

Case update:

# English Court of Appeal confirms 'useless' ADR procedure too uncertain to enforce

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In our *December 2022 issue of BuildLaw*, we reported on a *case in the English High Court*<sup>1</sup> about an unusual alternative dispute resolution (ADR) procedure in a construction contract that was held to be too uncertain to be an enforceable condition precedent to litigation. The case was appealed, but the Court of Appeal has recently issued its judgment dismissing the appeal on all grounds: *Kajima Construction Europe (UK) Limited and Kajima Europe Limited v Children's Ark Partnership Limited* [2023] EWCA Civ 292.

<sup>1</sup> *Children's Ark Partnerships Ltd v Kajima Construction Europe (UK) Limited and Kajima Europe Limited* [2022] EWHC 1595 (TCC).

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## Recap: Background to the dispute

In June 2004, Children's Ark Partnerships Ltd (**Ark**) entered into a development agreement with Brighton and Sussex University Hospital Trust to redevelop a children's hospital. Ark engaged Kajima Construction Europe UK Limited (**Kajima**) to design and build it.

After the Grenfell Tower tragedy, Ark and Kajima agreed to carry out remediation works on the hospital. This was many years after the project had been completed, and shortly before the expiry of the contractual limitation period for bringing a legal action.

The contract required any disputes to be submitted to ADR by a 'Liaison Committee' (which included Ark and the Hospital Trust, but not Kajima) before initiating court proceedings. This ADR procedure was described by both the High Court and the parties' representatives as *surprising and unusual*.

However, with issues around liability and damages unresolved and the litigation time bar fast approaching, Ark commenced an action in the High Court and asked for a stay of proceedings to allow it to engage in the ADR procedure.

Kajima argued in the High Court that Ark's legal claim should be struck out on the basis that

the contract's ADR procedure was a condition precedent to commencing litigation and Ark had failed to comply with it.

## High Court's decision

The High Court found that the ADR clause was indeed a condition precedent to commencing litigation. However, it found that the ADR procedure itself was not sufficiently clear or certain to make it an enforceable condition precedent. Some of these shortcomings included:<sup>1</sup>

- There was no meaningful description of the process to be followed. The Liaison Committee could make its own rules and procedures, but there was no evidence of what those rules and procedures needed to encompass. Therefore, there was no unequivocal commitment to engage in any particular ADR procedure.
- It was unclear how a dispute should be referred to the Liaison Committee or when the process of referral to the Liaison Committee came to an end, making it unclear when the condition precedent is satisfied.
- It was unclear how the Liaison Committee could identify or resolve a dispute because Kajima was not a member of the Committee and had no obligation or right to take part in the process. It was also unclear what impact any decision of the

Liaison Committee would have on Kajima.

The High Court refused Kajima's application for strike out and granted Ark's request to stay the proceedings. The High Court went on to say that even if the ADR condition precedent had been enforceable, it would not have struck out the claim, stating that a stay of proceedings was the *default remedy*.<sup>2</sup>

## Court of Appeal's decision

Kajima appealed the High Court's decision in the Court of Appeal on several grounds, but was unsuccessful on all of them. The first part of the judgment deals with the application and enforceability of the parties' bespoke ADR procedure in this case.

The second part addresses and clarifies the Court's discretion to stay or strike out proceedings where the contractual ADR procedures have not been followed, and the balancing exercise required, particularly where (as in this case) a stay will deprive one party of a time bar defence.

*Appeal as to enforceability of ADR condition precedent*

Kajima unsuccessfully argued that the High Court had wrongly concentrated on the *utility* of the ADR process, rather than determining if it was sufficiently certain to be an enforceable

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1 *Children's Ark*, above n 1, at [61].

2 *Children's Ark*, above n 1, at [82].

condition precedent.

The Court of Appeal agreed with the High Court's authorities and reasoning on the 'muddled' ADR procedure's shortcomings and uncertainties as outlined above, and agreed that this rendered the procedure unenforceable as a condition precedent to litigation. The Court of Appeal also rejected Kajima's criticism that the High Court had wrongly concentrated on the 'utility' of the procedure, stating it was *unable to accept that the court cannot have at least a weather eye on the issue of utility*.<sup>3</sup>

*Appeal as to stays being the "default remedy" for non-compliance with ADR*

Kajima argued that the High Court had been wrong to find that a stay of proceedings would in any event have been the "default remedy" (rather than a strike out).

The Court of Appeal acknowledged that the High Court judge may have overstated the applicability of stays, but that the expression "default remedy" had been used *simply as a shorthand to describe the usual*

*(as opposed to inevitable) order that the court will make when proceedings are started in breach of mandatory contractual dispute resolution mechanism*.<sup>4</sup> The Court of Appeal clarified that a stay is not a default remedy, and each case will turn on its facts. On the facts of this case, the Court of Appeal agreed that a stay was the appropriate remedy.

*Appeal as to judicial exercise of discretion in granting the stay*

Kajima unsuccessfully argued that in granting the stay of proceedings, the High Court judge had incorrectly exercised her discretion because she had not paid sufficient regard to the resulting deprivation of Kajima's limitation defence.

The Court of Appeal noted that while Kajima may well have been deprived of a limitation defence, the High Court judge had not incorrectly exercised her discretion in doing so, and had taken it into account as part of the balancing exercise. The Court of Appeal notes that the remediations issues had arisen at a late stage and indirectly, in response to the Grenfell Tower

tragedy. Furthermore, Ark had not simply ignored the contract's ADR procedure, or the limitation period – it had been well aware of both and had acted reasonably in bringing the proceedings and requesting the stay, rather than activating the *useless* ADR procedure and missing the time limit to bring a claim:<sup>5</sup>

*It would not be proportionate to exercise the court's discretion to strike out a claim because of a failure by a party (who has otherwise acted reasonably) to activate a useless procedure.*

### Conclusion

The Court of Appeal's decision confirms that a contractual ADR clause can only be relied upon as a condition precedent to litigation if the ADR process and procedures as drafted are sufficiently clear and certain.

Where a bespoke ADR process is opted for, parties should take care to ensure it is a robust and recognised procedure, and ensure the contract is clear and unambiguous about how it will operate and the rules that will be followed. If the ADR procedure is a condition precedent to bringing legal proceedings, the drafting should make it clear when the condition is fulfilled.

3 *Kajima Construction Europe (UK) Limited and Kajima Europe Limited v Children's Ark Partnership Limited* [2023] EWCA Civ 292 at [74].

4 *Kajima*, above n 4, at [92].

5 *Kajima*, above n 4, at [107].

