

CONSTRUCTION: ADJUDICATION - UNILATERAL WITHDRAWAL INDEED

Masood Ahmed

Introduced by the Housing Grants Construction and Regeneration Act 1996, the statutory adjudication scheme is a well-established dispute resolution mechanism within the UK construction industry. The scheme is often referred to as a 'pay now, argue later' mechanism which seeks to maintain cashflow during construction projects by providing a cost-effective and swift means of determining disputes. Although an adjudication award is binding, it is not final. However, in practice an adjudication award is often the final resolution of a dispute.

The very strict timeframes within which a matter must be resolved through the scheme means that parties must act quickly. Given the pressure on time in the resolution of a dispute, can party A, the referring party, withdraw a dispute from adjudication and subsequently refer the same, or substantially the same, dispute to a second adjudication? And can party B seek an injunction to restrain A from commencing a second adjudication? Mrs Justice O'Farrell provided guidance on these issues in *Jacobs UK Ltd v Skanska Construction UK Ltd* [2017] EWHC 2395 (TCC).

Legal principles

Before considering *Jacobs*, it is worth reflecting on some of the basic legal principles governing this area.

There is no express or implied restriction in the 1996 act or the scheme that prevents a party from withdrawing a disputed claim which has been referred to adjudication (*Midland Expressway Ltd v Carillion Construction Ltd* [2006] EWHC 1505 per Jackson J at paragraphs [100] and [101]). The entitlement of a party to withdraw a claim persists even after the

referral, regardless of the motive for the withdrawal, and does not necessarily preclude that party from pursuing the claim in a later adjudication (*Lanes Group pie v Galliford Try Infrastructure Ltd* [2012] EWCA Civ 1617 per Jackson LJ at paragraphs [38]-[40]). The principle of abuse of process does not apply to adjudication (*Connex South Eastern Ltd v MJ Building Services Group pie* [2005] EWCA Civ 193 per Dyson LJ at paragraph [40]).

However, as made clear by O'Farrell in *Jacobs*, it does not follow that the courts will never intervene to prevent a party from pursuing a claim in adjudication. Section 37 of the Senior Courts Act 1981 provides: 'The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.'

The court's power under section 37 may be exercised (a) where one party can show that the other party has invaded, or threatens to invade, a legal or equitable right of the former for the enforcement of which the latter is amenable to the jurisdiction of the court; or (b) where one party to any action has behaved, or threatens to behave, in a manner which is unconscionable. The court's jurisdiction extends to a power to grant an injunction restraining a party from commencing or continuing an adjudication that is unreasonable and oppressive, although the fact that a claim is being pursued by way of adjudication rather than litigation may affect the court's view as to whether or not it amounts to unreasonable and oppressive behaviour (*Mentmore Towers Ltd v Packman Lucas Ltd* [2010] EWHC 457 (TCC) per Edwards Stuart J at paragraphs [14] - [23] and *Twintec Ltd v Volkerfitzpatrick Ltd* [2014] EWHC 10 (TCC) per Edwards-Stuart J at paragraphs [63]-[73]).

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Jacobs

Skanska engaged Jacobs to provide design services in respect of a PFI project for the design and replacement of street lighting in Lewisham and Croydon. In 2011 Skanska entered into a formal contract with Jacobs for those services (the design agreement). A dispute arose between the parties as to the adequacy of the design services provided by Jacobs. Skanska's case was that Jacobs provided design and advice on which Skanska relied in submitting its bid for the PFI project.

Skanska's bid was successful. However, the design prepared by Jacobs following commencement of the PFI contract differed materially from the design and assumptions provided for the purposes of the bid. Skanska claimed that as a result of that disparity, together with delays in the production of the design and the poor quality of the design, it suffered loss and damage.

The parties agreed to refer the matter to adjudication and agreed the rules and timeframes which were to apply. Following the appointment of the adjudicator and initial exchange of documents, Skanska was unable to serve its reply and requested an extension of time from Jacobs, which was refused. Skanska's request for an extension of time was also rejected by the adjudicator, after which Skanska withdrew its reference to adjudication and invited the adjudicator to resign, which he did.

Skanska then gave a fresh notice of an intention to refer the dispute to a second adjudication which contained substantially the same claims against Jacobs.

Jacobs made an application under Part 8 seeking a declaration that Skanska was acting unlawfully in the second adjudication; an order restraining Skanska from taking further steps in the second adjudication; an order requiring Skanska to withdraw from the second adjudication; and a declaration that Jacobs was entitled to be paid its costs from the first adjudication.

Jacobs argued that the parties had agreed that the reference of the dispute should be to an adjudicator appointed under the scheme and that the adjudication should be conducted in accordance with an agreed timetable. Further, Jacobs had a right to a resolution process which was fair to both parties and did not confer an uncovenanted advantage on the referring party beyond that implicit in the rough and ready adjudication process.

Skanska, on the other hand, argued that there is no concept of abuse of process in adjudication and a referring party is free to obtain whatever tactical advantage it can. A party has the right to start adjudication in relation to a dispute at any time. This, Skanska argued, gives a party an unrestricted right to start, abandon and pursue serial adjudications in respect of the same dispute.

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Decision

O'Farrell J noted that the 1996 act and the scheme do not impose any restrictions on the referring party's entitlement to withdraw unilaterally a claim referred to adjudication or to commence a further adjudication in respect of the same, or substantially the same, dispute. The adjudicator in the first adjudication did not reach a decision and therefore the adjudicator in the second adjudication would have jurisdiction to determine the dispute referred.

O'Farrell J went on to confirm that the court has the power to grant an injunction to restrain the second adjudication 'if it is established that it is unreasonable and oppressive'. Such power, O'Farrell J stated, will be exercised where the adjudicator does not have jurisdiction (such as where the dispute has already been decided in an earlier adjudication), where the referring party has failed to comply with the adjudication agreement (such as failures to pay awards or costs from earlier adjudications), or where the further adjudication is vexatious (such as serial adjudications in respect of the same claim).

On the facts it was clear that Skanska's withdrawal of the claim was unreasonable. The unavailability of counsel was, according to the judge, 'rarely a good excuse for failing to meet an agreed timetable, especially where the party in default is the referring party who controls the timing and scope of the reference'. However, O'Farrell J explained that 'unreasonable behaviour by one party will not

automatically deprive it of the right to adjudicate the dispute in question in a subsequent reference. The court will not intervene unless the further reference is both unreasonable and oppressive'. On the facts of the present case, the substance of the claims remained the same and therefore Jacobs was entitled to rely in large part on its prepared response. Although there was new material, including new quantum expert evidence, the inconvenience and additional costs suffered by Jacobs as a result of the second adjudication was not, according to O'Farrell J, so severe or exceptional so as to warrant intervention by the courts by way of injunctive relief.

O'Farrell J also held that Jacobs was entitled to any wasted or additional costs caused by Skanska's failure to comply with the agreement regarding the timeframes and procedure of the adjudication. It was common ground that, in the absence of agreement giving the adjudicator jurisdiction to award costs, a party's costs of adjudication proceedings are not recoverable. However, O'Farrell J argued that in this case, the parties entered into an *ad hoc* agreement under which the procedure and timetable to resolve the referred dispute in the first adjudication were agreed and fixed. That went beyond mere agreement as to the timetable to be directed by the adjudicator in respect of an existing contractual or statutory adjudication and imposed new enforceable obligations on the parties. Further, Skanska's failure to serve its reply or continue with the first adjudication constituted a breach of the *ad hoc* agreement,

entitling Jacob to some (but not all) of its wasted or additional costs as damages.

O'Farrell J argued in the alternative regarding the wasted costs order by referring to the existence of an implied term in the *ad hoc* agreement which provided: '... if one party changed its mind and decided to ignore the agreement, it would pay the wasted costs of the other party. Such a term was both reasonable and necessary. They were commercial parties with the benefit of legal representation and they were aware of the substantial resources and funds required to participate in an adjudication of this nature. If each party had been asked whether they would expect the other party to pay any wasted costs in such circumstances, they would have replied "of course". Although the *ad hoc* agreement did not prohibit Skanska from withdrawing part or all of its claim, and starting a fresh adjudication in respect of the same or substantially the same claim, it did impose responsibility on Skanska

for the costs wasted or incurred by its failure to adhere to the agreed procedure and timetable.'

Jacobs reaffirms the basic principle that the adjudication scheme does not impose restrictions on a referring party's entitlement to unilaterally withdraw from one adjudication and to refer the same matter to a subsequent adjudication. Further, the case makes clear that the courts will only intervene and grant an injunction against the referring party refraining it from commencing a subsequent adjudication in circumstances where the high threshold of 'unreasonable and oppressive conduct' can be demonstrated. Finally, Jacobs sends out a clear warning that the courts will not hesitate to penalise a party by way of a wasted costs order where that party has failed to discharge its agreed procedural obligations in the adjudication scheme.

THE AUTHOR

Masood Ahmed is a qualified non-practising solicitor at an international commercial law firm and focuses on dispute resolution and commercial transactional work. Much of his work involves advising clients on high value and complex disputes in the Commercial Court and international commercial arbitration. He is currently a lecturer at the School of Law, University of Leicester.

He is the Alternative Dispute Resolution editor of the Civil Justice Quarterly and a member of the editorial board of *Frontiers of Legal Research*. He established and is the convenor of the Civil Procedure and ADR stream for the Socio-Legal Studies Association Conference.

Ahmed is also an external examiner at the University of Oxford and has been a visiting lecturer in international commercial arbitration at Masaryk University (Czech Republic).



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