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Recent case of BDW Trading Ltd v Ardmore Construction Ltd [2024] EWHC 3235 (TCC)

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Key Words:

Adjudication Enforcement, Crystallization of Dispute, Fiona Trust Principle, Jurisdiction, Natural Justice, Deliberate Concealment, Construction Contracts, Limitation Period

Summary

This judgment addresses BDW Trading Limited's (BDW) application to enforce an adjudicator's decision against Ardmore Construction Limited (Ardmore). The adjudicator found Ardmore liable for fire safety defects at a development completed nearly 20 years ago under both the building contract and the Defective Premises Act 1972. Ardmore opposed enforcement on four grounds, but the court rejected all objections and granted summary judgment in BDW's favour.

Key Themes:

1. ***Enforcement of Adjudication Decisions: T****he judgment reaffirms the courts' general willingness to enforce adjudication decisions, even those with errors.*
2. ***Crystallisation of Disputes:*** *Guidance is provided on assessing whether a dispute has sufficiently crystallised for adjudication.*
3. ***Jurisdiction of Adjudicators:*** *The judgment examines the scope of adjudicators' jurisdiction regarding claims under the Defective Premises Act 1972.*
4. ***Natural Justice in Adjudication:*** *Clarifies natural justice principles in adjudication, especially for complex or historic disputes with imbalances in evidence.*
5. ***Impact of Retrospective Legislation:*** *Highlights challenges from the retrospective extension of limitation periods, as applied under the Defective Premises Act 1972.*

Background

BDW sought damages from Ardmore for fire safety defects in a development completed in 2004. Legislative changes in 2022 extended the limitation period for Defective Premises Act 1972 (DPA) claims to 30 years, prompting BDW to initiate a claim based on alleged breaches of the building

contract and the DPA. After prolonged pre-action correspondence, BDW referred the dispute to adjudication, where the adjudicator ruled in BDW's favour, awarding damages and costs. Ardmore resisted enforcement, leading to BDW's application for summary judgment.

Legal Issues and Analysis

Ardmore raised four grounds of objection:

(a) Ground 1: Crystallisation of the Dispute: Ardmore argued the dispute had not crystallised due to changes and insufficient particularisation in BDW's pre-action claim [2, 17-42].

- Applying like *AMD Environmental Ltd v Cumberland Construction Company Ltd* [2016] EWHC 285 (TCC), 165 ConLR 191 [30] and *Cantillon Ltd v Urvasco* [2008] EWHC 282 [31], the court rejected Ardmore's argument.
- It found BDW's claim—concerning fire safety defects and breaches of the building contract and DPA—was sufficiently clear from the outset [32a].
- Ardmore's prolonged lack of meaningful response supported the inference that a dispute had crystallised, including on quantum [32c, d, f].

(b) Ground 2: Jurisdiction over the DPA claim: Ardmore contended the adjudicator lacked jurisdiction over the DPA claim, arguing the adjudication clause in the contract did not cover statutory tort claims [33-35, 37-89a].

- The court applied *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [2007] 4 All ER 951, HL, which favours broad interpretations of dispute resolution clauses [42].
- Reviewing authorities, including *Hillcrest Homes Ltd v Beresford & Curbishley Ltd* [2014] EWHC 280 [44-46] which favoured a narrow interpretation, *Aspect Contracts (Asbestos) Ltd v Higgins Construction plc* [2015] UKSC 38 [48-49] where Lord Mance was content to apply *Fiona Trust* to adjudications, and *J Murphy & Sons v W Maher and Sons Ltd* [2016] EWHC 1148 (TCC) [50-51] which strongly supported applying *Fiona Trust* to adjudication, the court rejected Ardmore's argument [52-89].
- The court held that the reasoning in Fiona Trust, advocating for a broad interpretation of dispute resolution clauses to reflect commercial common sense and the parties' likely intentions, applied equally to adjudication provisions [59-67].
- Ardmore's reliance on differing wordings in adjudication and arbitration clauses was rejected, with the court emphasising commercial common sense and the parties' likely intentions [75, 76, 78, 87, 88].
- Clauses 2.5.1 and 2.5.2 of the building contract, interpreted as incorporating DPA obligations, further supported the adjudicator’s jurisdiction [81, 82, 89d-89j].

(c) Ground 3: Inequality of Arms (Natural Justice): Ardmore argued that the adjudication was unfair due to inequality of arms, citing the 20-year gap since project completion and a lack of contemporaneous documentation, leaving it dependent on BDW's disclosure [2, 92, 93, 94, 96-98, 100-102, 105-115, 117-118, 120, 126-129, 131-135, 137-139, 141-147, 150-154].

- The court acknowledged the "rough and ready" nature of adjudication and the high threshold for natural justice challenges [88, 89, 90].
- It reviewed the legal principles governing natural justice in adjudication, emphasising the courts' reluctance to interfere with an adjudicator's assessment of fairness and the need for any alleged breach to be material.
- Examining the chronology of events, including the pre-action correspondence and the

disclosure process within the adjudication, the court rejected Ardmore's claim of unfairness [105-115, 117-118, 120, 126-129, 132-135, 137-139].

- It found that Ardmore had opportunities to obtain documents both before and during the adjudication. Ardmore had initially sought broad pre-action disclosure but later narrowed its requests, which the adjudicator directed BDW to fulfil [110, 126-129, 131].
- The court found no evidence to support Ardmore's assertions that BDW had failed to conduct adequate searches or that any potential breach of natural justice was material to the outcome of the adjudication [132-134].
- It distinguished the case *Whyte v Mackay Ltd v Blyth & Blyth Consulting Engineers Ltd* [2013] CSOH 54 [90], noting that *Whyte* did not involve arguments about lack of documentation and was decided on its specific facts.

(d) Ground 4: Failure to Consider a Material Defence (Natural Justice): Ardmore alleged that the adjudicator had deliberately ignored a material defence relating to the knowledge of BDW's assignor (BPCL) and its agents regarding the fire barriers [2, 143-146, 1510-154].

- The court rejected this ground, finding the defence was not explicitly raised by Ardmore during adjudication.
- It determined the adjudicator addressed the issue of BDW's knowledge and concluded Ardmore's challenge was merely a critique of the adjudicator's reasoning, not a valid natural justice argument.

Conclusion

The court dismissed all four grounds of objection. It held that the dispute had crystallised, the adjudicator had jurisdiction, and no material breaches of natural justice occurred. Summary judgment was granted in BDW's favour, enforcing the adjudicator's decision.

Key Takeaway:

This judgment underscores the courts' commitment to enforcing adjudication decisions, emphasising speed, efficiency, and finality in the process. It limits challenges on natural justice grounds, particularly where parties had opportunities to address procedural concerns during adjudication. The case also provides valuable guidance on interpreting adjudication clauses, supporting a broader application of the Fiona Trust principle to define an adjudicator's jurisdiction.

Ratio Decidendi & Obiter Dicta:

Ratio:

- *Crystallisation of the Dispute: The court determined that BDW's claim for fire safety defects and breaches of the building contract and DPA 1972 was sufficiently clear, and Ardmore's lack of meaningful response indicated a crystallised dispute.*
- *Jurisdiction over the DPA Claim: Applying the Fiona Trust principle, the court held the adjudication clause in the building contract encompassed the statutory tort claim.*
- *Natural Justice: Ardmore failed to prove a material breach of natural justice due to alleged inequality of arms. The court found Ardmore had sufficient opportunities to access documents, and the adjudicator addressed relevant disclosure requests.*
- *Material Defence: The court rejected Ardmore's claim that the adjudicator ignored a defence relating to knowledge of defects, finding it was not explicitly raised and the critique was of the adjudicator's reasoning rather than a procedural failing.*

***Obiter**:*

- *Fiona Trust Principle: The court endorsed applying the Fiona Trust principle to adjudication, supporting a broad interpretation of dispute resolution clauses to reflect commercial intentions.*
- *Passage of Time and Natural Justice: While acknowledging challenges posed by the passage of time, particularly with retrospective limitation extensions, the court emphasized that time alone does not establish unfairness. Parties must show a material breach of natural justice.*

Parting Thoughts - Navigating Legal Technicalities: A Matter of Context

This case illustrates the importance of accountability and contractual obligations, even decades after a project's completion. The courts reaffirmed that justice, even delayed, is not denied. It stresses the need for robust record-keeping, proactive communication, and timely pursuit of claims to navigate legal complexities effectively. For the construction industry, this judgment reinforces the value of swift dispute resolution while acknowledging the challenges of historic cases.

#ConstructionLaw #Adjudication #Enforcement #DefectivePremisesAct #FireSafetyDefects #LimitationPeriod #BuildingSafetyAct2022 #NaturalJustice #FionaTrustPrinciple #ConstructionDisputes #SummaryJudgment

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