

By Harry Smith



AQUA LEISURE INTERNATIONAL LTD V BENCHMARK LEISURE LTD [2020] EWHC 3511 (TCC)

A NEW BENCHMARK FOR WAIVER IN ADJUDICATION?

1. It is now unusual for any case to raise a truly novel point in the context of adjudication enforcement. *Aqua Leisure International Ltd v Benchmark Leisure Ltd* – a case about a waterpark in Scarborough – raises two.

The Facts

2. Benchmark engaged Aqua in 2015 to design, supply and install water rides and attractions at the The Sands, North Bay, Scarborough. The contract provided for adjudication in accordance with the Scheme.
3. In June 2017 the parties fell into dispute over payment. An adjudicator was appointed and ordered Benchmark to pay £200,537.35 to Aqua within 7 days. This sum included an award of £12,600 by way of legal costs pursuant to the Late Payment of Commercial Debts (Interest) Act 1998.
4. Following the adjudicator's decision, the parties entered negotiations and, in late August/early September 2017, reached a compromise agreement intended to wrap up the parties' dealings under the contract – including the adjudicator's decision – by which Benchmark would make a series of payments to Aqua, Benchmark's parent company would provide a guarantee, and Aqua would carry out snagging works. This agreement was made expressly "subject to contract".

5. Over the following months, Benchmark made a number of payments to Aqua, and Aqua carried out snagging works. In December 2017, Aqua sent a deed of settlement to Benchmark for signature. Benchmark did not sign. Aqua sent the deed to Benchmark five times more. Still Benchmark did not sign. However, in the background, Benchmark's payments, and Aqua's snagging works, went on regardless.
6. Matters came to a head in May 2018 when it transpired that Benchmark was at risk of defaulting on the final payment due under the compromise. Aqua made clear that it wished to rely on the guarantee from Benchmark's parent company. Benchmark replied that its parent company would not be providing a guarantee.
7. Aqua commenced proceedings in the High Court (TCC) to enforce the adjudicator's decision. Benchmark resisted enforcement on the grounds that (a) in view of the compromise, the decision was no longer binding; and (b) the portion of the decision awarding Late Payment Act costs was unenforceable.

The "Subject to Contract" Issue

8. Section 108(3) of the Housing Grants, Construction and Regeneration Act 1996 provides:

"The contract shall provide in writing that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement."

(Emphasis supplied)

9. In view of this provision, it was common ground between the parties that if the compromise agreement had become binding, the result would be that the parties were no longer bound by the adjudicator's decision.
10. In support of its case that the decision should be enforced, Aqua argued that the compromise had been entered into expressly "subject to contract" and had not lost that status later. It relied principally on the importance which Aqua had evidently placed on the signing of a written agreement, and on Benchmark's repeated refusal to sign.
11. Benchmark's case was that, whilst the compromise was initially "subject to contract", the parties had later agreed to treat the agreement as binding. It relied on the fact that Benchmark had made payments and Aqua carried out work pursuant to the compromise which – Benchmark argued – they would not have done had they not regarded themselves as legally bound.



“This case is a paradigm example of why the court “will not lightly hold” that a condition that negotiations and agreements are “subject to contract” has been superseded.”

12. The law governing the use of the phrase “subject to contract” is well-settled. In *Generator Developments Ltd v Lidl UK GmbH* [2018] EWCA Civ 396, Lewison LJ said at [79]:

“... The meaning of that phrase is well-known. What it means is that (a) neither party intends to be bound either in law or in equity unless and until a formal contract is made; and (b) each party reserves the right to withdraw until such time as a binding contract is made. It follows, therefore, that in negotiating on that basis [both parties] took the commercial risk that one or other of them might back out of the proposed transaction ... In short a 'subject to contract' agreement is no agreement at all. ...”

13. In *RTS Flexible Systems Ltd v Molkerei* [2010] UKSC 14, Lord Clarke said at [56]:

“Whether in such a case the parties agreed to enter into a binding contract, waiving reliance on the “subject to [written] contract” term or understanding will again depend upon all the circumstances of the case, although the cases show that the court will not lightly so hold.”

14. Applying these authorities, HHJ Bird held that Benchmark’s case had no prospect of success at trial, stating:

“This case is a paradigm example of why the court “will not lightly hold” that a condition that negotiations and agreements are “subject to contract” has been superseded. The parties set their own rules of engagement. They agreed that there would be no binding contract

until the terms were reduced to writing and signed off. They clearly envisaged that an agreement would be reached but that it would not be enforceable until the formalities had been observed. The presence of an agreement that was acted on, is not therefore without more enough to indicate that the parties intended to be bound. It was obvious that the agreement would be acted upon before it became binding.”

Waiver

15. The court went on to consider the portion of the adjudicator’s decision awarding Late Payment Act costs.
16. Following publication of the decision, *Enviroflow v Redhill* [2017] EWHC 2159 (TCC) had established that adjudicators do not have the power to award legal costs under the Act. Benchmark relied on this in support of its case that the portion of the decision awarding legal costs should be severed. It argued that the court could correct the error, applying *Caledonian v Mar* [2015] EWHC 1855 (TCC).
17. Aqua accepted that it followed from *Enviroflow v Redhill* that the adjudicator was wrong to make an award of legal costs. However, Aqua argued that this made no difference to the

enforceability of the decision. Either the error was one of law – in which case the decision should be enforced regardless: see *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] EWCA Civ 507; *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358 – or it was an error of jurisdiction, in which case the point was not open to Benchmark absent a proper reservation of its position: see *Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd* [2019] EWCA Civ 27 at [92].

18. Further, Aqua argued that *Caledonian v Mar* did not assist Benchmark in view of the more recent decision in *Hutton v Wilson* [2017] EWHC 527 (TCC), to the effect that the court would correct an error of law only in circumstances where the defendant had issued a Part 8 claim form seeking an appropriate declaration. Benchmark had not done so.
19. Thus, Aqua argued, the decision remained fully enforceable whichever analytical route one took.
20. However, in an original and interesting part of the judgment, HHJ Bird departed from both parties' submissions to some degree. He found that this was not a case where *Caledonian v Mar* applied. Rather, the question of Late Payment Act costs was a question **"of jurisdiction in the most fundamental sense"**. The adjudicator:

"had no jurisdiction to make the award at all because the statute under which he purported to act had no application."

21. Further, and notwithstanding that Benchmark had not reserved its position, this was not a case where the defendant could be taken to have waived its jurisdictional objection, for

two reasons. First, the defendant could not be expected to reserve its position on the basis of the reasoning in *Enviroflow* before *Enviroflow* had been decided:

"To conclude otherwise might well lead to parties to adjudication expressing general reservations in respect of developing law. That would be undesirable."

22. Second, HHJ Bird indicated that he was **"not persuaded that a fundamental point of jurisdiction such as the one in play here is capable of being waived"**. His reasons included that:
 - (1) The absence of jurisdiction to award Late Payment Act costs **"does not arise out of a mere procedural failure (which could be waived) but rather out of an express statutory provision removing the right to rely on the 1998 Act"**.
 - (2) The parties could not override the effect of the 1998 Act by agreement, still less by conduct.
 - (3) The question of waiver had not been raised in *Enviroflow*.
23. For those reasons the court severed the small portion of the decision awarding Late Payment Act costs and proceeded to enforce the balance.

Conclusion

24. This is the first reported decision concerning the effect of a compromise of an adjudicator's decision entered into "subject to contract". It is likely that in many similar cases defendants will

be given leave to defend the claimant's enforcement application to trial in view of the contested factual issues which performance of a "subject to contract" compromise often raise.

25. The court's analysis and conclusions in relation to reservations of jurisdiction are new and open up a potentially important lifeline to defendants wishing to take a late jurisdictional objection to enforcement of an adjudicator's decision. As HHJ Bird noted, his conclusion that the jurisdictional point in this case was incapable of being waived was not the subject of argument by the parties and did not reflect a submission made to him by Benchmark. What consequences this aspect of the judgment will have – and how, if at all, it is to be rationalised with the comprehensive analysis of waiver in adjudication by Coulson LJ in *Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd* – are, for the present, open questions.

Harry Smith appeared for Aqua, instructed by Helix Law.

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