

Construction Adjudication Enforcement

Westlaw UK Insight



Introduction

1. The legal effect of an adjudicator's decision is that it shall be binding on the parties and they shall comply with it unless and until the dispute is finally determined by¹:
 - (1) legal proceedings;
 - (2) arbitration (if the construction contract provides for arbitration or the parties otherwise agree to arbitration); or
 - (3) agreement between the parties.
2. If the unsuccessful party in the adjudication complies fully with the adjudicator's decision, the successful party will have no further remedy against the unsuccessful party pursuant to that particular adjudication.
3. If, after complying with the adjudicator's decision, either party to the adjudication seeks further or different redress in relation to the dispute referred to adjudication, then they must seek that via legal proceedings, arbitration or agreement.
4. However, if the unsuccessful party in the adjudication refuses to comply, in whole or in part, with the adjudicator's decision, the successful party is entitled to issue court proceedings specifically to seek enforcement of the adjudicator's decision.
5. This article provides an introduction to the enforcement of adjudicator's decisions. It assumes no extensive or specialist legal knowledge and examines in outline:
 - (1) the nature and procedure of adjudication enforcement proceedings;
 - (2) the grounds of challenge to adjudication enforcement proceedings;
 - (3) set-off against adjudication decisions and severability;

¹ Para 23 of the Scheme for Construction Contracts (England and Wales) Regulations 1998

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(4) stays of execution.

The nature and procedure of adjudication enforcement proceedings

6. A valid adjudicator's decision, once reached and issued, gives rise to a cause of action in favour of the parties to the adjudication.
7. The cause of action comprises the existence of a valid adjudicator's decision and the contractual obligation on the parties to comply with the decision pursuant to the underlying construction contract² under which the dispute was referred to adjudication, by reason of section 108(3) of the Housing Grants, Construction and Regeneration Act 1996 ("the Act") and paragraph 23(2) of the Scheme for Construction Contracts (England and Wales) Regulations 1998 ("the Scheme"): VHE Construction Plc v RBSTB Trust Co Limited [2000] 70 Con LR 51 at [54] *per* HHJ Hicks QC.
8. The most appropriate procedure for enforcing adjudication decisions in court is by way of summary judgment under Part 24 of the Civil Procedure Rules: Macob Civil Engineering Ltd v Morrison Construction Ltd (1999) 1 T.C.L.R. 113.
9. If enforced by way of summary judgment, the adjudicator's decision and the remedies provided for in the decision will be enforceable as a court judgment with the accompanying enforcement methods, including charging orders, warrants of execution, third party debt orders and attachment of earnings orders.
10. Section 9 of the TCC Guide sets out the procedure for enforcement.
11. In essence, to apply for summary judgment the party seeking to enforce the decision must issue a claim form (ordinarily Part 7) which identifies:
 - (1) the construction contract;
 - (2) the adjudicator's jurisdiction;
 - (3) the procedural rules under which the adjudication was conducted;
 - (4) the adjudicator's decision;

² as defined by section 104 of the Housing Grants, Construction and Regeneration Act 1996

(5) the relief sought from the court; and

(6) the grounds for seeking the relief.

12. The claim form should be accompanied by:

(1) An application notice (form N244) seeking summary judgment on the adjudicator's decision under Part 24 of the Civil Procedure Rules with the procedural directions that are sought. This will ordinarily include a direction for abridgment of time for acknowledging service and filing witness evidence.

(2) A witness statement setting out the evidence relied upon in support of the claim for enforcement of the decision and any associated procedural applications. This evidence should include a copy of the adjudicator's decision.

(3) A draft order with proposed directions in the form of Appendix F to the TCC Guide.

13. The Claim Form, application notice and witness statement(s) should be filed as being "*without notice adjudication enforcement claim and application for the urgent attention of a TCC Judge*". The claimant seeking enforcement should provide a time estimate for the hearing when filing these documents.

14. The TCC Judge will ordinarily provide directions within 3 working days of receipt. Ordinarily, the enforcement hearing will be heard within 28 days of the direction being made and for the defendant to be given at least 14 days from the date of service for the serving of any evidence in opposition to the adjudication procedure.

15. Adjudication decisions will be enforced, notwithstanding any errors of fact, law or procedure provided that the adjudicator did not thereby exceed his jurisdiction or materially breach the rules of natural justice.

16. Unless otherwise ordered, the parties should file by 4pm one clear working day before the enforcement hearing their skeleton arguments and a bundle containing the documents required at the enforcement hearing, including copies of all authorities and statutory provisions to be relied on at the hearing. The bundle should be agreed, if possible.

17. For hearings estimated to last half a day or less, skeleton arguments may be filed by no later than 1pm on the last working day before the hearing, unless otherwise ordered.
18. A claimant seeking enforcement may apply for default judgment under Part 12 of the Civil Procedure Rules if it is clear that, following service of the claim form and accompanying documents on the defendant, it is likely that the defendant will not participate in the enforcement proceedings: Coventry Scaffolding Co (London) Ltd v LancsVille Construction [2009] EWHC 2995 at [13] *per* Akenhead J.
19. The courts have repeatedly emphasised that adjudication decisions will ordinarily be enforced by way of summary judgment, unless there is a valid ground for resisting enforcement, as discussed below.
20. Jackson J (as he then was) summarised the position in Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2006] B.L.R. 15 at [80]:

“1. The adjudication procedure does not involve the final determination of anybody’s rights (unless all the parties so wish).

2. The Court of Appeal has repeatedly emphasised that adjudicators’ decisions must be enforced, even if they result from errors of procedure, fact or law: see Bouygues, C&B, Scene and Levolux.

3. Where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural justice, the court will not enforce his decision: see Discain, Balfour Beatty and Pegram Shopfitters.

4. Judges must be astute to examine technical defences with a degree of scepticism consonant with the policy of the 1996 Act. Errors of law, fact or procedure by an adjudicator must be examined critically before the Court accepts such errors constitute excess of jurisdiction or serious breaches of the rules of natural justice: see Pegram Shopfitters and Amec.”

Grounds of challenge to adjudication enforcement proceedings

21. The grounds of challenge to enforcement are limited. The following is an overview and does not purport to be exhaustive.

- Lack of binding jurisdiction

22. The courts will not enforce an adjudicator's decision which the adjudicator did not have jurisdiction to reach and which jurisdiction (or purported jurisdiction) does not bind the parties.
23. The adjudicator's jurisdiction and scope of the dispute is determined in the first instance by reference to the Notice of Adjudication: Ken Griffin v Midas Homes Limited [2000] 78 Con LR 152 at 153 *per* HHJ Humphrey Lloyd QC.
24. However, when analysing the scope of the adjudicator's jurisdiction and the dispute, "one will need to look at the dispute as it developed" and that "it simply depends on the relevant history": Herbosch-Kiere Marine Contractors Ltd v Dover Harbour Board [2012] EWHC 84 (TCC) at [23] *per* Akenhead J.
25. An adjudicator's decision will be enforced, even if he has made errors of law, fact and/or procedure, provided that it is not sufficiently serious to render the entire process in breach of the rules of natural justice or to take him outside his jurisdiction.

"If the adjudicator has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity.": Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd [2001] C.L.C. 927 at [27] *per* Chadwick LJ.

26. Depending on the circumstances, an adjudicator may not have jurisdiction in the following circumstances:
 - (1) The contract under which the dispute was referred to adjudication was not a "construction contract" within the meaning of section 104 of the Act pursuant to which a right to adjudicate existed.
 - (2) There was no construction contract "in writing" between the parties for the purposes of section 107 of the Act, in relation to construction contracts entered into prior to 1 October 2011.
 - (3) One of the parties to the adjudication was not in fact a contracting party to the construction contract.
 - (4) The dispute referred to adjudication has already been decided, in a prior adjudication, arbitral or litigious proceedings or by agreement of the parties.

- (5) The dispute referred to adjudication did not arise under the construction contract for the purposes of section 108(1) of the Act.
 - (6) The “dispute” referred to adjudication in fact comprised multiple disputes such that a single dispute was not referred.
 - (7) The “dispute” referred to adjudication has not yet crystallised.
 - (8) The adjudicator was not appointed in accordance with the terms of the construction contract.
 - (9) The referring party failed to serve on the adjudicator the referral notice not later than seven days from the date on which the notice of adjudication was sent.
 - (10) The adjudicator failed to reach his decision within 28 days of the referral of the dispute or such longer period as agreed by the parties.
27. Even if the adjudicator does not have jurisdiction to reach the decision, the adjudicator’s lack of jurisdiction may still bind the parties such that the decision is enforceable. In particular:
- (1) If the adjudicator investigates and rules on his substantive jurisdiction and the adjudication rules under which the adjudication is conducted provide that such decisions on jurisdiction by the adjudicator are binding on the parties, then even if the adjudicator erroneously rules that he has jurisdiction, that will not be a ground for refusing enforcement: Farebrother Building Services Ltd v Frogmore Investments Ltd [2001] CILL 1762 *per* HHJ Gilliland QC.
 - (2) A party to an adjudication seeking to resist enforcement may clothe the adjudicator with jurisdiction, even if the adjudicator does not have jurisdiction, through the party’s express or implied consent, conduct or acquiescence to the adjudicator’s purported jurisdiction and in the absence of an effective reservation of the party’s rights: Project Consultancy Group v The Trustees of the Gray Trust [1999] B.L.R. 37.
 - (3) If a possible jurisdictional objection was or ought to have been reasonably evident during the adjudication but was not raised, a party who continues in the adjudication may not seek to resist enforcement on the ground of lack of

jurisdiction unless it has clearly reserved its rights in relation to resisting on the grounds of lack of jurisdiction. Where a party makes a general but also a specific reservation of rights disputing the adjudicator's jurisdiction at the start of the adjudication, but subsequently only makes the specific reservation, that party may thereby be deemed to have abandoned its general reservation: Durham County Council v Jeremy Kendall [2011] B.L.R. 425.

- Material breach of natural justice

28. Adjudicators must act with impartiality³ and in accordance with the rules of natural justice.
29. At its most basic and fundamental, natural justice means knowing the case one has to meet and having a proper opportunity to meet it and make representations: Dean & Dyball Construction Ltd v Kenneth Grubb Associates Ltd [2003] EWHC 2465 (TCC) at [53] *per* HHJ Richard Seymour QC. Beyond that, the precise requirements of natural justice in any particular case will depend on the facts.
30. Adjudication is a temporarily binding form of dispute resolution. The process is swift, with a decision being reached in the first instance within 28 days of referral of the dispute. The requirements of natural justice must be judged against this background, namely the time restraints, the provisional nature of the decision and any concessions or agreements made by the parties as to the nature of the process in any particular case: Try Construction Ltd v Eton Town House Group Ltd [2003] EWHC 60 (TCC) at [50] *per* HHJ David Wilcox.
31. Adjudicator's must not act with actual or apparent bias.
32. Bias is an attitude of mind which prevents an adjudicator from making an objective determination of issues which he has to resolve.
33. Justice should not only be done, but should be seen to be done: R v Sussex Justices, ex parte McCarthy [1924] 1 K.B. 256.
34. Accordingly, there are two forms of bias:

(1) actual bias; and

³ Section 108(2)(e) of the Act

- (2) apparent bias.
35. Actual bias includes having a direct pecuniary, proprietary or other interest in the subject-matter of the dispute.
36. Apparent bias involves the appearance of bias such that justice might be seen not to be done. The test for apparent bias is whether the fair-minded and informed observer would conclude that there was a real possibility of bias: Lanes Group PLC v Galliford Try Infrastructure Ltd [2012] B.L.R. 121.
37. Not all breaches of natural justice render invalid an adjudicator's decision. The breach must be material for the court not to enforce the decision, namely "*substantial and relevant*": Discain Project Services Ltd v Opecprime Development Ltd [2001] B.L.R. 287 at [68] *per* HHJ Peter Bowsher QC.
38. Save for clear and obvious instances of actual bias, determining whether there is a breach of natural justice and whether it is material will depend on the facts.
39. In Cantillon Ltd v Urvasco Ltd [2008] EWHC 282 (TCC) at [57] Akenhead J gave guidance for assessing breaches of natural:
- (1) It must first be established that the Adjudicator failed to apply the rules of natural justice.
 - (2) Any breach of the rules must be more than peripheral; they must be material breaches.
 - (3) Breaches of the rules will be material in cases where the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant.
 - (4) Whether the issue is decisive or of considerable potential importance or is peripheral or irrelevant obviously involves a question of degree which must be assessed by any judge in a case such as this.
 - (5) It is only if the adjudicator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side, without giving the parties an opportunity to

comment or, where relevant put in further evidence, that a clear and material breach of the rules of natural justice comes into play. It follows that, if either party has argued a particular point and the other party does not come back on the point, there is no breach of the rules of natural justice in relation thereto.

40. Depending on the circumstances, an adjudicator may be in breach of natural justice in the following circumstances:

- (1) The adjudicator failed to consider evidence or submissions.
- (2) The adjudicator did not give the parties or a party adequate opportunity to respond to submissions or evidence.
- (3) The adjudicator reached his decision on a basis not submitted or argued.
- (4) The adjudicator decided a matter already decided in a prior adjudication.
- (5) The adjudicator relied on third party or his own expertise in reaching his decision without informing the parties or affording them opportunity to make submissions.
- (6) The adjudicator failed to give reasons, when required by the parties to do so.
- (7) The adjudicator has engaged in unilateral communications with one party to the adjudication without informing the other and without giving the other party opportunity to make submissions.
- (8) The adjudicator has decided the dispute in material reliance upon without prejudice material.

Set-off against adjudication decisions and severability

41. Set-off is not generally available against a valid and enforceable adjudicator's decision. However, set-off against the decision may be available⁴ where:

- (1) it follows logically from an adjudicator's decision that the employer is entitled to recover a specific sum by way of liquidated and ascertained damages; then

⁴ Balfour Beatty Construction Ltd v Serco Ltd [2004] EWHC 3336 (TCC) at [53] *per* Jackson J

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the employer may set off that sum against monies payable to the contractor pursuant to the adjudicator's decision, provided that the employer has given proper notice (insofar as required); or

- (2) the entitlement to liquidated and ascertained damages has not been determined either expressly or impliedly by the adjudicator's decision; then the question whether the employer is entitled to set off liquidated and ascertained damages against sums awarded by the adjudicator will depend upon the terms of the contract and the circumstances of the case.

42. If multiple disputes have validly been referred to adjudication and a decision reached, part of which is valid and enforceable, but another part of which is not, the valid part of the decision might, depending on the circumstances, be capable of enforcement by severing the invalid part of the decision.

43. In Cantillon Ltd v Urvasco Ltd [2008] EWHC 3315 (TCC) Akenhead J summarised the position as to severability:

- (1) The first step must be to ascertain what dispute or disputes has or have been referred to adjudication. One needs to see whether in fact or in effect there is in substance only one dispute or two and what any such dispute comprises.
- (2) It is open to a party to an adjudication agreement to seek to refer more than one dispute to an adjudicator. If there is no objection to that by the other party or if the contract permits it, the adjudicator will have to resolve all referred disputes and differences. If there is objection, the adjudicator can only proceed with resolving more than one dispute or difference if the contract permits him to do so.
- (3) If the decision properly addresses more than one dispute, a successful jurisdictional challenge on that part of the decision which deals with one such dispute or difference will not undermine the validity and enforceability of that part of the decision which deals with the other(s).
- (4) The same in logic must apply to the case where there is a non-compliance with the rules of natural justice which only affects the disposal of one dispute or difference.
- (5) There is a proviso to points (3) and (4) above which is that, if the decision as drafted is simply not severable in practice, for instance on the wording, or if

the breach of the rules of natural justice is so severe or all-pervading that the remainder of the decision is tainted, the decision will not be enforced.

- (6) In all cases where there is a decision on one dispute, and the adjudicator acts, materially, in excess of jurisdiction or in breach of the rules of natural justice, the decision will not be enforced by the Court.

Stays of execution

44. Summary judgment will not be granted in favour of a party who is in liquidation as at the enforcement hearing: Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd [2001] C.L.C. 927 at [35] *per* Chadwick LJ.

45. In Straw Realisations (No. 1) Ltd v Shaftsbury House (Developments) Ltd [2011] B.L.R. 47 Edwards-Stuart J indicated at [89] that summary judgment would also not be granted where the party seeking enforcement was, at the date of the enforcement hearing:

- (1) subject of the appointment of administrative receivers; or
- (2) in administration and a notice of distribution has been given; or
- (3) in administration, but no notice of distribution has been given and the adjudicator's decision has not, pursuant to the terms of the construction or by agreement of the parties, become final and binding on the parties.

46. However, subject to that, the general position, as set out above, is that:

- (1) valid adjudication decisions will be enforced by way of summary judgment;
and
- (2) the court will not grant a stay of execution on the enforcement of the decision.

47. If the party seeking to enforce the decision is in a financial position as at the date of the enforcement hearing such that it is probable that it would be unable to repay the judgment sum when it fell due, if the parties finally determined the dispute by way of litigation or arbitration, a stay will usually be granted: Wimbledon v Vago [2005] B.L.R. 374 at [26] *per* HHJ Coulson QC.

48. However, the court is unlikely to grant a stay of execution if the enforcing party's financial position is:

- (1) the same or similar to when the construction contract was made: Herschell Engineering Ltd v Breen Property Ltd (unreported, 28 July 2000); or
- (2) due, either wholly, or in significant part, to the party resisting enforcement's failure to pay those sums which were awarded by the adjudicator: Absolute Rentals v Glencor Enterprises Ltd (unreported, 16 January 2000).

49. To obtain a stay of execution, the burden of proof is on the resisting party to prove "a very real risk of future non-payment": Total M&E Services v ABB (2002) 87 Con LR 154 at [52] *per* HHJ Wilcox.

50. The court will make an assessment of the alleged inability of the enforcing party to repay the judgment sum as at the likely future date when repayment may be required: Berry Piling v Sheer Projects [2012] EWHC 241 (TCC) at [17] *per* Edwards-Stuart J.

Conclusion

51. The procedure and the substantive law of enforcement of adjudication decisions are not straightforward. This article comprises only a introduction to the topic by way of overview.

52. Whether to resist enforcement and/or whether to seek or resist a stay of execution are important mixed questions of law of fact, which parties to adjudication decisions should address with care and in good time before any enforcement hearing.

53. The selection, deployment and presentation of submissions at the enforcement hearing will also often be influential to the outcome of the hearing. Each case is different.

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