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Adjudication Update

20 April 2023

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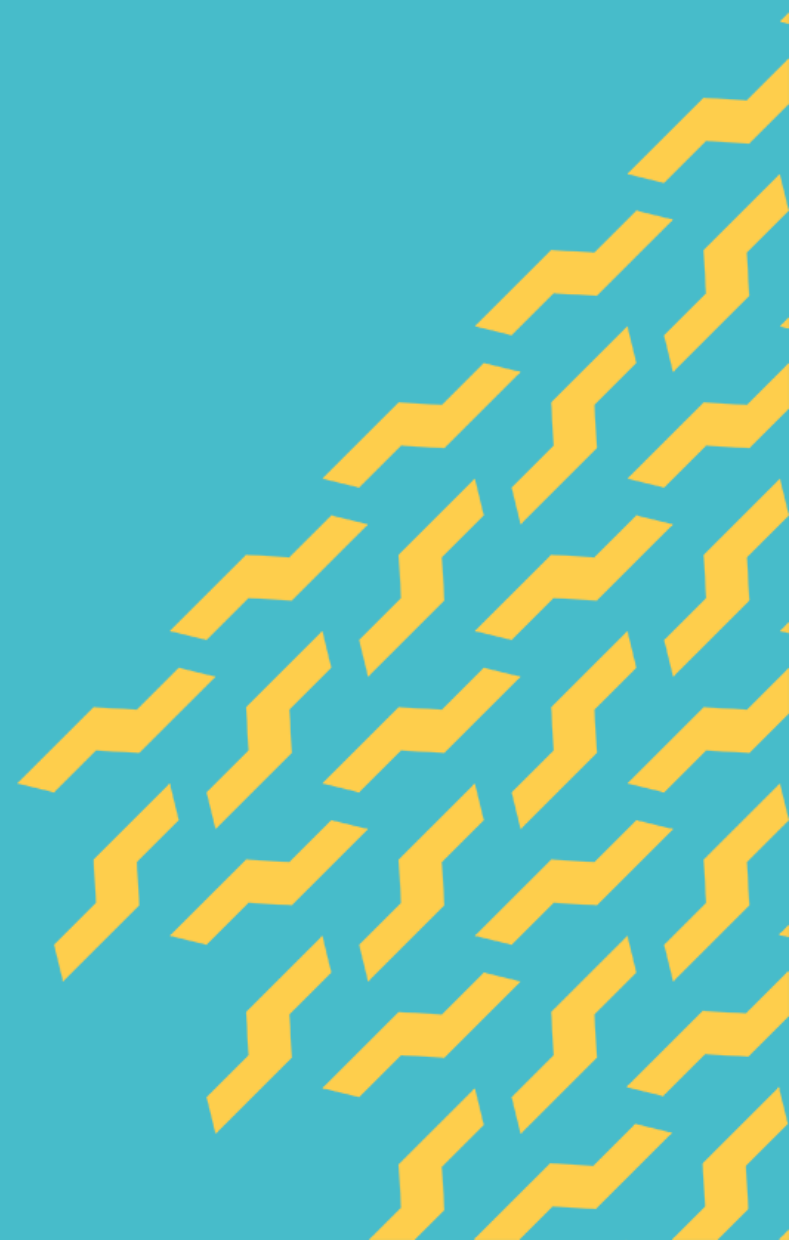
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***LJR Interiors Ltd v
Cooper Construction***

[2023] EWHC 3339 (TCC)



Why is it important?

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- No previous binding authority on whether the Limitation Act 1980 (“the Act”) applies to adjudication proceedings.
- When does the clock start running?

The Facts

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- August 2014: Contract. £18,675 plus VAT.
- 19 October 2014: Works completed.
- Applications 1 – 3 submitted during 2014.
- 31 July 2022 (almost 8 years later!): LJR submitted Application No 4. No response from Cooper.
- 9 September 2022: Notice of Adjudication.

Adjudication Decision

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- Application No 4 was a valid application for payment.
- No pay less notice had been served by Cooper.
- The breach alleged by LJR was the failure to make payment of a sum claimed due by the final date for payment, namely 28 August 2022. On that basis, the limitation period pursuant to Section 5 of the Act had not yet expired.
- LJR issued Part 7 claim to enforce, Cooper issued Part 8 claim seeking a declaration that the adjudicator's decision was void and unenforceable.

The Judgment

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- Section 5 of the Act: *“An action founded on simple contract shall not be brought after the expiration of 6 years from the date on which the cause of action accrued”*
- Key question: are adjudication proceedings an “action” within the meaning of Section 5?
- HHJ Russen KC said yes...

Why?

- Dicta in *Connex South Eastern Limited v M J Building Services Group PLC* [2005] EWCA Civ 193.
- “*almost instinctive response*” (paragraph 61).
- Adjudication decisions often lead to court proceedings in the form of enforcement.
- Otherwise party would benefit from the grafting on of the discrete limitation period which applies to any action to enforce the decision.
- If wrong, Court would be required to consider the limitation defence on the Part 8 claim.

Application

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- Contract contained adequate mechanism for payment.
- Sums claimed in Application No 4 had largely already been claimed in Application No 3. Right to payment of those sums accrued 28 days after the submission of Application No 3 (28 November 2014).
- If Scheme applied, due date 30 November 2014 and final date for payment 17 December 2014.
- Sums already claimed in Application No 3 were statute barred.

Application

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- Administration charge: date given for the completion of LJR's works under the Contract clearly points to the conclusion that any claim for payment of the administration charge was statute barred (paragraph 99).
- Retention: Works completed 19 October 2014. Claim for retention 7.5 years after completion of the works, and 6.5 years after the end of 12-month rectification period, would have been statute barred (paragraph 89). But had already been claimed in Application No 3 anyway (paragraph 96).

Health warning

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Judge's conclusions on applicability of the Act: *"...should be read with the caution that they are largely the product of my own thoughts and therefore lack the firmer footings usually provided by full adversarial argument"*

Will parties use this health warning?

Merits-Based Decision?

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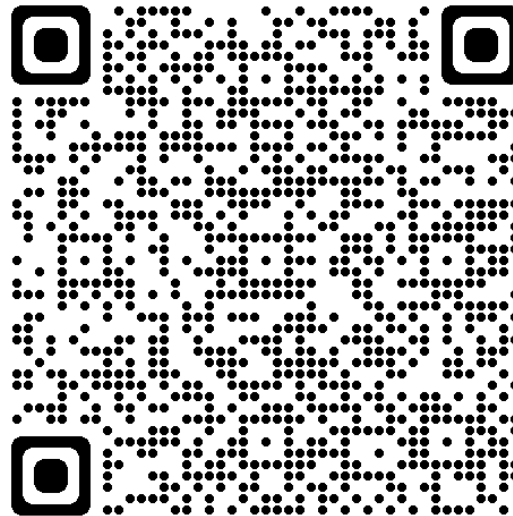
- Adjudication proceedings do not fit happily within the definition of an “action” within Section 38.
- No express extension to adjudication, unlike arbitration.
- How would dealing with limitation on enforcement work?
- Potential advantages to dealing with limitation on enforcement rather than during the adjudication proceedings.

When does the clock start running?

- Inconsistent with *Hirst v Dunbar* [2022] EWHC 41 (TCC):
 - Starting point is that the right to payment arises when the work in question is completed.
 - It is a question of construction whether the terms of a particular agreement produce a different result.
 - Payment notice under the Scheme not a precondition for payment, concerned with the “*process of billing and payment*” (paragraph 117).
- Hirst followed in *Consulting Concepts International v Consumer Protection Association* [2022] EWHC 461 (Comm).

Thank you!

Check out my blog on this case...



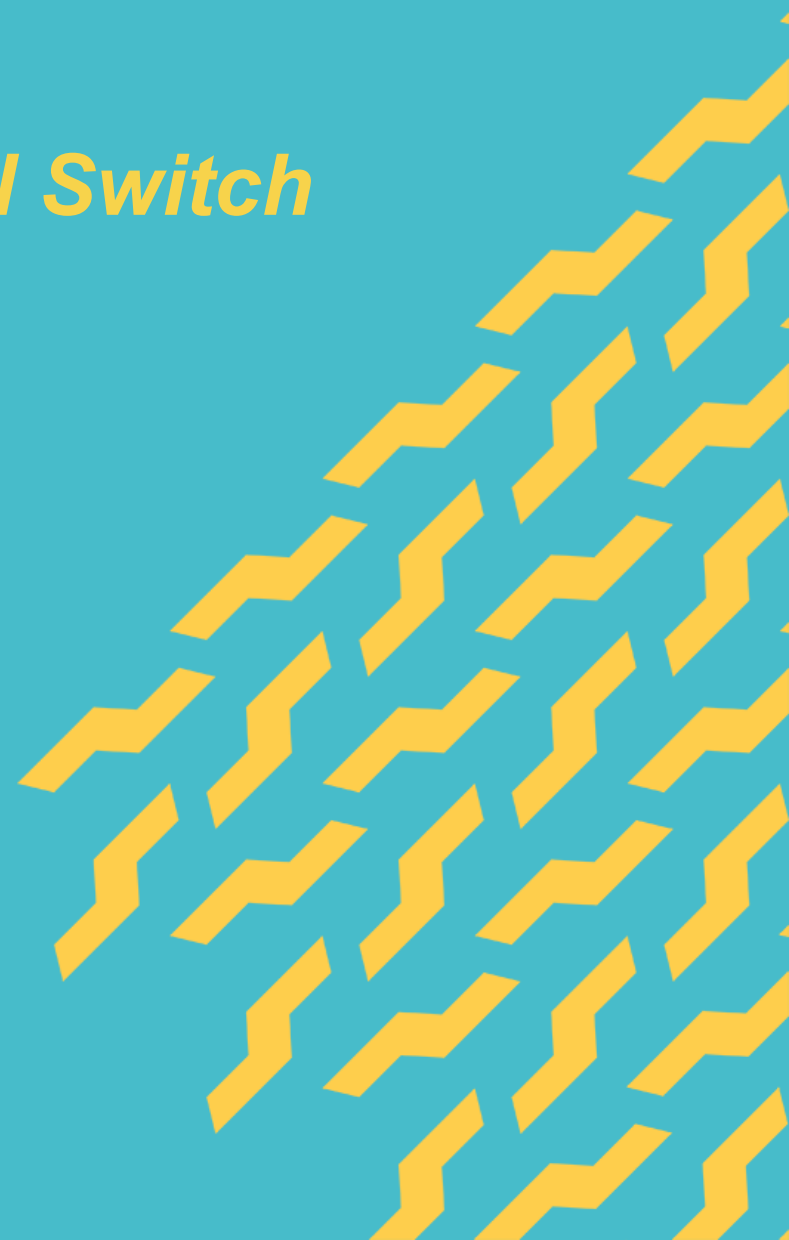
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Sudlows Limited v Global Switch Estates 1 Limited

[2022] EWHC 3319 (TCC)



When is an Adjudicator's decision binding?

- Binding until dispute is finally determined by court or arbitration proceedings.
- Only the decision is binding and not the reasons which are given in support.

Hyder Consulting (UK) Ltd v Carillion Construction Ltd [2011] EWHC 1810 (TCC)

The decision comprises the actual award as well as any other finding
“that forms an essential component of or basis for that award”

- Dispute cannot be referred to adjudication where it is the same or substantially the same as one previously referred and decided upon.

Background to the dispute



JCT Design & Build M&E fit out contract for a data hall.



Dispute as to sectional completion and ductwork enabling works for new high voltage cables.



Those enabling works were subject to delay.



Global alleged that Sudlows refused to connect and energise the cables resulting in ongoing delays to the cabling works and therefore power to site.

The fifth adjudication

- Sudlows sought an EOT between 29 May 2020 and 18 January 2021 (known as “Window 29”).

The adjudicator’s Decision

- Sudlows was entitled to refuse to connect and energise the cable supply and therefore entitled to an EOT.
- In reaching his decision the adjudicator considered whether defective ducting and delays caused by taking the cable work out of the contractor’s scope of work were “Relevant Events” as defined under the contract.

The sixth adjudication

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Based on Adjudication no. 5:

Sudlows...

- Sought a further EOT from 19 January 2021 to practical completion on 7 June 2021.
- Claim was based on the same Relevant Events the fifth adjudicator had considered.
- Sudlows submitted that the sixth adjudicator was bound by the fifth adjudicator's decision as to the Relevant Events so that, when dealing with the application for the further EOT, the sixth adjudicator was effectively bound to grant it.

Global...

- Claimed the fifth adjudicator's findings as to the Relevant Events formed part of his reasoning but not his decision.

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The Adjudication

- Parties were asked to confirm from the outset if they would like the sixth adjudicator to consider alternative positions in connection with the extent to which he was bound by the decision in the fifth adjudication.
- Sudlows accepted that:

“it may assist the Parties if, in the event that you agree with Sudlows that you are bound by Mr Curtis' findings regarding Relevant Events...you should nevertheless go on to consider the position as if you were not bound by those findings”

- However, Sudlows did not give the adjudicator permission to:

“open up and re-decide what...has already been decided by Mr Curtis”

The Adjudicator's Decision

The adjudicator's primary decision

- That he was bound by the Relevant Events decided by the fifth adjudicator as they formed an “essential component” of the EOT decision in the fifth adjudication.
- That Sudlows was entitled to a further EOT of 133 days.

The adjudicator's alternative decision

i.e., the position if he was wrong to restrict his own jurisdiction in his decision

- The events in question were not Relevant Events.
- Global to be awarded £209,000.
- Alternative interest calculations and fee apportionment given as well.

Enforcement proceedings

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Global brought Part 8 proceedings, resisting enforcement of the sixth adjudication and seeking a declaration that:

- The sixth adjudicator had breached the rules of natural justice by taking a too narrow view of his own jurisdiction by holding that he was bound by the findings of the fifth adjudicator.
- The alternative decision should be enforced.

Judgment

- The disputes in adjudication 5 and 6 were not the same or substantially the same.
- The sixth adjudicator:
 - Was not bound by the fifth adjudicator's decision.
 - Had taken a wrongfully narrow view of his own jurisdiction = breach of natural justice.



Principal decision in the sixth adjudication could not be enforced, however...

The alternative decision was a “very sensible approach” and therefore enforceable.

Key points to note



Implications for serial adjudications?



Court reluctant to give an overly generous effect to a previous adjudicator's decision.



Questions as to: "*For all times and all purposes going forwards*"

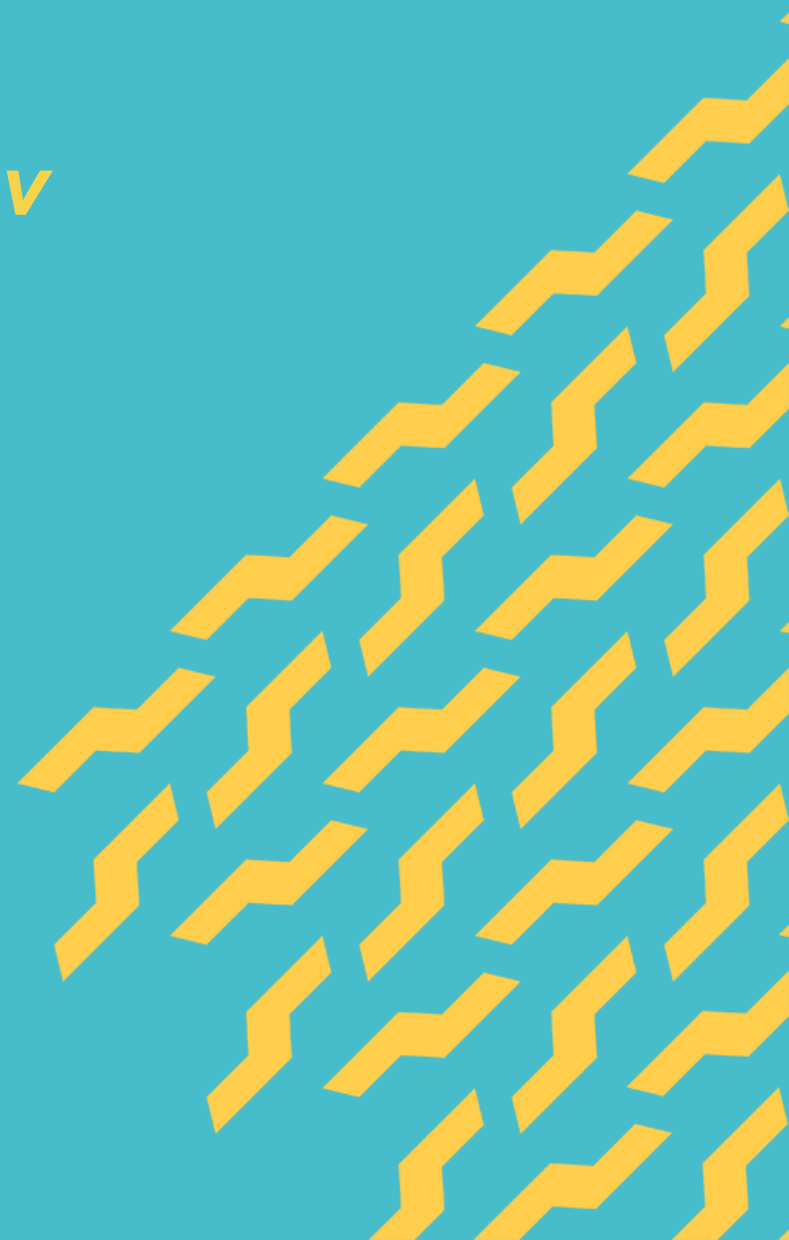
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Manor Co-Living Limited v RY Construction Limited

[2022] EWHC 2715 (TCC)



Background to the dispute



JCT Standard Build Contract 2016 for extension and conversion works.



Termination dispute.



RYC claimed repudiatory breach of contract on the basis that:

- The Termination Notice was invalid; and
- Manor had changed the locks on site, preventing RYC from carrying out the works.

The Adjudication

RYC...

- Sought a decision on whether Manor had correctly served the Termination Notice.
- Claimed the question of whether Manor had substantive grounds to terminate was not part of the matters referred.

Manor...

- Expressly raised the substantive grounds issue in its Response, arguing in defence that it had been entitled to terminate the contract at common law.
- Claimed the Termination Notice functioned as a valid acceptance of RYC's alleged repudiation of the contract.

The Adjudicator's Decision



Manor was in repudiatory breach of contract

Notice of Termination was not a valid acceptance of a repudiatory breach

Adjudicator had no jurisdiction to consider whether Manor had substantive grounds to terminate

Enforcement proceedings

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- Manor sought a declaration that the adjudicator's decision was invalid due to a breach of natural justice as:
 - The adjudicator's decision on the site access issue and prevention was tantamount to a finding that Manor's conduct was a valid communication of acceptance of a repudiatory breach at common law.
 - The adjudicator should have therefore considered Manor's case on repudiation.

Judgment

- Revisited the principles that a responding party is entitled any defences it considers properly arguable to rebut the claim.

“if the adjudicator fails to consider whether the matters relied upon by the responding party amounts to a valid defence to the claim in law and on the facts, that may amount to a breach of the rules of natural justice.”

- The word “may” is key.



Judgment

- The Adjudicator had considered the substance of Manor’s alternative argument and It had been necessary for the adjudicator to consider:
 1. whether RYC was in repudiatory breach
 2. whether Manor had validly communicated acceptance
- It was “plainly permissible” for the adjudicator to start his analysis on the second issue



- *“No breach of natural justice for the Adjudicator to fail to deal with a case which was not advanced”*
- Adjudicator had dealt “head on” with the question of whether the Termination Notice was a valid acceptance of a repudiatory breach and rejected it

Key points of note



Any scope of dispute restriction will depend on the defence advanced by the responding party to the alleged matters.



Adjudicators should not take a restrictive view of their own jurisdiction by excluding substantial parts of a responding party's defence.



The above considerations are very fact specific.



Follow terms of your contract to the letter when seeking to terminate!

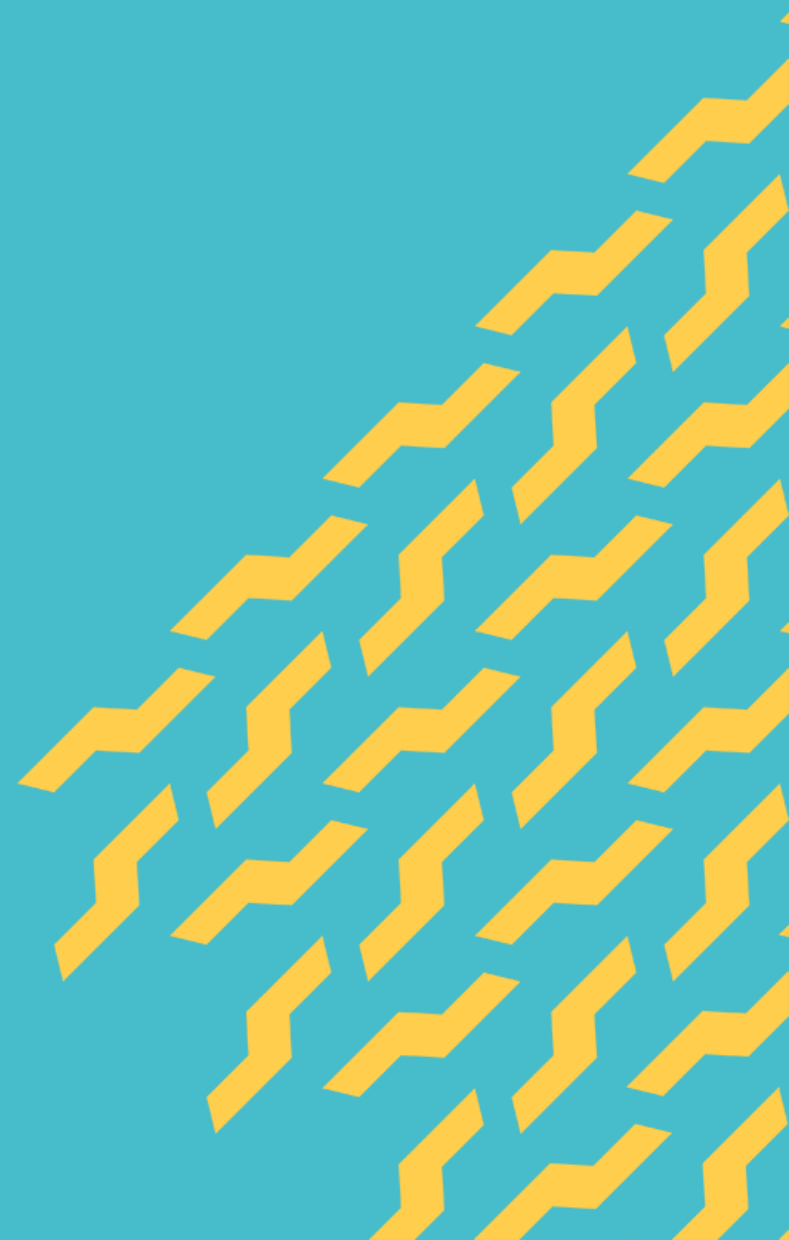
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***Northumbrian Water Ltd v
Doosan Enpure & Anor***

[2022] EWHC 2881 (TCC)



The Contract

- NEC3 Option C
- Option W2 agreed:

“the Adjudicator’s decision is binding on the Parties unless and until revised by the tribunal and is enforceable as a matter of contractual obligation between the Parties and not as an arbitral award. The Adjudicator’s decision is final and binding if neither Party has notified the other within the times required by this contract that he is dissatisfied with a matter decided by the Adjudicator and intends to refer the matter to the tribunal.”

The Facts

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- Both parties claimed damages from the other relating to cost over runs, delays, and issues with quality of the works reflecting a total of approximately £80 million in dispute.
- Adjudicator decided in favour of Northumbrian Water, awarding £22,458,540 plus interest to be paid by the JV.
- The JV issued a Notice of Dissatisfaction expressing dissatisfaction with a majority of the elements of the decision, but not all elements, and confirming it would refer these disputed elements to arbitration.

Court Proceedings

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- Northumbrian Water issued a claim for summary judgment to enforce adjudicator’s decision.
- The JV made an application to stay the enforcement proceedings pursuant to section 9 of the Arbitration Act 1996, on the basis that the application for summary judgment qualified as a “*dispute arising out of or in connection with this contract*” for the purpose of Option W2.
- No defence to the summary judgment application was issued.

Enforcement

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- On the face of it, the adjudicator's decision is binding.
 - No challenge to jurisdiction
 - No allegations of breach of natural justice
- By way of Option W2, the parties had expressly agreed the decision would be binding, unless and until revised by an arbitral tribunal.
 - Requiring enforcement to occur by way of the arbitral tribunal would deprive the decision of its intended efficacy.

Enforcement

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- Notice of Dissatisfaction:
 - Vague
 - Did not raise any grounds on which the *validity* of the decision would or could be challenged

“it was implicit in the JV’s stated intention to accept parts of the decision on the merits that it accepted the underlying validity of the decision”

- *Bresco Electrical Services Limited v Michael J Lonsdale (Electrical)* [2019] also applies to contractual adjudications.

Enforcement

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“The courts take a robust approach to adjudication enforcement, enforcing the decisions of adjudicators by summary judgment regardless of errors of procedure, fact or law, unless the adjudicator has acted in excess of jurisdiction or in serious breach of the rules of natural justice”

- O’Farrell J

- Subject to the application to stay proceedings, the JV had no available defence to the enforcement and Northumbrian was entitled to summary judgment.

Application to Stay

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- Section 9 of the Arbitration Act 1996 is mandatory; if there is a valid arbitration agreement that applies, the court proceeding must be stayed.
- Section 9 was found not to apply to the enforcement proceedings for the following reason:
 - The JV had not disputed the validity of the decision and was now barred from doing so
 - The parties had expressly agreed the adjudication decision would be binding on an interim basis
- *Macob Civil Engineering Limited v Morrison Construction Limited* [1999]

Considerations

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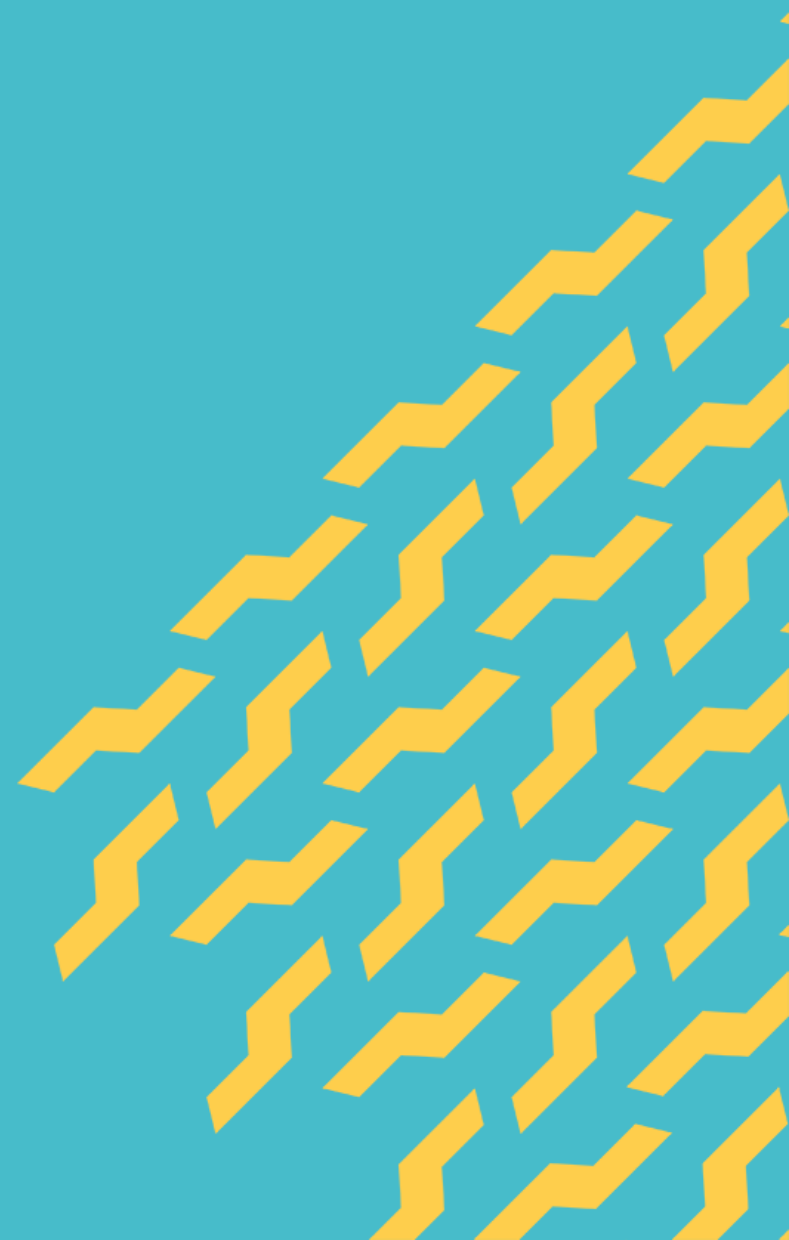
- Limited options in utilising tiered dispute resolution clauses following an adjudication decision
- Detail and specificity in Notices of Dissatisfaction
- Potential amendments to W2

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Industry Updates



Equal Representation in Adjudication Pledge

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- Only 7.88% of Adjudicators in the UK are women.
- Aim of the pledge is to highlight this issue with an aim to improve the statistic by encouraging:
 - Committees, governing bodies and conference panels in the field of adjudication to include a fair representation of women.
 - Lists of potential adjudicators for consideration for appointments include a fair representation of female candidates.
 - ANBs include a fair representation of female candidates on their roster.
 - Senior, experienced adjudication practitioners support, mentor and encourage women to pursue adjudication appointments.

Please follow the link below to sign the pledge:

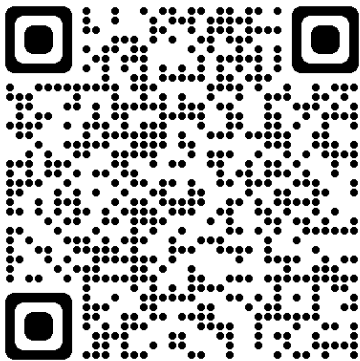
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Equal Representation in Adjudication Pledge | The Adjudication

<https://www.adjudication.org/diversity/equal-representation-in-adjudication-pledge>

<https://www.adjudication.org/civicrm/profile/create?gid=20&reset=1>



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Women in Adjudication

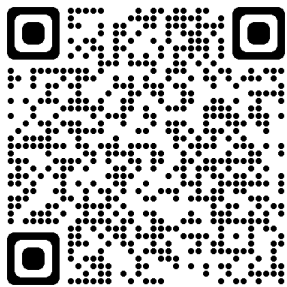
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- Umbrella body established by the Adjudication Society to support the efforts of the pledge by training and promoting women in adjudication as well as collecting data to better understand why female participation and representation is low.
- Consider joining Women in Adjudication at the link below:

[Women in Adjudication | The Adjudication Society](https://www.adjudication.org/diversity/women-in-adjudication)

<https://www.adjudication.org/diversity/women-in-adjudication>



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**Thank you.
Questions?**

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