

ePaper:

Adjudication: How to Resist Enforcement



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Adjudication: the raison d'être

- Adjudication is the most simplistic form of dispute resolution available for resolving construction disputes. It is also the most common by some margin. It prioritizes getting an outcome to a dispute, any outcome, over getting the right one. Speed and hence relatively low costs, are more important to the process than a comprehensive examination of legal argument and evidence. Its raison d'être is to get Decisions on disputes and hence often the payment of money, moving more quickly and frequently than usually happened before adjudication was introduced back in May 1998.

So, if a Decision goes against you, it's hard, very hard, to get out of having to comply with it.

Deadline for compliance

- You won't get long to comply with an adverse Decision. The Scheme¹ says: *in his decision, the adjudicator may, if he thinks fit, order any of the parties to comply peremptorily with his decision or any part of it* (paragraph 23(1)). Most Decisions expressly require peremptory compliance. In no more than 7 days usually.

Enforcement Proceedings

- If you don't comply, usually the successful party will start enforcement proceedings against you straightaway, ie fast-tracked litigation in the Technology & Construction Court (TCC), seeking an Order from the Court that you comply with the Adjudicator's Decision. The hearing will typically be listed in 1.5-2 months' time, so it will come around quickly. If you lose those court proceedings, you will then have your opponent's legal costs of the litigation, plus additional interest, added to what you owe the other party.

Making challenges to enforcement as early as possible

- It will assist you when resisting enforcement, if you made challenges based on the grounds* that you are now relying on, early in the adjudication. That way you will demonstrate a genuine belief in your grounds, instead of just relying on them at the last minute and hence implying that you are reaching for them only out of desperation. You will also have given the other party and the Adjudicator, as much notice as possible of your concerns and hence opportunity to stop the adjudication or resign, respectively, if they see the merit in what you are saying, and thereby avoid wasting time and money on the rest of the adjudication.
- When making your challenges during the adjudication, you should say that you are now only participating in the adjudication subject to those challenges.

Grounds to resist enforcement*

- There are effectively 5 grounds on which to try and resist enforcement.

¹The Scheme for Construction Contracts (England & Wales) Regulations 1998

Adjudicator had no jurisdiction to make the Decision

- This is the most common challenge to enforcement. It is also the one that can take the greatest number of forms. However they all amount to the assertion that the Adjudicator did not have jurisdiction / authority to decide what it has decided.
- Examples of these challenges include: (i) the contract is not a *construction contract* and so the statutory right to adjudicate disputes does not arise (ii) a party to the contract is a *residential occupier* (ie it occupies or intends to occupy the property in question as its residence) and so again the right to adjudicate does not arise and (iii) the dispute referred to the adjudicator is narrow and does not include some of the matters that it has decided in the Decision.
- Unless the parties have agreed otherwise, an Adjudicator will have the ability to make **non-binding** decisions on its jurisdiction during the adjudication.

Adjudicator has materially breached the rules of natural justice in reaching the Decision

- As in all other forms of dispute resolution in England, an Adjudicator must comply with the rules of natural justice when overseeing an adjudication: ie both parties must be given a fair hearing. Breach of those rules may take the form of bias, a failure to act impartially, or procedural irregularity. The breach must be a material one (ie not trivial).
- As always the bar to proving this ground, is a high one. In practice though the court never really starts from the premise that the adjudication proceedings must be fair. If it did, it would strike out most Decisions simply on the basis that a Referring Party has had all the time it wants to prepare its claim (often together with volumes of evidence), but usually the Responding Party gets only 7-10 days to make sense of the claim and respond. That is hardly fair.

Fraud by successful party

- A court will not allow enforcement proceedings to be used as a “*vehicle to facilitate fraud*” (PBS Energo AS v Bester Generacion UK Ltd)². Therefore if a losing party can demonstrate that the Decision against it was partly the product of fraud by the successful party, it may seek to challenge on that basis. Strong evidence of the fraud will be required. By fraud, one cannot simply argue though based on (what are fairly commonplace) allegations of inflated payment applications for time and money, since that will be unlikely to interest the court.

Successful party’s insolvency

- The likely inability of the successful party to repay the adjudication Decision sum (eg a smash and grab award), where the losing party says that it has a claim to bring against it to recover that sum (eg based on defects in the works), because the successful party is insolvent or on the verge of insolvency, is a basis of challenge to enforcement. It will fail though where the successful party’s financial position now is no different to what it was at the time when the contract was made, or its likely inability to repay has been caused by the losing party’s failure to date to pay the sum awarded in the adjudication.
- You will need strong accountancy evidence to demonstrate this risk of inability to repay. The leading case is *Wimbledon Construction Co 2000 Ltd v Vago*³.

²[2019] EWHC 996 (TCC)

³[2005] EWHC 1086 (TCC)

Dissipation of funds by successful party

- This ground for challenging enforcement also arises out of *Wimbledon v Vago*. It arises: *if the evidence demonstrates that there is a real risk that any judgment would go unsatisfied by reason of the claimant organising its financial affairs with the purpose of dissipating or disposing of the adjudication sum so that it would not be available to be repaid, then this would also justify the grant of a stay*. In other words, there is the risk that a sum paid over now on enforcement, would be dissipated before it could be recovered via the losing party's claim back at the successful party.
- Again you will need strong evidence to succeed with this challenge.

CPR Part 8 Proceedings

- Finally, the practice has grown up of the party resisting enforcement, sometimes also deciding to start "Part 8 proceedings" in the tcc in tandem with resisting enforcement, in cases where an adjudicator has made a clear error. The reason for doing this is to try by an additional route, to defeat the enforcement of the Decision. If the Part 8 claim succeeds it will cancel out the error in the Decision and thereby render the effect of the Decision, much less punitive than it is currently, or zero.
- The court is sparing in the cases that it will allow along this Part 8 track though. They are only those where:
 - there is a short and self-contained issue which arose in the adjudication and which the defendant continues to contest;*
 - that issue requires no oral evidence, or any other elaboration beyond that which is capable of being provided during the enforcement hearing; and*
 - the issue is one which it would be unconscionable for the court to ignore; and there should be proper proceedings for declaratory relief.*

[The TCC Guide](#)

If you have any questions or need any advice please email Tim Seal on tseal@ridgemont.co or call him on 0203 909 9592.

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