

Know your dispute resolution clauses: Key take-aways from Kajima v Children's Ark and Lancashire Schools v Lendlease

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This article summarises the key cases of *Kajima Construction Europe (UK) Limited v Children's Ark Partnerships Ltd* [2023] and *Lancashire Schools SPC Phase 2 Ltd (formerly Catalyst Education (Lancashire) Phase 2 Ltd) v Lendlease Construction (Europe) Ltd (formerly Bovis Lend Lease Ltd)* [2024], the findings of which include key points to consider when reviewing the terms of contractual dispute resolution procedures and the consequences of non-compliance.

Kajima Construction Europe (UK) Ltd and Anor v Children's Ark Partnerships Ltd

In 2004, Brighton and Sussex University Hospital NHS Trust (the **Trust**) and Children's Ark Partnerships Limited entered into a PFI project agreement (**Project Agreement**) to finance, design and build the Royal Alexandra Hospital for Sick Children in Brighton. Children's Ark Partnerships Limited also entered into a construction contract with Kajima Construction Europe (UK) Limited (**Kajima**) to design, construct and commission the hospital.

The Dispute Resolution Procedure detailed in the construction contract between Children's Ark Partnerships Limited and Kajima required all disputes to be referred to a liaison committee, but that committee was only comprised of representatives from the Trust and Children's Ark Partnerships Limited; none from Kajima.

In 2018, the Trust discovered fire defects within the construction of the hospital and Kajima agreed to carry out remedial works at its own cost without admission of liability. The existence of the fire defects entitled the Trust to levy deductions to Children's Ark Partnerships Limited's payments under the Project Agreement. Children's Ark Partnerships Limited then requested that Kajima reimburse the amount of these deductions under the construction contract. Whilst the matter of ongoing remedial works was discussed at the liaison committee, there was no express referral to the liaison committee of: (i) Kajima's liability for the fire defects, or (ii) Children's Ark Partnerships Limited's liability for deductions under the Project Agreement.

By 2021, although the remedial works to the hospital had largely been completed, there were still some works outstanding and Kajima refused to grant a further extension of the limitation period under the construction contract. Children's Ark Partnerships Limited subsequently issued proceedings against Kajima.

Kajima sought to strike out Children's Ark Partnerships Limited's claim on the basis that Children's Ark Partnerships Limited had not complied with the Dispute Resolution Procedure under the construction contract and argued that Children's Ark Partnerships Limited was time-barred from seeking recovery of the deductions.

This dispute centred around the enforceability of the Dispute Resolution Procedure. The Court of Appeal agreed with the lower court that the Dispute Resolution Procedure in the construction contract was unenforceable where it:

1. adopted the procedure in the Project Agreement and, thereby, transposed mechanisms that Kajima could not comply with; and
2. was insufficiently certain to be enforceable given that there was no meaningful description of the process to be followed and no

unequivocal commitment to engage in any particular form of ADR.

The Court of Appeal also endorsed the lower court's finding that if Children's Ark Partnerships Limited's claim form had been struck out, this would have been a draconian remedy that was unsuitable for the circumstances of this case; and, thus, even if the construction contract Dispute Resolution Procedure had been enforceable, a stay would have been granted.

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)

In this matter, the Court had to again consider whether to give effect to a contractual Dispute Resolution Procedure but, in this instance, one that required the parties to adjudicate the dispute as a pre-condition to litigation.

The claim arose as a result of alleged defects discovered at a school that was built and maintained under a PFI Project Agreement between the Project Company and Lancashire County Council (the “**Council**”) (the “**Project Agreement**”). The Council submitted an application that the Court should choose not to exercise its jurisdiction and/or should strike out the claim on the grounds that no adjudication had taken place between the parties, despite this being a pre-condition to litigation under the terms of the Project Agreement.

In contrast to the **Kajima** case, the Court found that the Dispute Resolution Procedure (including the adjudication of a dispute between the Council and the Project Company) was a condition precedent to starting litigation and, as it was clear and certain, it was enforceable.

However, the Court declined to exercise its discretion to strike out the claim and/or stay the proceedings (to allow the parties to follow the Dispute Resolution Procedure) on the basis that:

1. As it was a complex multi-party dispute, a bi-lateral adjudication between the Council and the Project Company would unlikely lead to a resolution;
2. The Council did not assert that the Project Company's claim against it disclosed no reasonable grounds;
3. The multi-party mediation could be negatively impacted by sending the dispute between the Council and the Project Company down a different track (via an adjudication);
4. It was not an abuse of process for the Project Company to have started proceedings without first adjudicating but, even if it was, the Court would not have struck out the claim in the exercise of its discretion, having regard to the overriding objective;
5. A stay for adjudication would likely interfere with the multi-party litigation, which would be contrary to the overriding objective.

What do these cases mean for other PFI contracts?

As many PFI Projects approach contractual expiry and move into the handback phase, we expect that many disputes may arise for the reasons explored in our other articles in this series. Parties will, therefore, increasingly look to utilise contractual Dispute Resolution Procedures.

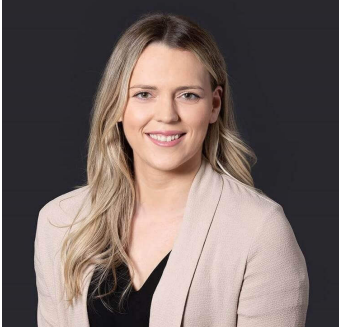
Both cases show that the courts can exercise discretion not to enforce clauses that require Dispute Resolution Procedures to be followed, even if those are pre-conditions to starting litigation. However, the Lancashire case, in particular, is very fact-specific given the Court refused to grant a stay even when the Dispute Resolution Procedure was a condition precedent and also enforceable.

Parties should expect that the courts will generally uphold agreements that have voluntarily been entered into, barring any compelling reasons to do otherwise. It is likely that instances in which the courts opt *not* to enforce such contractual clauses will be limited.

Ultimately, a party that does not adhere to an ADR provision in a contract runs the risk of a court ordering a stay or strike-out of the claim.

That said, Contracting Authorities should also take care when interpreting their Dispute Resolution Procedures set out in PFI Project Agreements and other project documents. With the expiry of limitation periods looming, it would be advisable for Contracting Authorities to set aside time prior to handback to consider the timings for contractual compliance and to explore whether separate courses of action may need to be pursued either at the same time or in the alternative.

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