



Pick your battles: unmeritorious challenge to adjudicator's decision results in award of indemnity costs

Those on the losing end of an adjudication often look to a supposed breach of natural justice in an effort to resist enforcement of the decision. While not impossible, persuading the Court that you did not get a fair hearing is no easy feat.

The recent case of *Essential Living (Greenwich) Limited v Conneely Facades Limited* [2024] EWHC 2629 (TCC) serves as a reminder that arguments around natural justice must be considered very carefully. Failing to persuade the Court that such a challenge has merit may result in a costs penalty.

The case also provides further illustration of how the losing party's conduct *after* the adjudication may result in it waiving any argument it might otherwise have had.

Key takeaways:

- The threshold for successfully arguing a breach of natural justice remains very high.
- Parties making "unmeritorious" challenges are at risk of being ordered to pay indemnity costs. The Court expects the parties to make responsible arguments; not just try their luck.
- Paying the Adjudicator's fees, without expressly reserving the right to maintain a challenge to jurisdiction, may blow one's chance of sustaining such a challenge during future enforcement proceedings. Hold the door open by explicitly reserving your rights.

Background

In June 2017, Essential Living (Greenwich) Ltd ("**Essential**") engaged Conneely Facades Ltd ("**Conneely**") to carry out the design and construction of various cladding works at Greenwich Creekside (the "**Works**").

In February 2024, Essential commenced an adjudication against Conneely for circa £1 million after discovering a series of defects in the Works (the "**Defects**").

During the adjudication, Conneely requested disclosure of a previous adjudication decision between Essential and another trade contractor, together with associated expert reports and other materials. Conneely claimed these materials proved that other parties were liable for the Defects and Essential was seeking double recovery of costs.

The Adjudicator's Decision

The Adjudicator rejected Conneely's disclosure request and deemed the suggestion of double recovery "*fanciful*." Reasons for this rejection included:

- That the two contractors had different work packages;
- The earlier adjudication decision pre-dated the appearance of the Defects by several months; and
- The request for "all materials" relating to the previous adjudication was too vague to be justified. However, the Adjudicator did say that he would be willing to reconsider the disclosure request in the light of substantive evidence provided by Conneely's experts.

Conneely later dropped its allegation that Essential had double counted the claim.

HAWKSWELL KILVINGTON LIMITED

2nd Floor, 3150 Century Way, Thorpe Park, Leeds LS15 8ZB | 28 Queen Street, London EC4R 1BB
Tel: 0113 543 6700 | Fax: 0113 543 6720 | enquiries@hklegal.co.uk | www.hklegal.co.uk



On 19 April 2024, the Adjudicator found in Essential's favour. On 15 May 2024, Conneely paid the Adjudicator's fees without reservation.

Essential subsequently issued proceedings to enforce the Decision.

Conneely sought to avoid enforcement on the basis that the Adjudicator had breached the rules of natural justice. Conneely argued that in his ruling on the application for disclosure, the Adjudicator had made a determination about the strength of Conneely's case that would lead a fair-minded and informed observer to conclude that there was a real possibility that he had predetermined the case. In other words, that the Adjudicator was biased.

Held

The brevity of the judgment – it runs to seven pages only – is perhaps a reflection of how little merit the court evidently felt there was in Conneely's natural justice challenge.

In firmly rejecting the challenge, the judge observed that with reference to the relevant legal tests set out in earlier authorities:

- The Adjudicator's disclosure ruling "*was not a breach of the rules of natural justice, let alone a serious breach.*" The Adjudicator had "*at every stage left the door fully open to Conneely*" to pursue its case, and did not predetermine any issues by rejecting the disclosure application.
- Even if there had been a breach of natural justice (which there had not), such breach "*did not make a material difference to the outcome*" – materiality being a key requirement if a breach of natural justice is to invalidate a decision. It was Conneely itself that had later abandoned the double recovery argument.
- In any event, even if there had been merit in its natural justice argument (which again, there had not), Conneely had contrived to waive its right to

pursue it by paying the Adjudicator's fees without expressly reserving its position on jurisdiction.

In summary, the court was unimpressed. It stated that by adopting "*unmeritorious*" arguments, Conneely had caused considerable delay to payment of the sums due, and it was "*wholly inappropriate*" for Conneely to "*make an attack upon the way in which this very experienced adjudicator went about his duties.*"

For these reasons, the Judge granted Essential summary judgment enforcing the Decision and ordered Conneely to pay Essential's costs on the indemnity basis, rather than the more usual and less onerous standard basis.

Analysis

While it is possible to successfully argue that a breach of natural justice has occurred, the threshold remains extremely high. The Courts are generally sceptical when considering arguments of bias or impropriety in the Adjudicator's process.

Parties that double-down by running obviously "unmeritorious" arguments on enforcement risk an award of indemnity costs.

The second warning from the case relates to paying the Adjudicator's fees. While parties must pay up when ordered to do so, they should nevertheless be astute to reserve any challenge they might wish to maintain in relation to jurisdiction.

This article contains information of general interest about current legal issues, but does not provide legal advice. It is prepared for the general information of our clients and other interested parties. This article should not be relied upon in any specific situation without appropriate legal advice. If you require legal advice on any of the issues raised in this article, please contact one of our specialist construction lawyers.
© Hawkswell Kilvington Limited 2024

HAWKSWELL KILVINGTON LIMITED

2nd Floor, 3150 Century Way, Thorpe Park, Leeds LS15 8ZB | 28 Queen Street, London EC4R 1BB
Tel: 0113 543 6700 | Fax: 0113 543 6720 | enquiries@hklegal.co.uk | www.hklegal.co.uk