

# Pay Now—don't stay adjudication enforcement for arbitration (MBC Sefton v Allenbuild)

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**Construction analysis:** The case has clarified some of the remaining conflicts between the Housing Grants Construction and Regeneration Act 1996 (as amended) and the Arbitration Act 1996 (AA 1996) in quite sweeping terms. The judge would not stay the summary judgment enforcement proceedings in order that the dispute which had been adjudicated could be referred to arbitration. After refusing the stay the judge then enforced the adjudicator's decision for payment of despite a set of arguments against enforcement and against the background of a finding that the wrong adjudication rules had been applied by all concerned. Written by James Davison, barrister at 3PB Barristers.

*Metropolitan Borough Council of Sefton v Allenbuild Ltd* [\[2022\] EWHC 1443 \(TCC\)](#)

## What are the practical implications of this case?

The courts continue to give the provisions of the Construction Act primacy when consideration is given to the interface of that legislation with contract rights and legislation. Practically, properly made adjudicators' decisions will be enforced summarily so the 'pay now argue later' principle asserted by Parliament is maintained for construction contracts.

A late argument on jurisdiction failed in this case. The judge found that the defendant 'has waived any right to object to the jurisdiction of the adjudicator by participating in the adjudication without any reservation of rights (and later by inviting him to correct his decision for manifest error)' para [86].

The court also made repeated reference to the specialist experience of the solicitors taking part in the adjudication being relevant to the inferences and findings that the court could make. That is typical of the weight of expectation placed upon practitioners by specialist courts in such specialist proceedings.

There must be a lingering speculation for any impartial practitioner that the defendant was playing for time. Given the vintage of the dispute and the fact that the Adjudicator's decision was issued on 17 January 2022, then perhaps they got enough of what they wanted. Without the judgment on costs (perhaps by reference to Part 36 uplifts etc) we can't know if the price the defendant paid for the time gained was worth it.

## What was the background?

NEC

The dispute concerned a waterpark near Southport. The Works were procured under an NEC2 and the judge noted that 'Practical completion was certified on 22 June 2007' para [4].

A dispute had eventually been taken to adjudication in late 2021 and, having lost that adjudication the defendant wanted to have the dispute referred to Arbitration in accordance, they said, with the arbitration agreement in the NEC contract.

Procedurally, the claimant sought enforcement of the adjudicator's award by way of summary judgment and the defendant cross applied for the matter to be stayed for Arbitration pursuant to Section 9(4) of the Arbitration Act.

The question was who holds the cash during the dispute once an adjudicator has made a proper decision and does an arbitration clause make a difference to this principle or the practice of summary enforcement in the TCC?

The answer to each question was (after a tour through the authority and learned commentary) not just 'no' but 'of course not'. The court had to decide this question by identifying the true scope of any reference to arbitration and matters of challenging adjudicators' decisions were excluded from the arbitration agreement.

## What did the court decide?

His Honour Judge Hodge QC decided that the adjudicator's decision would be enforced and that the defendant would have to pay some £2,204,217.13 forthwith. Prior to being able to reach that decision he had dismissed the application by the defendant to have the summary judgment/adjudication enforcement stayed pursuant to [AA 1996, s 9\(4\)](#).

The judge decided that the fundamental issue for the court is ultimately one of construction para [51] and that 'the court refuses a stay because the parties have agreed in their construction contract (consistently with [the Housing Grants, Construction and Regeneration] Act) that to give effect to that policy, the arbitration provisions of their contract do not extend to any challenge to an adjudication decision' para [52]. Further that this was the case under both the CIC model adjudication procedure and the Scheme and that 'the court will always have jurisdiction to enforce an adjudicator's decision and will never grant a stay for arbitration under s 9 of the Arbitration Act' (para [53] with emphasis added). That is a fairly emphatically stated judgment.

Ultimately, the judge held that the understanding, error or ignorance that led to all concerned following the wrong adjudication rules and those rules being adopted by both parties without demur would not derail the process of enforcing the Adjudicator's Decision. The result on the facts was that the defendant's right to object had been waived.

The court also found that NEC Core Clause 90.2 with respect to communication of the adjudicator's decision to the project manager was on the facts displaced.

### Case details:

- Court: Technology and Construction Court
- Judge: Judge Hodge QC
- Date of judgment: 20 June 2022

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