



Technical

6 of the Key Construction Cases Decided in the Past 3 Months (Article 59)

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Introduction

1. In the past 3 months there have been several cases in the Technology and Construction Court ("TCC"). Below is a summary of 6 of the Key Judgments:
 - **J J Rhatigan & Co (UK) Limited and Rosemary Lodge Developments Limited [2019] EWHC 1152 (TCC).**
 - **Indigo Projects London Limited and Razin and another [2019] EWHC 1205 (TCC).**
 - **Willow Corp S.À.R.L. and MTD Contractors Limited [2019] EWHC 1591 (TCC).**
 - **PBS Energo A.S and Bester Generacion UK Limited [2019] EWHC 996.**
 - **RGB P&C Limited and Victory House General Partner Limited [2019] EWHC 1188 (TCC).**
 - **Walter Lilly & Co. Limited and Mr Jean-François Clin [2019] EWHC 945 (TCC).**
2. The majority of cases are where parties have sought to obtain a summary judgment to enforce Adjudicator's decisions. There are limited bases on which a defendant may resist enforcement including lack of jurisdiction and a material breach of natural justice. The issues considered in the recent cases include decisions obtained by fraud, the Adjudicator undertaking his own analysis of delay, the Adjudicator not dealing with issues raised in the adjudication, the severability of an Adjudicator's decision (where parts of the decision can be enforced or if the entire decision falls down) and enforcement where a party has entered into a Company Voluntary Arrangement ("CVA").

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3. The final case (Walter Lilly & Co Limited and Mr Jean-Francois) contains a detailed assessment to determine whether an event was a Relevant Event.

J J Rhatigan & Co (UK) Limited and Rosemary Lodge Developments Limited [2019] EWHC 1152 (TCC)

4. This case was the enforcement of an Adjudicator's decision with the defendant arguing the decision should not be enforced because the Adjudicator failed to deal with an issue, and this was a breach of natural justice.
5. The judgment explains "*it is well established that an Adjudicator's decision will normally be enforced by summary judgment and that the Court is not concerned with the merits of the decision. There are limited bases on which a defendant may resist enforcement including lack of jurisdiction and a material breach of natural justice.*" (at paragraph 5).
6. Mrs Justice Jefford DBE summarises the law by citing (at paragraph 6 and 7) the decision of the Court of Appeal in "*Carillion Construction Ltd. v Devonport Royal Dockyard [2005] EWCA Civ 1358 and Cantillon Ltd. v Urvasco Ltd.*" [2008] EWHC 282 (TCC) at [57].
7. In this case Mrs Justice Jefford DBE concluded "*To the extent that RDL's case was that the Adjudicator had simply failed to take into account an aspect of the evidence, I cannot see that this could amount to a breach of natural justice in itself. It would simply be an error but not one with which the Court is concerned. Even if it could amount to a breach of natural justice, it would not, in this case, be a material breach because Mr Morgan's evidence was not in any sense crucial.*" (paragraph 63 and 64).
8. Adjudication is a rough and ready process. If the Adjudicator does not take into account an aspect of evidence that was not crucial it would not be grounds for a Court to not enforce an Adjudicator's decision. It is important for parties in an adjudication to present the key evidence clearly so that the Adjudicator understand the issues in the short timescales of the process.

Indigo Projects London Limited and Razin and another [2019] EWHC 1205 (TCC)

9. This was an application to enforce an Adjudicator's decision. The Claimant had entered into a Company Voluntary Arrangement . The Defendants contended that enforcement of the decision would undermine the proper operation of the CVA. This case was different to previous cases because the CVA was entered into after the Adjudicator's decision and the application to enforce it. It was also relevant that the decision of the Adjudicator was not a decision on the merits of one parties' case, or part of its case. It was a decision based solely on the failure to serve a Pay Less Notice. This meant that if that decision had been complied with, the effect in a subsequent resolution of the entire dispute would have been that the payment would have been treated as an interim payment on account.

10. Sir Anthony Edwards-Stuart found “*To order the Defendants to pay, after the CVA has been entered into, the sum determined by the Adjudicator would, in my judgment, distort the process of accounting that is required under the CVA because the money would not be applied for the sole benefit of the Defendants but instead for the benefit of the creditors generally.*” (paragraph 55).
11. The enforcement of Adjudicator’s differs depending on whether a party is in a CVA, liquidation or administration. In some circumstances an adjudication could be a waste of time and the financial position of both parties should be carefully considered before starting an adjudication.

Willow Corp S.À.R.L. and MTD Contractors Limited [2019] EWHC 1591 (TCC)

12. This provides a useful summary of Practical Completion (at paragraph 41). It also explains that Adjudication “*requires an impartial and reasoned provisional decision within a very compressed timetable...It provides a quick and interim solution that the Courts will ordinarily enforce pending final resolution of the parties’ dispute*” (at paragraph 56). In the judgement Mr Justice Pepperall concluded there was also an error in law in the Adjudicator’s decision and “*the good can and should be severed from the bad*” (at paragraph 75).
13. In this case the Court enforced the parts of the Adjudicator’s decisions that were “*good*” but severing it from the “*bad*” and enforced the decision as far as it sensibly could.
14. The Court also emphasised the “*very compressed timetable*” for Adjudicator’s to make reasoned decisions. This importance of a party clearly presenting its case is clearly crucial to obtaining a favourable outcome. In our experience this requires careful presentation of the key issues in very short amount of time, especially when a party is responding to a claim and may only have a week to prepare its response.
15. The Adjudicator’s decisions are almost always enforced and in practice the party usually only has one chance of getting its claim right.

PBS Energo A.S and Bester Generacion UK Limited [2019] EWHC 996

16. The Adjudicator’s decision was obtained by fraud. The judge, Mr Justice Pepperall refused to enforce the Adjudicator’s decision and said “*severance is not available and an Adjudicator’s decision on a single dispute is either valid and enforced or invalid and not enforced: Cantillon Ltd v Urvasco Ltd [2008] EWHC 282 (TCC)*” (at paragraph 71).
17. This is one of the few cases where the Adjudicator’s decision was not enforced. From the judgment it is clearly important that claims for losses are properly evidenced or the entire Adjudicator’s decision could fall down and not be enforced.

RGB P&C Limited and Victory House General Partner Limited [2019] EWHC 1188 (TCC)

18. The defendants argued an Adjudicator's decision could not be enforced because it breached rules of natural justice because the Adjudicator:
 - “undertook his own analysis without any reference to the parties and without affording them any opportunity to advance their own case as to the course he proposed to take” (at paragraph 8).
 - “he failed to address” key aspects of the defence (at paragraph 8).
19. Mrs Justice Jefford DBE's judgment sets out the principles on natural justice at paragraph 9 to 12 and 51 to 57.
20. Mrs Justice Jefford concluded what the Adjudicator did “entirely properly, was reach his own conclusions”. Mrs Justice Jefford said this was “far removed from the factual scenario in *Balfour Beatty v Lambeth or Herbosh-Kiere v Devon Harbour Board* and well within the remit of what the Adjudicator was properly entitled to do to decide the dispute referred to him” (at paragraph 46).
21. On the second issue Mrs Justice Jefford explained “The failure to consider every sub-issue, if there was such a failure, does not render the decision one reached in breach of the rules of natural justice...in any case, on analysis, it cannot be argued that the Adjudicator failed to address the substance of the issue of the manufactured claims. He made express reference to it and the only proper inference is that he considered and dismissed it or considered it irrelevant if he was concerned with the merits of the claims.” (at paragraph 74 and 75)
22. Adjudicator's have some freedom when deciding the dispute. In my experience it is advantageous to prepare a claim that leads the Adjudicator through the facts so that he is guided to a decision. There should rarely be the need for the Adjudicator to carry out his own assessment.

Walter Lilly & Co. Limited and Mr Jean-François Clin [2019] EWHC 945 (TCC)

23. The final case I have looked at does not follow-on from an adjudication, but it provides a useful guide to what could be necessary to establish that an event is a Relevant Event under the Contract that gives entitlement to additional time.
24. There was a delay of 53.2 weeks whilst a Conservation Area Consent (“CAC”) was obtained. The dispute was whether the CAC required by the local planning authority was necessary. Mr Justice Waksman concluded that it was necessary and that it was a Relevant Event (paragraph 163 to 164). The judgment is an example of the detailed assessment that may be necessary to determine whether an event is a Relevant Event. This included expert opinion and a review of the meaning of “demolition” and case law.

Conclusions

25. Adjudication is a quick process with a very compressed timetable. The decisions are described as being “*interim*” but in practice they are infrequently contested in litigation or arbitration. This means it is crucial that a party’s case is presented in a clear and convincing way during the adjudication. The short timescales will mean experience and expertise in managing the process and presenting the position in a compelling way is vital to obtaining the most favourable outcome that is possible to the circumstances.

Note: This article is based on the author’s own research.

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