MC MS Blog

Horses for Courses - Choosing the right forum of dispute resolution for post-Grenfell cladding disputes

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The most recent TCC decision of BDW Trading v Ardmore Construction Ltd **and others provided guidance on the practical implementation of building liability orders and information orders: in particular, the need for applicants to establish a clear and existing liability before the court can grant an information order in support of a building liability order.**

In summary, BDW made an application for information orders against Ardmore to gather details to support potential building liability orders related to fire safety and structural defects in five developments completed between 1999 and 2005. The court denied BDW's applications concluding that the statutory conditions were not met, and no relevant liability had been established. The court held that information orders could only be issued if two conditions are satisfied: (1) the company is subject to a "relevant liability"; (2) and it is appropriate to require the information or documents to enable the applicant to make, or consider whether to make, an application for a building liability order. Although liability had been established in an adjudication in respect to one of the developments, the adjudication award had been settled by payment, which meant Ardmore was no longer subject to that liability. In terms of the other four developments, the ongoing arbitration and litigation proceedings meant liability was still to be determined and therefore the "relevant liability" threshold had also not been met.

With multiple proceedings taking place in respect of all five developments, it got me thinking: *what's the most appropriate forum of dispute resolution for these types of post-Grenfell and historic cladding remedial works claims?*

Before I come on to consider the various benefits and challenges of each in a post-Grenfell era, I think it's worth reminding ourselves of one of the best known decisions in English case law which dealt with contractual dispute resolution provisions. i.e. the *Fiona Trust* case which Jonathan **blogged** about earlier this year following another TCC decision relating to BDW v Ardmore in December 2024, where BDW Trading successfully enforced an adjudicator's award of approximately £14.5m against Ardmore concerning alleged fire safety defects. The TCC's judgment addressed significant issues, including the applicability of adjudication clauses to claims under the Defective Premises Act 1972 and the crystallisation of disputes for adjudication purposes. The court confirmed that adjudication clauses could encompass statutory claims like those under the Defective Premises Act, reinforcing the broad scope of such clauses in construction contracts. Following the principles in *Fiona Trust*, the case reinforced the strong presumption that commercial parties intend all disputes to be resolved by a single forum - unless there was explicit contractual language to the contrary. With BDW v Ardmore now proceeding to the Court of Appeal (which, according to the Civil Appeals Case Tracker is

scheduled to be heard by April 7, 2026), it will be interesting to see if the upcoming appeal will address these legal interpretations and what their implications for the construction industry will be.

Similarly, in the landmark case of **Abbey Healthcare (Mill Hill) Ltd v Simply Construct (UK) LLP [2024] UKSC 23**, the Supreme Court clarified that a collateral warranty does not qualify as a "construction contract" under section 104(1) of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) if it merely affirms obligations already present in the primary building contract. Overturning the Court of Appeal's ruling, the Supreme Court emphasised that for a warranty to be considered a construction contract, it must entail separate or distinct obligations to carry out construction operations for the beneficiary, beyond those in the original agreement. The implications being, of course, that if it's not a construction contract, then statutory adjudication provisions do apply to such warranties, and underscores the importance of precise contractual language to ensure that the parties' intentions regarding dispute resolution mechanisms are clearly articulated.

Adjudication

So, staying with the topic of adjudication and, as many of us know, it's still the most commonly used dispute resolution process for construction related disputes in the UK. Arguably its primary advantage being the speed in which decisions are typically reached - this is crucial in ensuring that unsafe cladding is addressed promptly, reducing risks to residents. It is also less formal and costly compared to litigation or arbitration, making it an accessible option for many and a way of resolving disputes efficiently.

However, adjudication has its drawbacks in complex cladding cases, where issues of liability, safety standards, and contractual obligations require detailed consideration. The rapid process may lead to less thorough consideration of these issues, potentially resulting in decisions that favour speed over fairness. Additionally, while adjudicator decisions are binding, they are often temporary and, if parties are unsatisfied with outcomes, they can be challenged through arbitration or litigation, potentially prolonging the dispute resolution process and delaying final resolutions. Query whether such so-called "rough justice" is fair on the defendant in these types of high-profile cladding disputes which are under such scrutiny in the aftermath of the Grenfell tragedy?

On that note, many of you will have seen that the Government has recently issued its **full response** to the Grenfell Tower Inquiry's **final report**, published on September 4th 2024, identifying systemic failures across government bodies and private companies that led to the 2017 fire, and which resulted in 72 deaths. In its response on February 26th 2025, the Government accepted the report's findings and committed to acting on all 58 recommendations which aim to overhaul building safety regulations, enforce stricter oversight within the construction industry, and strengthen accountability to prevent future tragedies happening again.

Litigation

Turning to litigation, which I think can play a critical role in resolving cladding disputes post-Grenfell, particularly in cases involving complex liability issues, regulatory breaches, or where other dispute resolution methods have failed. Its primary advantage is that it provides a formal, legally binding judgment that can set precedent and enforce accountability especially against parties unwilling to engage in alternative dispute resolution. Courts can also compel disclosure of key evidence, which is vital in uncovering responsibility in intricate cladding cases.

However, we all know litigation can be lengthy, costly, and adversarial, which can exacerbate financial and emotional stress for affected parties and delay critical remediation works, prolonging safety concerns. The complexity of cladding remedial claims often necessitates a forum capable of handling intricate legal and technical details. While the TCC is a specialist construction court, the First Tier Tribunal, on the other hand, deals with more property law disputes (e.g. landlord-tenant matters,

leasehold disputes, and land registration etc) so may not have the requisite specialism.

Interestingly, in *Fiona Trust*, the court highlighted the difficult path to be followed for the English court in reaching decisions in concurrent litigation proceedings which could impact upon or be seen to prejudge issues in on-going arbitration. Smith J in this case granted an application to clarify the meaning of an order to prevent the litigation process from undermining or obstructing the ongoing arbitration. Such judicial restraint ensures that arbitration can proceed without external interference, respecting the autonomy of the arbitral process.

Arbitration

Arbitration's key advantage is the ability to provide a private, structured, and legally binding resolution whilst giving parties a significant degree of autonomy and flexibility in resolving their disputes which they would not otherwise have through litigation. Some parties may prefer confidential proceedings to protect commercial interests and reputations. However, in light of the Grenfell Inquiry recommendations and in the interests of accountability, is it right that these disputes remain confidential? There's a strong argument to say the details of which should be made available in the overriding interests of accountability and public policy.

Of huge benefit and importance is that arbitration also allows for the appointment of industry experts as arbitrators, ensuring that decisions are informed by relevant technical knowledge, which can be particularly valuable in complex cases involving multiple parties, technical details, and significant financial implications.

However, arbitration can be costly and time-consuming compared to adjudication, which may be challenging for certain parties. Additionally, while arbitration decisions are final and enforceable, the process lacks the urgency needed for immediate safety concerns, potentially delaying critical cladding remediation works. I think this makes arbitration more suited for resolving complex liability issues rather than addressing immediate safety risks.

Mediation

Last, but by no means least, mediation. Mediation offers a collaborative and flexible approach to finding mutually acceptable solutions and, where possible, it is nearly always best to settle. Mediation encourages open dialogue between parties, helping to preserve relationships and achieve outcomes that consider the interests of all stakeholders. It is typically quicker and less expensive than arbitration or litigation, which is beneficial when urgent remediation works are needed. It also allows for creative, tailored solutions that formal legal processes might not accommodate. However, since it's a voluntary process, its success relies on the willingness of all parties to negotiate and settle in good faith. Of course, any agreement reached needs to be formalised in a contract for it to be legally binding, otherwise any unresolved disputes may still proceed to adjudication, arbitration, or litigation. Mediation (possibly followed by litigation) may also be better suited to multi-party (e.g., developers, contractors, insurers, and leaseholders) disputes, although Jonathan has done a multi-party adjudication by agreement and joinder is, of course, possible in arbitration.

So which forum is best?

Given the multifaceted nature of post-Grenfell cladding claims, my view is that no single dispute resolution forum is universally optimal. The most appropriate forum(s) is likely to depend on the very specific circumstances and priorities of the parties involved and stakeholders should, of course, seek expert legal advice to select the forum that aligns best with the specifics of their claim and desired outcomes.

On balance, I think a combined tiered approach can offer the most effective strategy: preparing for litigation or arbitration, using adjudication as a pre-action step to gauge the parties' positions, and, if

necessary, employing mediation post-adjudication but before proceeding to the TCC to ensure all collaborative methods have been explored and exhausted.

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