

ADJUDICATION ENFORCEMENT

- ▶ Court reaffirms the position on adjudication enforcement.
- ▶ Only in rare circumstances will the court interfere in an adjudicator's decision.
- ▶ The aim of adjudication is for a "quick" answer, even if not always the "right" answer.

What's it about?

Losing parties in adjudications are increasingly attempting to resist court proceedings to enforce the adjudicator's decision on the ground that the adjudicator lacked jurisdiction to decide the dispute, or that the adjudication process involved a breach of natural justice, for example in that the adjudicator appeared to show bias against the complainant.

The courts are however strongly disposed to allow adjudicators' decisions to be enforced summarily, leaving the losing party to have the underlying dispute re-examined in separate proceedings, should he wish to do so, after the disposal of which it is usually (but not always) possible for any overpayment under the adjudicator's decision to be recovered. Only in the clearest cases of excess of jurisdiction or other material irregularity will the courts refuse to enforce.

Despite this, litigants continue to throw good money after bad in doomed attempts to resist enforcement: recently, for example, in *Ground Developments Ltd v FCC Construction SA and others*, some £55,000 was wasted in legal costs over a claim for about £200,000 and a host of arguments against enforcement all of which the court found to be utterly unconvincing.

Why does it matter?

The courts have reaffirmed the principle that adjudicators' decisions should be enforced unless it is "*plain that the question which [the adjudicator] has decided was not the question referred to him, or the manner in which he has gone about his task is obviously unfair.*" The courts repeatedly deplore "*scrabbling around to find some argument, however tenuous, to resist payment*".

The main object of statutory adjudication under the Construction Act 1996 is to provide rapid and effective interim solutions to money disputes, in an industry that had become notorious for the incidence of wrongful withholding of payment down the supply chain, facilitated by the absence of any timely, cost-effective means of redress. Accordingly, an adjudicator is not required to be legally qualified, is not required to mimic a court of law, and is obliged to reach a decision with great rapidity. The aim is a "quick" answer rather than necessarily the "right" answer, and adjudication cannot always be expected to provide definitive answers to complex questions.

When considering issues of jurisdiction or breach of natural justice, the court will consider all relevant documents, including the notice of adjudication, the referral document and the adjudicator's decision. New points raised in subsequent documents (i.e. the rejoinder) may be deemed within the adjudicator's remit, despite not being in the notice, as in the 2016 case of *Lulu Construction Ltd v Mulallay & Co*. Any potential challenges to the decision therefore need to be considered very carefully before a decision to resist payment is made.

Now what?

Generally, disagreements with an adjudicator's decision should be resolved by legal/arbitration proceedings, not a jurisdiction/breach of natural justice challenge, except in the plainest of cases.

The referring party should ensure that the notice of adjudication is drafted in clear terms so that the adjudicator and the responding party are made fully aware of the scope of the dispute being referred and so that the limits of the adjudicator's remit is adequately defined. Where there are arguments over what were the contract terms, as in the *Ground Developments* case, the alleged terms must be clearly set out in notice of adjudication and in the appointment form if necessary.

Arguments as to whether the dispute is subject to statutory adjudication at all, or as to the validity of the adjudicator's appointment should be raised at the earliest possible opportunity, and repeated as necessary throughout the process, lest any impression is given that by participating in the adjudication such objection has been waived by conduct.

The team at Addleshaw Goddard LLP will be happy to discuss the above with you. Please contact Joe Wilkinson or Jayne Moyle.

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