MC MS Blog

Is Fiona Trust to be trusted to apply to adjudication?

JANUARY 21, 2025

The scope of construction adjudication is something I have a tendency to blog about every 4 years: for example back in 2016 in my blog *"Akenhead J is back and has widened the scope of construction adjudication"*, and then again in 2020 in my *blog "Broad meaning given to "dispute arising under the contract" in adjudication".*

So, another 4 years later (give or take a few months), it seems only fitting that my first blog of the year is prompted by the recent TCC decision of *BDW Trading Limited v Ardmore Construction Limited* [2024] EWHC 3235 handed down by Mrs Justice Joanna Smith DBE just before Christmas.

As no doubt many of you will be aware, and as I'll otherwise come on to later, the decision in this case is of huge significance for the construction industry, as it's the first case to consider whether an adjudicator has jurisdiction to determine historic claims for fire safety defects under the Defective Premises Act 1972 ("DPA").

The background

In October 2002, Basingstoke Property Company Limited ("BPCL") entered into a JCT Design and Build contract with Ardmore Construction Ltd ("the contractor") to design and construct a block of apartments known as "Crown Heights". The apartments reached practical completion between December 2003 and June 2004, and BPCL then assigned the contract to BDW in November 2004. BDW subsequently identified fire safety defects in the apartments.

As many of you will know, prior to the Building Safety Act 2022 ("BSA") coming into force in June 2022, any claim related to historic building safety issues brought under the DPA would need to be commenced within 6-years of completion of the project. However, the BSA extended that period to 30 years for projects completed before 28 June 2022 (and 15 years for projects completed after that date), giving BDW the opportunity to commence a claim which had previously expired.

On 21 March 2024, some 20 years after completion of the works, BDW referred the dispute to adjudication alleging that the fire safety issues derived from the contractor's breaches of contract and/or their statutory duties pursuant to the DPA.

In a decision issued in September 2024, the adjudicator decided that: (a) the contractor had breached its duties under the contract in respect of the fire safety defects; (b) the contractor was liable under the DPA; and as such (c) the contractor was required to pay BDW circa £14.4m by way of damages in respect of the cladding replacement scheme.

When the contractor didn't pay the adjudicator's award, BDW commenced enforcement proceedings.

However, the contractor sought to defend enforcement of the adjudicator's decision on four grounds: (1) the dispute referred to adjudication had not yet crystallised; (2) the adjudicator lacked jurisdiction to decide DPA claims; (3) procedural unfairness due to the contractor's lack of documentation; and (4) the adjudicator failed to consider a material defence.

The *Fiona Trust* principle

Grounds 1, 3 and 4 are fairly fact specific, with less wider application in alternative scenarios, so I won't dwell on those for this purposes of this blog. However, ground 2 (whether the adjudicator had jurisdiction to determine a claim for breach of the DPA) is of much broader interest to the construction industry given the current number of disputes relating to the fire safety of dwellings. It essentially boiled down to the question of whether the reasoning in ***Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40** ("Fiona Trust") as to the interpretation of arbitration agreements also applies to adjudication clauses.

The contractor argued that the adjudicator did not have jurisdiction to determine BDW's claim for breach of the DPA on the basis that it did not arise '*under the contract*' and, in doing so, distinguished between the wording of Articles 5 and 6a of the JCT contract which said:

- Article 5 (the right to adjudicate) - "If any dispute or difference arises under this Contract either Party may refer it to adjudication in accordance with clause 39A"; and
- Article 6a (the right to arbitrate) - "…if any dispute or difference as to any matter or thing of whatsoever nature arising under this Contract *or in connection therewith*…shall arise between the Parties…it shall be referred to arbitration in accordance with clause 29B and the JCT 1998 edition of the Construction Industry Model Arbitration Rules (CIMAR).

The contractor argued the distinction in writing was a clear intention by the JCT draftsmen to make the right to adjudicate more limited in scope than the right to arbitrate, or at the very least an uncertainty which needed clarification.

In defence, BDW sought to rely on the principles laid down by the House of Lords in *Fiona Trust* which confirmed that dispute resolution procedures should not be interpreted narrowly.

The analysis and decision

At paragraphs 34-87 of the decision, Smith J analysed *Fiona Trust* and other authorities, and went on to reject the jurisdictional challenge. She decided that the *Fiona Trust* principle does indeed apply to adjudication clauses, for a number of reasons including:

- The term '*under the contract'* should be taken to mean that commercial parties intend all disputes arising out of the contractual relationship (rather than the contract itself) to be capable of being dealt with by adjudication and there should not be any linguistic difference or nuance between '*under'* and '*in connection with'.* Quoting Lord Hoffman in *Fiona Trust* at [12] and Sir Robert Akenhead in *Murphy* at [31](e) that such distinctions "*reflect no credit upon English commercial law*" and accordingly the more extensive wording of the arbitration clause did not *"indicate a clear intention that the jurisdiction of the adjudicator would be narrower than that of the arbitrator"*.
- The suggestion that *Fiona Trust* reasoning does not apply to adjudication clauses because adjudication is a "creature of statute" rather than freely agreed by the parties was also not accepted:

  > *"On the contrary, that Parliament considered all parties to appropriate contracts should have a right to adjudicate "points if anything in the opposite direction" … I agree with the observations … that "Parliament should, when legislating for the construction industry, be considered to be as concerned with business common sense as contracting parties are taken*

to be";

- rejecting an argument raised by the contractor that the "underpinning" factors applicable to arbitration which were relied upon in *Fiona Trust* are inappropriate or inapplicable to adjudication, the Judge held that "*the relevant "underpinnings" for adjudication are in many ways similar to those identified by Lord Hoffmann for arbitration (in Fiona Trust) and "this strongly supports the application of the Fiona Trust principle to adjudication provisions*."

The take-aways

The case of *BDW v Ardmore* is unquestionably of real importance, not only for the construction industry and the construction dispute resolution community, but for all parties that have been involved in residential projects which have building safety issues. For me, the key take-aways I want to draw out are:

1. The decision gives further support that the principles established by the House of Lords in *Fiona Trust* do apply to adjudication, as well as arbitration, favouring a wider interpretation of the meaning of disputes arising "under" a construction contract.
2. Along similar lines, it echoes the court's findings in cases such as *Murphy v Maher*, *Aspect Contracts v Higgins* and *Bresco*, extending further the scope of adjudication.
3. It strengthens the use of adjudication to pursue fire safety claims (now dating as far back as 1992) under the DPA, confirming that a party to a construction contract may bring an adjudication after the usual contractual limitation periods expire.
4. The decision is in line with public policy, reinforcing the views of the senior judiciary and government in collective support of fast and effective alternative dispute resolution.
5. It will also help towards alleviating the burden on the courts to deal with the large volume of post-Grenfell building safety cases by directing them to alternative processes for resolving disputes.
6. This case reiterates the TCC's objective of upholding adjudication decisions unless there are clear and exceptional grounds to refuse enforcement.

Finally, I appreciate nobody likes a show-off, but for those of you that have read my previous blogs on this topic and have read some of my adjudication Decisions in which I have addressed it, you'll know that I've concluded that the *Fiona Trust* principles apply to adjudication. Whilst I freely admit I am sometimes wrong (some might even say often!), on this point at least, I was right.

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