

## Insights

# INJUNCTION NOT GRANTED IN ONGOING ADJUDICATION: BILLINGFORD V SMC BUILDING

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Imagine the scene: you are the responding party to an adjudication and right at the outset you spot that the adjudicator has been incorrectly appointed and does not have jurisdiction. You try to call a halt to the proceedings. The claimant refuses. Surely you can get an injunction? Why go to all the trouble, expense and effort of an adjudication, for which you won't be able to recover your costs, only to incur further legal costs at enforcement proceedings, at which you are eventually vindicated? Wouldn't it make more sense to call time on the adjudication and start again?

In *Billingford Holdings Ltd & BFL Trade Ltd v SMC Building Solutions Ltd* and another, Fraser J refused to grant an injunction. This blog post considers whether this approach can be reconciled with section 37 of the Senior Courts Act 1981, which provides that the court may grant an injunction in all cases in which it appears to the court to be just and convenient to do so and the overriding objective of saving expense.

## What happened

Billingford Holdings and BFL Trade entered into a construction contract with SMC Building Solutions. SMC issued a notice of intention to refer a dispute to adjudication on 21 February, and the adjudicator was nominated by the President of RICS. RICS notified the parties of the appointment on 25 February, and SMC issued its referral on the same day.

Billingford argued that SMC had used the incorrect nominating body. It applied for urgent interim relief after close of business on 7 March seeking an order against both the adjudicator and SMC to prevent them from continuing the adjudication. The hearing took place on 8 March.

## Judgment

Fraser J refused to grant the injunction. He noted that the court has jurisdiction to issue injunctions in respect of ongoing adjudications, and indeed has done so in the past, in *Twintec Ltd v Volkerfitzpatrick Ltd*. However, in the words of Coulson J (as he then was) in *Dorchester Hotel Ltd v Vivid Interiors Ltd*, "such a jurisdiction will be exercised very sparingly" and would be the exception, not the rule.

Fraser J found that this was not such a rare case. Indeed the issues were “entirely run of the mill”. They were similar to those in *Skymist Holdings Ltd v Grandlane Developments Ltd*, in which the court also declined to grant declaratory relief. The correct time to challenge the adjudicator’s jurisdiction in such a case would be on enforcement.

### **Construction Act v overriding objective and section 37**

At first sight, Fraser J’s approach might appear to be in conflict not only with section 37 but also with the overriding objective. Allowing an adjudication to proceed which is “fundamentally flawed” (to quote Coulson J in *Dorchester*) seems to fly in the face of common sense.

However, one must remember the Parliamentary intention that underlies construction adjudication.

Adjudication is unlike most other forms of dispute resolution. Its whole purpose is to be quick and cheap and to keep the project on track (as far as possible). Adjudicators are expected to reach a decision within 28 days (or up to 42 days with an extension). Speed is its very essence. As Fraser J said:

*“There is simply no time within that duration to factor in applications to the court, with contested points on jurisdiction, without causing serious disruption and delay to the timetable set down by Parliament for an adjudicator to reach a decision.”*

The judge refused to interfere in the adjudicator’s control of the timetable. As he aptly said:

*“Adjudication has to be allowed to continue, so far as possible, free from the interference of the court, and quibbles or challenges to an adjudicator’s jurisdiction should, in a conventional case, be taken upon enforcement.”*

This suggests that, except in rare cases, the time for challenging an adjudication is on enforcement. Granting an injunction at the start of an adjudication risks opening the floodgates to tactics designed to derail the adjudication process. In addition, there is always the possibility that the adjudicator will find in favour of the responding party, or failing that, that the parties will live with the decision and continue with the project.

### **Reconciliation?**

So can this approach be reconciled with the overriding objective and section 37? I believe it can.

Taking section 37 first, the court’s reluctance to grant an injunction in an ongoing adjudication is not in conflict with section 37. Fraser J did not say that the court will never interfere in ongoing adjudications, but merely that it would only intervene in “rare” cases. As outlined above, there are powerful policy reasons why the court should be wary of interfering in ongoing adjudications: it will do so only when it is “just and convenient” to do so.

Neither is there a conflict with the overriding objective, when considered in the long term. Adjudication is a (relatively) inexpensive process, and this aligns with the overriding objective. Every now and then there will be an adjudication that justifies court interference while it is ongoing but this will be the exception rather than the rule.

So reconciliation is possible. But this begs the question: when is court interference in the form of an injunction justified in an ongoing adjudication?

### **The exception?**

Unfortunately, Fraser J did not offer a clear cut answer. The most he would say is that the test advanced by Billingford (“the issues are so very clear it would be wrong for the court to allow the adjudication to run if there was no prospect of it reaching a binding decision”) was incorrect.

However, while he did not identify the correct test he did make clear it would have to be a “rare case” to justify an injunction. His view was that this was a matter which:

*“... can and will be decided at the enforcement stage if that is challenged, and if the claimants in these proceedings are unsuccessful in the adjudication.”*

We all welcome clear cut tests but perhaps here the judge is sensible not to provide one. Clear cut tests encourage parties to try their luck and this is precisely what the court is trying to avoid.

This [article](#) first appeared on the Practical Law Construction blog dated 17 April 2019.

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