

## Construction Law Update

### When Does an Adjudicator's Error Amount to a Breach of Natural Justice?

One of the few grounds available for resisting the enforcement of an adjudicator's decision is a claim of breach of the rules of natural justice. In the case of *JJ Rhatigan & Co (UK) Limited ("Rhatigan") v Rosemary Lodge Developments Limited ("RLD")* the TCC provided a decision clarifying the threshold for successfully claiming breach of natural justice as a defence and whether the adjudicator failing to take into account a witness statement that the defendant believed to be key to its defence was a breach of natural justice.

#### Background

Rhatigan was engaged as contractor by RLD for the construction of six new build units and the refurbishment of a care home in Wimbledon for just under £6.2 million. On 30 May 2018, the parties met in an attempt to reach an agreement as to the final account. Rhatigan believed an agreement had been reached but RLD disputed this was the case. The dispute was referred to adjudication.

#### The adjudication

Rhatigan argued that at the meeting the parties had agreed a sum of £8.6m was due to Rhatigan and it had followed up the meeting by sending a draft deed of variation to RLD. The parties never executed the deed of variation and RLD disputed that such an agreement had been reached at the meeting because Rhatigan had been informed that RLD needed approval from its funders before anything could be agreed.

The adjudicator decided that irrespective of the fact the deed of variation had not been executed, the parties had agreed that Rhatigan would be paid £8.6m.

RLD sought to resist enforcement by way of summary judgment on the basis that the adjudicator's decision was reached in breach of natural justice.

#### The arguments

RLD's primary argument was that the adjudicator had failed to deal with RLD's key defence (that there was no intention to create legal relations at the meeting in May as no binding agreement could be made without RLD's funders approval). This was largely because of the adjudicator's statements that he had considered the witness statements of four of the parties who had attended the meeting and did not make reference to Mr Morgan's statement. Mr Morgan's statement set out that RLD had made it clear to Rhatigan at the meeting that RLD's hands were tied by what the funders would sign off and so RLD could only deal with principles at the meeting. RLD asserted that Mr Morgan's statement was potentially determinative on the matter and that because the adjudicator failed to deal with it, the process had been carried out in a way that was materially unfair and in breach of natural justice.

#### What amounts to a breach of natural justice?

In providing its decision, the court set out the starting position that in order to resist enforcement of the adjudicator's decision, RLD would need to establish that:

- (i) there was some plain breach of the rules of natural justice;
- (ii) the breach was material to the outcome of the adjudication; and
- (iii) that because of this material breach it would be unfair to enforce the decision.

#### The decision

The court held that, even if the adjudicator had not had Mr Morgan's evidence in mind, this did not amount to more than failing to take into account an element of evidence.

The court also held that, on the facts, it could not be a key defence that there could be no binding agreement

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without approval from RLD's funders and that Mr Morgan's witness statement added nothing to the evidence already given in other witness statements. Therefore, the court could not see how the adjudicator had failed to take into account an aspect of the evidence that would amount to a breach of natural justice. This could only be an error and one that the court would not be concerned with as the witness statement was not in any sense crucial and therefore it could not be a material breach. As such, the court enforced the adjudicator's decision.

### Analysis

This decision clarifies the starting point for what amounts to a breach of natural justice and how high the threshold is for claiming such a defence. On the facts in this case, the adjudicator not taking into account a piece of evidence in error was not sufficient to satisfy the high threshold for breach of natural justice, the breach must be a material breach.

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