



Recent trends in dispute resolution

by Toby Randle

The economy might, strictly speaking, be in the ascendancy, but that does not mean that the good times have returned and everything is rosy. By contrast, we are finding incidences of clients having their retention being withheld – often for unclear reasons – and being subjected to oppressive administration of contracts that is squeezing what little life is left in the cash flow.

The more unscrupulous employers are, on occasion, using their dominant financial positions to starve smaller contractors of cash and, when combined with the well-documented reticence of banks to lend freely or extend overdraft facilities (or indeed to grant them in the first place!), this makes it difficult for these contractors to fund the projects they have undertaken.

As a result, contractors can be susceptible to having their contracts determined for a host of reasons. In particular we have seen a spate of situations in which employers have given contractors notice on the basis that the contractor is not proceeding regularly and diligently; which is often a product of an employer's asphyxiating administration of the contract.

Having stated that, by the same token, clients, who possibly have not been as diligent as they could have been but are, nonetheless, in desperate need of favourable outcomes from disputes and differences, are taking advice on speculative points.

Another common reason for the termination of contracts is on account of the insolvency of contractors; again, brought on in part by the more aggressive approaches being taken by some employers during the currency of the works.

Aside from the obvious difficulties that it brings, the insolvency or looming spectre of insolvency creates problems with regard to adjudication enforcement (discussed in more detail below) and is a reason why adjudication is not always the option we advise. In better times, when cash was not as scarce and clients were not on the precipice of going under, adjudication was an almost default option: it's quick, it can be well prepared by the referring party and can catch the respondent on the hop. These days it is always worth considering alternatives to adjudications, in particular Part 8 proceedings.

Adjudication

Notwithstanding the above comment, adjudication is still a popular and worthwhile form of alternative dispute resolution that is widely used. The poor economic environment for the construction industry is not dissimilar to the one that precipitated the Latham Report, and so it is hardly surprising that it is as popular as it is.

While realistic figures of the numbers of adjudications being referred are hard to obtain, we have found ourselves responding to and referring an increase in adjudications, and one only need see the law reports to look at the number of adjudicators' decisions that are not being complied with, the enforcement of which is being resisted. On which point, it would appear that in this category of dispute resolution there appear to be two trends:



1. The large number of enforcement applications in the TCC, the defences for which are often inventive, if not successful; and
2. The requests for stays of execution of any enforcement order on account of the insolvency – real or potential – of the claimant.

As to the first of these two trends, an example in which a party resisting enforcement tried a venturesome (and ultimately unsuccessful) argument was the case of *S G South v Swan Yard (Cirencester) Limited*¹.

Swan Yard had employed S G South to construct and fit out a retail shopping arcade and hotel at two sites in Cirencester. An adjudication was concluded with a favourable outcome to S G South and Swan Yard declined to pay the sums awarded. During the enforcement proceedings one of the arguments advanced by Swan Yard was that the parts of the dispute that surrounded an interim payment would be resolved at the Final Account stage, and as proceedings had been commenced in the Bristol District Registry to determine that dispute the enforcement proceedings should be adjourned until that was concluded.

Mr Justice Coulson rejected this submission (under a heading in the judgment of “Irrelevant Matters”), as there was a temporarily binding adjudicator’s decision in place and it would be inappropriate not to give effect to that decision.

Interestingly, as Coulson J pointed out, Mr Justice Akenhead had already rejected such an argument in a different set of enforcement proceedings involving S G South and the solicitor-counsel team of the defendant; but nevertheless the defendant’s solicitor-counsel team tried its luck again.

Another example is from the Court of Appeal case of *Speymill Contracts Ltd v Eric Baskind*². This case revolved around the conversion of a country house hotel into a home for Mr Baskind. When an adjudication was commenced in respect of unpaid payment certificates Mr Baskind countered the suggestion that valid withholding notices had not been issued by asserting that the files containing his copies of said withholding notices had been stolen by employees of Speymill and, by freak coincidence, Mr Baskind was unable to produce electronic copies as his computer had been destroyed by a lightning strike and power surge.

Lord Justice Jackson noted that at first instance Mr Baskind had served a defence some 32 pages long and “[advanced] a number of ingenious arguments as to why the adjudicator’s decision should not be enforced. With one exception, all of those ingenious arguments were rejected. The one argument that was not rejected was the fraud argument and one can therefore be forgiven for thinking that, because of how dismissive of this allegation Jackson LJ was, his use of the word “ingenious” was intended with a certain degree of irony.

Regarding the second of the two adjudication trends, another issue in *Speymill* was a stay of execution that had been given by the judge at first instance on the grounds of Speymill’s parlous financial position. It was not appealed by Speymill and so Jackson LJ described the victory on the appealed summary judgment point as “pyrrhic”. It is interesting, therefore, that Speymill chose to go to the Court of Appeal in the hope that the unsuccessful summary judgment decision of the judge at first instance would be overturned, knowing full well

¹ [2010] EWHC 376

² [2010] EWCA Civ 120



that as it had not appealed the granting of the stay of execution that the best it could hope for was merely a declaration and no money would be forthcoming to Speymill.

The law is fairly clear on when a judge will and will not grant a stay of execution on the grounds of insolvency and essentially it boils down to this: if the claimant is insolvent then a stay will usually be granted unless:

1. Its insolvency is the fault of – or substantially the fault of – the defendant’s refusal to pay sums awarded by an adjudicator; or
2. If its financial position is the same as or similar to its financial position at the time when the relevant contract was made.

As a result of the trend in requesting stays because of claimants’ poor financial positions there is the need to make clients well aware that, even if they are successful in obtaining an adjudicator’s decision in their favour, there is a well-worn tactic of not paying up because of a potential grant of a stay of execution on any judge’s decision.

Launching an adjudication for a company walking a financial tightrope can plunge clients somewhere between the devil and the deep blue sea: expending the money might be necessary because the sums that are owed are large and extremely important to the client; but expending said sums could be in vain as the client can ill-afford to spend them and exacerbate the problem it will face when rejecting requests for a stay.

The reason judges grant stays is because of a perceived unfairness in handing over vast sums of money to a precarious company as a result of an adjudicator’s decision that is only *temporarily* binding. It’s a stiff balancing act for judges as, on one hand, the adjudicator’s decision is binding and they have to try and give effect to Parliament’s intentions behind adjudication that it is to be a rough and ready process of getting cash flowing. However, on the other hand *final* determination of the dispute is by reference to arbitration, court proceedings or by agreement, and seeing as how the company may be going to the wall it would be unfair on the party unsuccessful in the adjudication to give away large sums of money which may vanish and had never really been truly owed to the other side.

As it is this “final determination” point that is at the heart of the granting of a stay it is not surprising that there is also a noticeable number of Part 8 applications being commenced – at the encouragement of the courts – to finally determine discreet issues.

Part 8

Paragraph 9.4.1 of the TCC Guide provides that the TCC has jurisdiction to hear Part 8 applications for declaratory relief arising out of a disputed adjudication and so, rather than being a complete alternative to adjudication, parties are seemingly using the Part 8 process as a complement to adjudication.

The Part 8 process is one which can be used if the claimant seeks a court’s decision on a question that is unlikely to involve a substantial dispute of fact. If a substantial dispute of fact is likely then the more appropriate means, if seeking final determination of the issue, is to commence regular Part 7 proceedings (or to arbitrate, depending on what the contract specifies, if indeed it does so).



Case law has established that the court has the discretion to grant declarations under CPR Part 8 and should do so only if appropriate in the circumstances; it can also grant negative declarations.

There have been recent cases of parties seeking final determination of part of a dispute (see *Geoffrey Osborne Ltd v Atkins Rail Ltd*³); those in which a party seeks to finally determine the dispute in its entirety (e.g. *Fenice Investments Inc v Jerram Falkus Construction Ltd*⁴); and Part 8 proceedings commenced during an adjudication itself (*Banner Holdings Ltd v Colchester Borough Council*⁵ on the issue of an adjudicator's jurisdiction).

The advantage of Part 8 proceedings is that, if the case is amenable to it, either party to an adjudication can seek to use the process. For example, in *Fenice* the Part 8 proceedings were brought by Fenice as it had been an unsuccessful responding party to the adjudication. It argued that the payment provisions in the ERs were the ones that were operable and not those contained in the contract (as Jerram Falkus asserted). Fenice, advancing the same argument in Part 8, however, was ultimately unsuccessful again.

We are advising from time to time that Part 8 proceedings are not necessarily just useful in the context of obtaining declarations as part of adjudications. The decisions handed down are judicial, binding decisions and come with much heavier penalties for non-compliance than there are for not complying with an adjudicator's decision. Also, unlike in adjudications where the costs of referring or responding to adjudications are lost, there is the chance of cost recovery in Part 8 proceedings. Plus, given that the TCC suggests that a one-day hearing can be obtained as quickly as four to six weeks after issuing the claim form, a party can get this binding decision in a time limit not dissimilar to the one in which an adjudication is concluded.

Obviously the case has to be appropriate and should be limited to things such as the interpretation of individual clauses, who has design liability and the like. *Fenice* was a fine example of a case that seemingly could have been dealt with by Part 8 alone and need not really have gone to adjudication first.⁶

An extremely recent example of a party we advised to commence Part 8 proceedings prior to any adjudication is *Yuanda (UK) Co. Ltd v WW Gear Construction Ltd*.⁷ Yuanda was engaged by Gear to work on the Westminster Bridge Park, Plaza Hotel project. It commenced Part 8 proceedings seeking declarations that, *inter alia*, the amended adjudication clause that provided for Yuanda to meet any of Gear's legal and professional costs of any reference to adjudication that Yuanda made, regardless of the outcome, was incompatible with the Housing Grants, Construction and Regeneration Act 1998. The judge stated that the adjudication clause was not compliant and should be replaced wholesale by the Scheme.

Though judges are encouraging the use of Part 8 there is an undertone of caution embedded in recent judgments; caution with regard to ensuring that the type of case is proper for Part 8 proceedings and also that they are not brought in improper circumstances.

A recent example of the former of the two cautionary notes is *Forest Heath District Council v ISG Jackson Ltd*.⁸ There was a dispute about, *inter alia*, delays relating to the painting of steelwork in a pool hall in a community sports centre. In respect of this point ISG Jackson had obtained an adjudicator's decision that the painting *in situ*, rather than off site, was as a result of late design information and was a relevant event for which Forest Heath was responsible.

³ [2009] EWHC 2425

⁴ [2009] EWHC 3272

⁵ [2010] EWHC 139

⁶ This is an assumption based on the content of the judgment alone; there could have been parts to the original adjudication which would have rendered the dispute between the parties inappropriate for Part 8 proceedings.

⁷ [2010] EWHC 720

⁸ [2010] EWHC 322



Forest Heath commenced Part 8 proceedings on this discreet part of the decision but Mr Justice Ramsey did not grant the declarations sought. He stated that there was a substantial dispute of fact that would require further evidence to be considered. Also, in any event, this dispute was not suitable to be determined by an application for such a declaration as any declaration would not lead to a final resolution of the dispute; nor would it serve to do justice between the parties to grant it. To do so, in the words of Ramsey J, would prove a “treacherous shortcut”.

Another cautionary note came from Mr Justice Akenhead in *Build Ability Ltd v O'Donnell Developments Ltd*.⁹ These proceedings were concerned with costs alone, as the parties had, by consent, dealt with the substantive points at issue.

Build Ability had entered into a conditional fee arrangement with its solicitors that provided for a 100% uplift on their fees in the event of success. Akenhead J stated that it would be “wholly inappropriate” to permit any contingency fee because, among other reasons, Build Ability had made no effort to comply with the TCC Pre-Action Protocol.¹⁰

The final example of recent words of warning from the TCC judges is that of Coulson J in *Fenice*. Although Part 8 can be used to seek final determination of a dispute this does not mean that the adjudicator’s decision is any less binding temporarily. In other words, you still have to pay whatever amounts the adjudicator decides you should. Coulson J underlined this by stating that a party that does not comply with an adjudicator’s decision should “expect to be penalised by way of interest and costs”; he instructed that the costs of the enforcement proceedings be paid by Fenice on an indemnity basis.¹¹

Part 7

It is somewhat paradoxical that the courts encourage parties at all costs to avoid the courts through negotiation or some other form of alternative dispute resolution, but we are seeing the continuance of the ironic trend of parties commencing the Pre-Action Protocol process, a necessary precursor to Part 7 proceedings, in order to prevent going to court.

The advantage of the Pre-Action Protocol process that is used for construction and engineering disputes is that it shows each side one another’s cards and then lets them assess the relative positions and perhaps come to a deal. We have seen recently a number of incidents in which the parties are still on speaking terms with their employer or the professional team, but are no nearer an amicable resolution of a dispute. The initiation of the Pre-Action Protocol process puts a timetable in place – although at pre-action stage it is admittedly flexible – and concentrates the parties on the issue in a forum in which they can work on their arguments, but also try to resolve the dispute without need to further the process, commonly with mediation at the end.

Though adjudication is attractive because of the rapidity with which it can be concluded (although that is not always the case), it tends to polarise the parties and as soon as one is referred both sides can pretty much say goodbye to several thousand pounds in legal costs. There is also indication of some adjudicators adopting a very robust line on the basis that it is only an interim process and they have been known to present bold decisions, sometimes on an “all or nothing” basis. This may be in response to the common criticism that they just “split the difference”. Ironically, such bold decisions may not be in the interests of the parties as they commit them to going to the next stage and they become locked into expensive disputes.

⁹ [2009] EWHC 3196

¹⁰ I suggest it will be interesting to see the extent to which this is applied because the TCC Guide at paragraph 2.3.1(d) states that proceedings relating to substantially the same issues as have been the subject of a recent adjudication are exempt from complying with the Protocol.

¹¹ The costs of the Part 8 proceedings (which were heard at the same time as the enforcement proceedings) were ordered to be paid by Fenice on the standard basis as its point of law, while incorrect, was bona fide.



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Perhaps all-out litigation is unattractive because if the other side is not minded to negotiate then the process itself can be very costly and take a long time, but there is plenty of scope for the matter to be resolved without spending vast sums. It should always be at least considered as an alternative to adjudication.

Lord Justice Jackson's final report on civil litigation on costs has recommended that the Protocol be retained as a pre-action process, but the report suggests a number of amendments. For example, the recommendations are that the letters of claim and response should not append a de facto draft pleading. Doing it in this way should retain the benefit of the period in which parties can negotiate or mediate before going through the hoops of formalising a claim.

Conclusion

Though the title of this paper is recent trends (i.e. in the plural) in dispute resolution, there is one ostensible, abiding trend: diversity of approach.

Clients are, more than ever, seeking to use different dispute resolution methods, often with more than one option being used for one dispute. The emphasis that the courts have put on using ADR or Part 8 where appropriate is a clear theme throughout judgments, both at first instance and in the appellate courts, and parties appear to be genuinely taking judges' advice – although at times it would seem that judges think that they are talking to a series of brick walls.

Toby Randle
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