) specified in the contract to act as adjudicator, or

(b) if no person is named in the contract or the person named has already indicated that he is unwilling or unable to act, and the contract provides for a specified nominating body to select a person, the referring party shall request the nominating body named in the contract to select a person to act as adjudicator, or

(c) where neither paragraph (a) nor (b) above applies, or where the person referred to in (a) has already indicated that he is unwilling or unable to act and (b) does not apply, the referring party shall request an adjudicator nominating body to select a person to act as adjudicator.

(2) A person requested to act as adjudicator in accordance with the provisions of paragraph (1) shall indicate whether or not he is willing to act within two days of receiving the request.

.......... 

8. 

(4) Where an adjudicator ceases to act because a dispute is to be adjudicated on by another person in terms of this paragraph, that adjudicator’s fees and expenses shall be determined in accordance with paragraph 25.

9.—(1) An adjudicator may resign at any time on giving notice in writing to the parties to the dispute.

(2) An adjudicator must resign where the dispute is the same or substantially the same as one which has previously been referred to adjudication, and a decision has been taken in that adjudication.
(4) Where an adjudicator resigns in the circumstances referred to in paragraph (2), or where a dispute varies significantly from the dispute referred to him in the referral notice and for that reason he is not competent to decide it, the adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses reasonably incurred by him. The parties shall be jointly and severally liable for any sum which remains outstanding following the making of any determination on how the payment shall be apportioned.

11.—(1) The parties to a dispute may at any time agree to revoke the appointment of the adjudicator. The adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses incurred by him. The parties shall be jointly and severally liable for any sum which remains outstanding following the making of any determination on how the payment shall be apportioned.

(2) Where the revocation of the appointment of the adjudicator is due to the default or misconduct of the adjudicator, the parties shall not be liable to pay the adjudicator’s fees and expenses.

Adjudicator’s decision

20. The adjudicator shall decide the matters in dispute. He may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute. …

Effects of the decision

23.—

(2) The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties.
The adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses reasonably incurred by him. The parties shall be jointly and severally liable for any sum which remains outstanding following the making of any determination on how the payment shall be apportioned.

26. The adjudicator shall not be 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 any employee or agent of the adjudicator shall be similarly protected from liability.”

The judgment of Akenhead J

11. In summary, the case advanced on behalf of PCH in the court below (and on appeal) is that the adjudicator was not entitled to any fee because he failed to produce an enforceable decision: he had failed to perform the service which he had contracted to perform.

12. The judge rejected this case for a number of reasons. Since Miss Rawley QC seeks to uphold most of the judge’s reasoning, it is necessary to refer to it in a little detail. He said (para 39) that the “ultimate object” of adjudication pursuant to the 1996 Act is the production of a decision. But the statutory Scheme envisages that a number of functions are to be performed by the adjudicator prior to the issue of the decision. Further, the Scheme gives the adjudicator a “raft of powers” (para 40). For example, para 13(f) provides that the adjudicator may “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”. The production of the decision is, therefore, not the only function which the adjudicator is required to perform (para 41). The judge summarised his conclusion as to the nature of the bargained-for performance at para 43 as follows:

“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 judgment or an award but also to provide all the necessary and important ancillary and anterior functions, so it is, generally, with an adjudicator” (para 43).

13. At para 44, the judge found support for his view in considerations of policy. He noted that adjudicators under construction contracts are “effectively performing a statutory role”. He said:
“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” (para 44).

14. He concluded, therefore, that it could not be said that there had been a total failure of consideration by the adjudicator in the present case. He had done a considerable amount of work on the dispute. 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” (para 45).

15. Finally, he said that he was satisfied that his earlier decision that there had been breaches of the rules of natural justice by the adjudicator was correct (para 47). It was now even clearer that the adjudicator had 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”. In the result, he failed to deal with PCH’s basic defence that no retention monies were due because Tyroddy had already been paid more than the sum to which it was entitled. But for the reasons that he gave, the adjudicator was entitled to his fees on all three adjudications which had been agreed in the sum of £22,000 plus VAT.

Discussion

16. There was some debate before us on the question whether the adjudicator’s failure to make an enforceable decision was a total failure of consideration. 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: see Chitty on Contracts (30th edition) paras 29-04 to 29-05 and Goff and Jones, The Law of Restitution (7th edition) paras 20-002, 20-004 and 20-005. 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 analysis and the distinction that Miss Rawley makes. 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.

18. Two contrasting cases were cited to us in the course of argument which illustrate the problem well. For present purposes, it is immaterial that they are both restitution cases. In *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 WLR 574, a dispute arose under a contract whereby a shipyard undertook to “design, build, complete and deliver” the vessel, property in the vessel not passing to the buyers until delivery. The contract price was payable in four instalments. Broadly, the instalments were fixed by reference to stages in the performance of the contractual obligations, the final instalment being payable upon delivery of the vessel. The contract was terminated after a considerable amount of the work had been done, but before the property in the vessel (or any part of it) had passed to the buyers. In considering whether the suppliers had performed any part of the contractual duties in respect of which the payment was due, the House of Lords asked whether the contract was (a) simply a contract for the sale of a ship or (b) a contract under which the design and construction of the ship were discrete contractual duties. The House concluded that it was the latter. This is what the contracts provided in their terms. Consistently with those terms, payment of instalments of the price was geared to the progress in the construction of the vessel.

19. This case is to be contrasted with *Fibrosa Spolka v Fairbairn Lawson* [1943] AC 32 which concerned a contract for the sale and delivery of machinery to Gdynia, Poland. The Germans occupied Gdynia and the machinery could not be delivered. Although the sellers of the machinery had to undertake preparatory manufacturing work before the machines could be delivered, the contract attributed no significance to that preparatory work. They were, therefore, not entitled to any payment under the contract and were obliged to repay the advance payment that they had made because there had been a total failure of consideration. The position would have been otherwise if the contract had provided for instalments of the contract price to be payable at specified stages of the contract performance.

20. As Mr Bowling points out, adjudication is a “pay now, argue later” regime under which the decision of an adjudicator is accorded “temporary finality”. The objectives of the adjudication scheme are (a) to impose on the parties to a construction contract the right to go to an independent adjudicator for an interim binding decision on the dispute; and (b) to impose on the adjudicator the obligation to produce such a decision within a short period. Thus the Scheme provides that the adjudicator is to “decide the matters in dispute” (para 20); he is obliged to reach a “decision” within 28 days or such longer period as the parties allow (paras 12(a) and 19); and the “decision” is
required to be binding pending litigation, arbitration or subsequent agreement (para 23(2)).

21. As I have said, 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. In supporting this conclusion, Miss Rawley draws attention to the terms of the letter of 20 January 2010: “I confirm my appointment by the RICS to act as Adjudicator in the above dispute”; and the phrase “act as adjudicator” in para 2 of the Scheme. She submits that the adjudicator’s functions were not limited to making a 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 to which I have referred at para 3 above. 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. With respect to him, the judge does not seem to have analysed the terms of engagement and the Scheme in order to arrive at his conclusion.

24. Subject to paras 8, 9 and 11 of the Scheme (to which I shall come shortly), the contract does not contain any provision for payment of the adjudicator’s fees by reference to the completion of discrete parts of the engagement. There is no reference to instalment payments in the relevant parts of the 1996 Act or the Scheme. It is worth contrasting the statutory payment provisions in relation to adjudication with those set out in section 109 of the 1996 Act, which deals with payment provisions under construction contracts. Section 109(1) provides that, subject to certain exceptions, a party to a construction contract is entitled to payment by instalments, stage payments or other periodic payments. The draftsman was, therefore, alive to the concept of instalment payments, but did not see fit to adopt it in relation to adjudications. That is not surprising in view of the fact that it was envisaged that adjudications would be completed within a short period of time.

25. Miss Rawley submits that, upon the true construction of the contract, the adjudicator’s entitlement to be paid accrued as and when the services were provided, and not on the making of the decision. She relies on the fact that Mr Doherty’s terms of engagement provide that the adjudicator’s charges are calculated at the rate of £210 per hour for “all time incurred by reason of my appointment” (para 1 of the terms of engagement); demands for “interim payment” may be made at any time “prior to reaching my
decision” (para 6); and that all “outstanding charges are due when my decision in respect of the matter referred for adjudication is reached” (para 5).

26. But the terms of engagement must be read together with the terms of the Scheme. The significance of the Scheme is that it contains important provisions which deal with the question of remuneration in the event that the adjudicator does not reach a decision in various circumstances. Para 8(4) provides that, where an adjudicator ceases to act because a dispute is to be adjudicated by another person, he is entitled to payment of his fees and expenses in accordance with para 25. Para 9(1) provides that an adjudicator may resign at any time on notice. Para 9(2) provides that an adjudicator must resign where the dispute is the same or substantially the same as one which has previously been referred to adjudication, and a decision has been taken in that adjudication. Para 9(4) provides that where an adjudicator resigns in the circumstances referred to in para 9(2), or where a dispute varies significantly from the dispute referred to him in the referral notice and for that reason he is not competent to decide it, he is entitled to payment of reasonable fees and expenses. It is significant that, if the adjudicator resigns by giving notice under para 9(1), he is not entitled to any remuneration. This shows that the adjudicator is entitled to fees and expenses where he does not complete his engagement by making a decision, but only in carefully defined circumstances. The contrast between the treatment of a resignation under para 9(1) and 9(2) is striking.

27. A similar contrast is made at para 11 in relation to the adjudicator’s remuneration in the event of a revocation of his appointment. Para 11(1) provides that the parties may at any time agree to revoke the appointment for any reason. In that event, the adjudicator is entitled to payment of reasonable fees and expenses. But if the revocation is due to “the default or misconduct of the adjudicator”, para 11(2) provides that there is no entitlement to fees or expenses.

28. 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.

29. Even if looked at in isolation, the points made by Miss Rawley on the basis of Mr Doherty’s terms of engagement do not unambiguously support her case. The fact that the charges were to be calculated at an hourly rate and that the adjudicator was permitted to demand interim payments does not tell us what the parties intended the position to be if he failed to produce an enforceable decision on the dispute which had been referred to him. The existence of an hourly rate is consistent with an entire contract (being simply the mechanism for calculating the fee for the entire service); and the right to demand interim payments could have been intended to do no more than provide cashflow for the adjudicator. But the terms of engagement cannot be viewed in isolation from the Scheme. Paras 8, 9 and 11 of the Scheme show clearly that it was not intended that the adjudicator should be paid in every case where he did not perform all of his obligations (including the making of an enforceable decision).

30. Miss Rawley also attaches some importance to para 25 of the Scheme which provides that the adjudicator is entitled to his reasonable fees and expenses. But the purpose of para 25 is to make it clear that the adjudicator cannot charge a fee that is unreasonably high. For example, he cannot charge for an unreasonable number of hours’ work. But para 25 sheds no light on the question whether the adjudicator is entitled to be
paid for producing an unenforceable decision. Nor can para 25 be relied on to support a claim for reasonable fees for services provided by the adjudicator prior to the production of the decision. Para 25 is in the part of the Scheme which is headed “Effects of the decision”. It is concerned with remuneration for the decision (including all the steps which lead up to it). The only circumstances in which the Scheme contemplates remuneration where no decision is produced are those to which I have already referred.

31. None of the circumstances mentioned in para 8(4), 9(2) or 11(1) existed in this case. It follows that the adjudicator had no discrete entitlement to his fees and expenses for the ancillary and anterior functions that he performed. I should add that I accept the submission of Mr Bowling that these functions, which included making directions, considering the papers and so on, had no discrete value to the parties. Even the adjudicator’s decision on the jurisdiction issue to which I referred at para 3 above was of no value in itself. It did not produce a decision which was binding in any future adjudication: it is well established that an adjudicator does not have inherent power to decide his own jurisdiction: see Coulson, Construction Adjudication (2nd edition) at para 7.09.

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.

33. Para 11(2) of the Scheme provides powerful support for PCH’s case. If the adjudicator’s appointment is revoked due to his default or misconduct, he is not entitled to any fees. It can hardly be disputed that the making of a decision which is unenforceable by reason of a breach of the rules of natural justice is a “default” or “misconduct” on the part of the adjudicator. It is a serious failure to conduct the adjudication in a lawful manner. If during the course of an adjudication, the adjudicator indicates that he intends to act in breach of natural justice (for example, by making it clear that he intends to make a decision without considering an important defence), the parties can agree to revoke his appointment. In that event, the adjudicator is not entitled to any remuneration. It makes no sense for the parties to agree that the adjudicator is not entitled to be paid if his appointment is revoked for default or misconduct before he makes his purported decision, but to agree that he is entitled to full remuneration if the same default or misconduct first becomes manifest in the decision itself. I would not construe the agreement as having that nonsensical effect unless compelled to do so by express words or by necessary implication. I can find no words which yield such a meaning either expressly or by necessary implication.

34. The fact that the adjudicator was not liable for anything done or omitted to be done unless it was in bad faith (para 26) lends further support to the view that the parties did not intend that the adjudicator should be paid for producing an unenforceable decision. If Miss Rawley is right, the adjudicator was entitled to be paid the same fee
for producing an unenforceable decision as for producing one that was enforceable and yet, absent bad faith, the parties are not able to claim damages for the adjudicator’s failure to produce an enforceable decision, regardless of the seriousness of the failure and the loss it has caused. That is a most surprising bargain for the parties to have made. I would be reluctant to impute to them an intention to make such a bargain unless compelled to do so. I can find nothing in the terms of engagement or the Scheme which compels the conclusion that this was their intention.

The position of judges and arbitrators

35. As I have said, the judge seems to have found support for his conclusion that the functions performed by an adjudicator which are ancillary and anterior to the making of a decision are valuable in their own right by comparing the position of adjudicators with that of arbitrators and judges: see para 12 above. Miss Rawley has not relied on this part of the judge’s reasoning. I think that she is right not to do so. A judge has an inherent jurisdiction and does not derive his powers over a dispute from a contract of appointment. That is sufficient to render any comparison with a judge wholly inapposite.

36. At first sight, the comparison with the position of arbitrators might seem to be more fruitful, since they derive their authority from a contract with the parties. But as Mr Bowling points out, there are important differences between adjudicators and arbitrators. First and foremost, serious errors and fundamental misunderstandings by an arbitrator do not invalidate his award. The award is binding, subject to the supervisory jurisdiction of the court under sections 66-68 of the Arbitration Act 1996. Secondly, when anterior and ancillary functions are carried out by an arbitrator, they are binding on the parties (and therefore the arbitrator gives value in performing them). If the arbitrator ceases to hold office during the course of a reference, the parties are free to agree whether and, if so, how the vacancy is to be filled and whether and, if so, to what extent the previous proceedings should stand: see section 27 of the Act. This is to be contrasted with the position in an adjudication: if the adjudicator’s appointment is terminated (for whatever reason), the process must be started again with a fresh referral. Thirdly, an arbitrator has inherent jurisdiction and power to make a binding decision on the scope of his own jurisdiction, unless the parties otherwise agree: section 30 of the Act. An arbitrator, unlike an adjudicator, can give value by providing a binding ruling on his jurisdiction.

Policy considerations

37. Finally, I should deal briefly with the judge’s recourse to policy considerations. I accept that the statutory provisions for adjudication reflect a Parliamentary intention to provide a scheme for a rough and ready temporary resolution of construction disputes. That is why the courts will enforce decisions, even where they can be shown to be wrong on the facts or in law. An erroneous decision is nevertheless an enforceable decision within the meaning of the 1996 Act and the Scheme. But a decision which is unenforceable because the adjudicator had no jurisdiction to make it or because it was made in breach of the rules of natural justice is quite another matter. Such a decision does not further the statutory policy of encouraging the parties to a construction contract to refer their disputes for temporary resolution by an adjudicator. It has quite the opposite effect. It causes the parties to incur cost and suffer delay on a futile exercise. I can see no basis for holding that Parliament must
have intended that an adjudicator who produces an unenforceable decision should be entitled to payment. As I have attempted to show, Parliament did address the question of remuneration in the Scheme and produced a carefully calibrated set of provisions. I suppose that Parliament could have provided that an adjudicator was entitled to reasonable remuneration even where he produced an unenforceable decision, although this possibility seems rather fanciful to me. But it did not do so. I do not consider that it is legitimate, in effect, to rewrite the Scheme on the basis of some unarticulated Parliamentary policy grounds.

Conclusion

38. For all these reasons and for the reasons given by Davis LJ (with whose judgment I entirely agree), I would allow this appeal.

Lord Justice Davis:

39. I agree that this appeal should be allowed for the reasons given by the Master of the Rolls. I add only a few observations.

40. In the present case, as Akenhead J found at the earlier hearing, the adjudicator – albeit acting in good faith – entirely failed to deal with a defence raised which (if valid, which it may or may not have been) would have defeated Tyroddy’s claims. Further, he failed first to advise the parties of his intended approach or seek their submissions. So it can properly be said that there was here a breach of the rules of natural justice constituting a “default” of which he was the author. But it will not always be so. For example, the logic of Mr Bowling’s argument would, as he accepted, apply – absent specific contractual terms to the contrary – to cases where, for example, an adjudicator, having done a considerable amount of work, died or was struck down with serious incapacitating illness before a decision could be produced at all.

41. That said, in my view the key nevertheless is to consider what was the contractual bargain actually made. To say in general terms, as Mr Bowling did as an opening observation, that the law does not require people to pay for worthless things is not necessarily right as a generalisation and is wrong in failing to focus on what the actual terms of the contract are. I in fact did not regard either counsel’s respective appeals to the asserted merits very helpful. All depends on the contract actually made.

42. To me, what effectively decides the matter in favour of the appellant are the terms of the Scheme itself. As the Master of the Rolls has explained, the terms of paragraph 9 and of paragraph 11 – and in particular the intention behind and implications of paragraph 11(2) – indicate that the conclusion for which Mr Bowling contended is the correct one. Nor do the Terms of Engagement employed by Mr Doherty and incorporated into this particular contract indicate any different conclusion.

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. On Miss Rawley’s argument the parties – absent an express term – not only have no redress for any loss (in that the Scheme excludes any warranty on the part of the adjudicator and excludes any liability for acts done or omitted, absent bad faith) they also must pay the adjudicator’s fees notwithstanding
that the adjudicator has not decided the matters in dispute. In my view, that would be surprising and is also an indicator in favour of Mr Bowling’s argument.

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 Halliwell 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.

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.

46. I doubt if the present decision should have any very great ramifications. Prior to this case, I personally had had little acquaintance with the adjudication Scheme under the 1996 Act. It appears, from what we were told, generally to be working very well indeed – and not least, I suspect, because of the short prescribed time limits and the splendid “pay now, argue later” approach, which is thoroughly to be commended. At all events in the fifteen years or so since the scheme has been operating this particular kind of dispute about fees seems, as we were told, not previously to have surfaced in the courts. In any case, if this decision does give rise to concerns on the part of adjudicators then the solution is in the market-place: to incorporate into their Terms of Engagement (if the parties to the adjudication are prepared to agree) a provision covering payment of their fees and expenses in the event of a decision not being delivered or proving to be unenforceable. It is of course a consequence of this court’s conclusion that it is for the adjudicator to stipulate for such a term: not for the parties to the adjudication to stipulate to the contrary.

47. Finally, this conclusion should hardly come as an “out of the blue” decision. Intimations – albeit guarded – to like effect have been given by, for example, Judge Gilliland QC at paragraph 33 of his judgment in Rankilor & Perco Engineering Services Ltd v Igoe (M) Ltd [2006] EWHC 3413 (TCC), [2006] Adj.L.R. 01/27 and elsewhere in publications concerning construction law.

Lord Justice Treacy:

48. I agree with both judgments.