
DISPUTE RESOLUTION JOURNAL®

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When Will ADR Provisions in Dispute Resolution Clauses Not Be Enforced by English Courts?

Mark Stefanini and Jeremy Holden¹

In this article, the authors discuss a recent decision that serves as a timely reminder that English courts have the discretion not to give effect to a mandatory, binding dispute resolution clause that includes alternative dispute resolution as a condition precedent to litigation and that they will exercise that discretion in appropriate circumstances.

Will English courts always give effect to a mandatory, binding dispute resolution clause that includes alternative dispute resolution (ADR) as a condition precedent to litigation? The decision in the recent case of *Lancashire Schools v. Lendlease*² serves as a timely reminder that the court has the discretion not to do so and will exercise that discretion in appropriate circumstances.

The court reviewed the principles relevant to determining whether a dispute resolution clause was enforceable, and found that the particular clause met the requirements in that it:

1. Contained a mandatory obligation to enter adjudication,
2. This was a condition precedent to commencing litigation, and

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² *Lancashire Schools SPC Phase 2 Ltd. (formerly Catalyst Education (Lancashire) Phase 2 Ltd.) v. Lendlease Construction (Europe) Ltd. (formerly Bovis Lend Lease Ltd.)* [2024] EWHC 37 (TCC).

3. The dispute resolution process to be followed was sufficiently certain.

However, in declining to stay or strike out the proceedings that had been commenced without following the mandatory steps specified, the court emphasized that it retains discretion as to whether to decline jurisdiction in these circumstances. The exercise of this discretion involves balancing the public policy interest in upholding the parties' commercial agreement and the overriding objective of assisting the parties to resolve their dispute.

In the immediate case: the dispute resolution clause envisaged a bipartite adjudication that did not suit the particular multiparty, multidirectional dispute that had arisen; other parties not party to the dispute resolution clause would likely end up drawn into the adjudication at their own irrecoverable cost; the complexity of the dispute meant any stay for an adjudication would likely need to be for an undesirably long period of time, would interfere with the court's ability to case manage related proceedings, and would likely make settlement more difficult.

The Dispute

The dispute concerned a set of contracts entered into in connection with the construction of serviced accommodation at a school in Lancashire:

- A Project Agreement entered into by Lancashire County Council (the Council, and the Fourth Defendant) and a special purpose vehicle (Project Co, and the Claimant);
- A Building Contract entered into by Project Co and Lendlease (a building contractor, and the First Defendant), relating to the building works element of the Project Agreement; and
- A Facilities Management contract (the FM Contract) entered into by Project Co and a maintenance

contractor (the FM Contractor, and the Third Defendant), relating to the facilities management services element of the Project Agreement.

In the *Lancashire Schools v. Lendlease* proceedings, Project Co claimed against Lendlease for breach of the Building Contract, arising from alleged defects. Alternatively, it claimed against the FM Contractor for breach of the FM Contract in relation to those defects. In addition, insofar as Project Co did not prove that either contractor was liable in respect of the defects, Project Co sought a declaration that, in essence, the particular defects were of no consequence under the Project Agreement either on the basis that Project Co's obligations to the Council were back to back with the obligations of Lendlease and the FM Contractor. Thus the Council would be prevented from claiming against Project Co under the Project Agreement in relation to the same defects if neither contractor was liable.

The Application

At a preliminary stage, the Council made an application that the court should choose not to exercise its jurisdiction and/or should strike out the claim against it (the claim either disclosing no reasonable grounds or being an abuse of process), on the basis that the Project Agreement contained a mandatory requirement for adjudication as a pre-condition to litigation, and no adjudication had taken place. The following questions fell to be determined by the court:

1. Was adjudication a condition precedent to the right to pursue litigation? If not, was the requirement to adjudicate at least mandatory and enforceable?
2. How should the court use its discretion as to exercising jurisdiction?
3. Should the court strike out the proceedings?

Interpreting a Dispute Resolution Clause

The basic principles as to the enforceability of ADR provisions in dispute resolution clauses were laid out by O'Farrell J in *Ohpen Operations UK Ltd. v. Invesco Fund Managers Ltd.*:³

- The Agreement must create an enforceable obligation requiring the Parties to engage in ADR,
- The obligation must be expressed clearly as a condition precedent to court proceedings or arbitration,
- The ADR process followed need not be formal but must be sufficiently clear and certain by reference to objective criteria, and
- The court has a discretion to stay proceedings commenced in breach of an enforceable ADR agreement or provision.

Continuing the line of authorities, these principles were followed by Joanna Smith J in *Children's Ark Partnership Ltd. v. Kajima Construction Europe (UK) Ltd.*,⁴ with the exception of the second principle. Joanna Smith J concluded it was sufficient for the ADR obligation to be mandatory and enforceable, and that it did not necessarily have to be a condition precedent (although in fact it was in that case).

In the present case, Mr. Nissen KC, sitting as Deputy High Court Judge, proposed to follow the combined effect of those cases. He found that the requirement in the relevant dispute resolution clause of the Project Agreement for adjudication of a dispute between the Council and Project Co was indeed a condition precedent to pursuing the dispute into litigation.

³ *Ohpen Operations UK Ltd. v. Invesco Fund Managers Ltd.* [2019] EWHC 2246.

⁴ *Children's Ark Partnership Ltd. v. Kajima Construction Europe (UK) Ltd.* [2022] EWHC 1595.

The Judge's Discretion

The case turned on whether the judge should exercise his discretion to proceed with the claim in spite of the mandatory dispute resolution provision in the Project Agreement.

The judge noted that it was common ground that the court was not obliged to give effect to a mandatory dispute resolution provision by ousting or refusing to exercise its jurisdiction.

In *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.*,⁵ Lord Mustill identified a presumption that those who make agreements for the resolution of disputes must show good reasons for departing from them. In the *Ohpen* case, Justice O'Farrell expressed that there was a "public policy interest in upholding the Parties' commercial agreement and furthering the overriding objective in assisting the Parties to resolve their disputes."

The judge considered various other judicial statements as to the nature of the court's discretion, and highlighted that one issue that was often considered was the utility or practical value of following the dispute resolution clause. Ultimately, while there was a presumption as per *Channel Tunnel Group* and *Ohpen*, the judge concluded that "each case turns on its own facts and the particular features which arise for consideration in the exercise of discretion."

On this basis, the judge accepted the submissions of Project Co and exercised his discretion to allow the claim against the Council to continue. He gave his reasons as follows:

1. Considering the proper characterization of the nature of the dispute between Project Co and the Council, he did not think it was limited to a question of contractual interpretation because there could be circumstances which meant that the respective liabilities under the agreements are factually not co-extensive even if the contractual provisions are back-to-back.
2. It was necessary to review the scope of the proceedings in a wider context in order to understand the likely

⁵ *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.* [1993] AC 334.

role to be played by the Council in respect of them. The judge considered from what the Council had said so far in the claim that there were factual matters that would need to be tested at trial to determine the Council's position.

3. It was important to consider what the impact of granting a stay might be, since the utility of the proposed course of action which the stay was designed to require can be a relevant consideration. Although the judge considered the Council's points about clauses 68.16 and 68.17—which allowed Lendlease and the FM Contractor to make submissions within an adjudication between the Council and Project Co—to be powerful ones, he thought they gave rise to difficulties of application. He considered that in a more simple case, the provisions might be effective. But he considered the present case to be more complicated because it involved two supply chain parties each likely to be saying the other is responsible. As a result, he doubted there could be an effective bipartite adjudication, because there appeared to be no real issue directly between the Council and Project Co except those that were contingent on the position adopted by the two contractors. He also doubted adjudication could be effective in circumstances where Project Co would need to provide submissions simultaneously in parallel disputes with Lendlease and the FM contractor.
4. The two contractors would likely end up drawn into any adjudication between Project Co and the Council, requiring them to incur irrecoverable expense, despite having both chosen not to insist on adjudication with Project Co.
5. There was a risk of satellite adjudications between Project Co and the contractors. At the very least, the judge considered that things “could become complicated.”
6. If an adjudication between Project Co and the Council were likely to be short, it would be a factor supporting a stay. As it was, in spite of the short adjudication

period provided for in the Project Agreement, the judge considered the complexity of the issues likely to cause the parties to agree a much longer timetable. Conversely, in the event one party insisted on a determination in the 28-day period provided for by the Project Agreement, he considered it more likely that the losing party would pursue a final resolution by litigation anyway.

7. A stay for an adjudication could interfere with the court's ability to case manage these proceedings with related proceedings (already afoot) relating to the same contractors and similar defects in the same wider Council school facilities building program.
8. It was likely to be more difficult to settle the various disputes without the direct involvement of the Council, in particular because the Council had a claim for "Deductions" against Project Co, which were continuing to accrue and which Project Co might seek to pass through to the two contractors.