

Adjudicators – It's good to share

The Court of Session decision of Lord Hodge in *Carillion Utility Services Limited ("Carillion") v SP Power Systems Limited ("SP")* issued on 18 August 2011 provides a valuable review and clarification of the restraints on an adjudicator when applying his own knowledge and experience in reaching a decision.

In this case Carillion carried out excavation, backfilling and reinstatement works as well as installing electricity and ancillary cables for SP. A dispute as to payment for periods where Carillion was waiting for SP to carry out works was sent to adjudication and Carillion was awarded a substantial payment along with interest. In reaching his decision the adjudicator used his own knowledge and experience of what constitutes reasonable commercial rates rather than using the method of quantification proposed by Carillion. SP claimed that this breached the rules of natural justice as they were not given an opportunity to consider and comment on the materials and methodology relied upon by the adjudicator.

In his judgment, Lord Hodge states that the rules of natural justice are designed to prevent not just injustice, but the possibility of injustice occurring. It is therefore not necessary for the person challenging a decision to demonstrate actual injustice but rather that an opportunity was afforded for injustice to be done. In applying this to the use of the adjudicator's own knowledge and experience in reaching a decision, Lord Hodge concludes that it will normally be appropriate to make propositions which have not been canvassed by the parties known and call for the parties comments thereon. However, this opportunity is not required in every circumstance and depends on the circumstances of the individual case and whether it causes a material breach of natural justice.

On this basis, Lord Hodge approved of the adjudicator's methodology for calculating the sum due to Carillion as the reasoning had been derived from the parties' submissions rather than adopting a wholly extraneous method. He therefore had no need to seek comment from the parties before reaching a decision on that element of the claim.

However, Lord Hodge refused to enforce the decision of the adjudicator as the commercial rates applied by the adjudicator were based solely on his own experience and had no basis in any evidence put forward by the parties. The rates themselves were not necessarily unjust but rather the adjudicator's failure to put them to the parties given their significance to the outcome of the dispute breached natural justice because it afforded the opportunity for an injustice to be done.

The judgment of Lord Hodge should be seen as a welcome addition to the already extensive case law on natural justice in the adjudication process. It makes it



Anne Struckmeier
Senior Associate
Construction
dt: +44 (0) 131 222 9839
m: +44 (0) 7918 767 329
AStruckmeier@hbjgateley.com

clear that if an adjudicator wishes to rely upon his own knowledge and experience rather than the submissions of the parties then he will require to seek submissions from the parties before doing so where that reliance will have a significant effect on the decision issued.



