MC MS Blog

# Applying to stay adjudication enforcement proceedings to arbitration

JULY 19, 2022

When I was looking at the list of TCC cases to find something to write about this week, my first thought was Adrian Williamson QC's judgment in *FTH Ltd v Varis Developments Ltd*, where he refused to grant summary judgment to *enforce an adjudicator's decision* due to the claimant's *company voluntary administration* (CVA). Unfortunately for me, *Simon Thompson* beat me to it on that one. I would have made the point that I thought the judge's dismissal of the claim was a warning to other insolvent parties. While *Bresco* may have given insolvent parties a right to adjudicate, as someone said to me recently, it might be "a first class ticket to nowhere" as the TCC will not enforce the adjudicator's decision (something that both Coulson LLJ and Lewinson LLJ effectively said in their judgments in *John Doyle Construction Ltd (In Liquidation) v Erith Contractors Ltd*).

My second choice is HHJ Hodge QC's judgment in *Metropolitan Borough Council of Sefton v Allenbuild Ltd*, where he enforced an adjudicator's decision and rejected an *application for a stay to arbitration*. So here goes on a topic that is quite rare in adjudication enforcement proceedings, but possibly not as rare as hens' teeth!

**Metropolitan Borough Council of Sefton v Allenbuild Ltd**

This was a dispute arising out of a contract based on the *NEC2 Engineering and Construction Contract* (ECC) that the parties entered into in September 2005, under which Allenbuild agreed to build a leisure centre and water-based theme park in Southport. I suspect the water park is one of those places that parents with children of a certain age are all too familiar with, while the rest of the population never goes near (luckily I'm also in the latter bracket now!). Anyway, back to the dispute.

Practical completion was reached in June 2007 and, after a series of standstill agreements, in November 2021 the Council served its notice of adjudication relating to defects at the park. The adjudicator's decision was issued in January 2022. It awarded the Council over £2.2 million plus interest. When Allenbuild did not pay, the Council commenced enforcement proceedings. In turn, Allenbuild issued a cross-application seeking a stay in accordance with *section 9(4) of the Arbitration Act 1996*. It asked the court to adjourn the summary judgment application. The two applications were listed to be heard together.

**Which adjudication procedure applied?**

The parties' contract provided for the *CIC's adjudication procedure*, named the president of the Chartered Institute of Arbitrators as the *adjudicator nominating body* (ANB) and stated that the tribunal was arbitration. *Clause 90.2* required the adjudicator to notify the parties and the project manager of their decision and provided that it would be "final and binding unless and until revised by the tribunal". Clause 93.1 required a party to serve a *notice of dissatisfaction* with the adjudicator's decision within four weeks.

Because clause 90.1 set out prescribed time limits as to when a dispute may be submitted to adjudication, it was common ground that it did not comply with section 108 of the Construction Act 1996 (which provides that a construction contract must enable a party to give notice "*at any time*"). The parties disagreed over the consequences of this, with the Council arguing that the adjudication provisions of the *Scheme for Construction Contracts 1998* should apply, and Allenbuild arguing for the CIC adjudication procedure.

The judge preferred Allenbuild's position on this, which meant all of clauses 90 to 92 were displaced by the CIC adjudication procedure. He said that if he was wrong on this, then those clauses would have been displaced in favour of the Scheme's adjudication procedure. Either way, it meant the adjudicator did not have to notify the project manager of his decision, but the requirement on the parties to serve a notice of dissatisfaction and refer disputes to arbitration did survive.

One of the reasons all of this is important and I'm mentioning it in such detail is because the parties' adjudication was conducted under the rules of the Scheme, not the CIC adjudication procedure. Consequently, they had used the wrong set of adjudication rules and, while this could (and usually would) be fatal to any enforcement proceedings, it seems Allenbuild had not made a *jurisdictional challenge* during the adjudication, nor had it expressly *reserved its right* to do so in the future:

"… there is not a shred of evidence that the defendant ever reserved its position on jurisdiction."

Applying the principles on waiver and general reservations that Coulson LJ set out in Court of Appeal in the *Cannon v Primus Build* part of the *Bresco appeal*, that was rather the end of that.

**Notice of dissatisfaction**

Allenbuild's notice of dissatisfaction was given in February 2022. It was said to relate to:

"… the entirety of the Adjudicator's Decision including all of the Adjudicator's conclusions, reasoning, and decisions."

There was an issue over what this actually meant in practice. Allenbuild argued for a wide interpretation, with the effect that it prevented the decision from becoming final and binding and "leaves open any challenges on any basis whatsoever". It relied on two judgments, *Transport for Greater Manchester v Kier Construction Ltd* and *Prater Ltd v John Sisk & Son (Holdings) Ltd*. In response, the Council argued that the notice of dissatisfaction was not specific enough: if the validity of the adjudicator's decision was being challenged, then that matter "needed to be spelt out if it was to be referred to the tribunal".

The judge preferred the Council's position:

"… whilst a notice of dissatisfaction need not descend into the details of any substantive challenge to an adjudicator's decision, the issue of the validity of such a decision is of a fundamentally different character from its substantive merits; and a notice of dissatisfaction needs to make it clear whether a challenge is being made to the validity of an adjudicator's decision on jurisdictional grounds, instead of, or in addition to, a challenge to its substantive merits."

In case it wasn't clear before, now we know that using broad language in a notice of dissatisfaction

will not suffice and, if you want to challenge the validity of the adjudicator's decision on jurisdictional grounds, you need to do so expressly.

**Stay for arbitration**

I must admit that when I started reading the opening paragraph of the judgment, my immediate thought was that the stay application didn't have much chance of success and I was quite surprised to see the argument being raised. Having now read the detailed paragraphs on this, it doesn't surprise me that the court came down on the side of enforcement rather than a stay. As the judge noted:

"… a stay will not be granted under s. 9 of the Arbitration Act if the dispute in question does not fall within the scope of the relevant arbitration provision, so the fundamental issue for this court is ultimately one of construction … whether the particular contract contains an arbitration provision which covers adjudication enforcement."

Here the judge concluded that:

"… the CIC model adjudication procedure and the Scheme expressly exclude any challenge to the decision of an adjudicator from the range of matters which may be referred to arbitration so the court will always have jurisdiction to enforce an adjudicator's decision and will never grant a stay for arbitration under s. 9 of the Arbitration Act."

Consequently, the stay application was refused.

**Conclusion**

I rather liked the judge's concluding remark:

"Give that practical completion of this construction project was certified almost 15 years ago, I recognise that the 'pay now, argue later' policy that underlies the adjudication provisions of the Construction Act has something of a hollow ring in the present case. However, in this court, hard cases do not make bad law."

He might have thought it was a "hard case", but it was also an old case. We know from other TCC judges that adjudication and its summary enforcement process may not be entirely suited to old cases, since the time for "pay now" has long since passed.

However, I think it is more reflective of the esteem that adjudication is currently held in. In recent years we have seen a number of appellate decisions (including in the Supreme Court in *Bresco* and the Court of Appeal in *John Doyle v Erith Contractors*), where the judges are roundly supportive of adjudication. Indeed, just last month in *Abbey Healthcare v Simply Construct*, Coulson LJ referred to one of the statutory purposes of the Construction Act 1996 as being to "provide an effective dispute resolution system". It wasn't that long ago that the emphasis always seemed to be on keeping cash flowing and that was where the "pay now, argue later" mantra came from.

I would agree with the judges that we have created "an effective dispute resolution system". In my view, it rivals arbitration in many ways (and some might say it has for many years now). For example, Jonathan and I often deal with large, complex disputes referred to adjudication. These might be the same size and complexity as disputes that we are dealing with in arbitration, but adjudication still has the advantage that they are much quicker to deal with (months rather than years). In fact, in some ways, the larger the sum in dispute the more attractive adjudication can be when it comes to costs because of the level of unrecoverable costs when the costs are taxed in a successful arbitration. You are protected from the other side's costs. I also note that in many international arbitrations, the parties bear their own costs in any event (especially in investor v state arbitrations).

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