



## When will a Contractual Dispute Resolution Procedure be Unenforceable?

In *Kajima Construction Europe (UK) Ltd v Children's Ark Partnership Ltd* [2023], the Court of Appeal found the first instance Judge had been correct to conclude that a dispute resolution procedure in a construction contract had been unenforceable by reason of uncertainty.

### Background

On 10 June 2004, Brighton and Sussex University Hospital NHS Trust ("the **Trust**") engaged Children's Ark Partnership Limited ("**CAP**") to design, build and finance the redevelopment of the Royal Alexandra Hospital for Sick Children, in Brighton ("the **Project Agreement**"). CAP engaged Kajima Construction Europe (UK) Limited ("**Kajima**") for the design, construction and commissioning of the Works ("the **Construction Contract**").

### The Limitation Clause

Clause 9.7 of the Construction Contract provided that no claim, action, or proceedings would be commenced against Kajima after the expiry of 12 years from the "*Actual Completion Date of the Works*". The Actual Completion Date was 2 April 2007, meaning the relevant date for limitation purposes was originally 2 April 2019.

### The Dispute Resolution Procedure ("**DRP**")

As part of the Construction Contract, the Trust and CAP also established a Liaison Committee comprising of three representatives from each party, with the aim of resolving disputes amicably. Paragraph 3.1 of the Construction Contract provided that any decision of the Liaison Committee shall be

*"final and binding unless the parties otherwise agree"*.

### The Dispute

In September 2018 and following the tragedy at Grenfell Tower, project fire safety concerns were notified to Kajima. In response to this, Kajima agreed to carry out remedial works at their own cost, but without admission of liability ("**the Remedial Works**"). The Remedial Works began in December 2018 and were ongoing until early 2022, in order to minimise disruption at the Hospital. During this period, and to address immediate concerns regarding limitation (which was due to expire on 2 April 2019), the parties entered into a standstill agreement dated 29 March 2019 to extend the limitation period to 29 December 2021.

On 30 November 2021, Kajima informed CAP that the Remedial Works were largely complete and as a consequence they did not wish to extend the limitation period any further than 29 December 2021. However, CAP disagreed and considered there still to be defects which would not be complete by 29 December 2021. Moreover, the absence of any admission of liability by Kajima meant CAP still faced the possibility of a claim under the Project Agreement in relation to these Remedial Works. In the absence of an extension, CAP therefore maintained they would have no choice but to commence proceedings.

By a letter dated 16 December 2021 CAP proposed to extend the limitation period to 31 March 2022, however no further reply was received from Kajima. Therefore, on 21 December 2021, CAP commenced proceedings against Kajima and Kajima Europe in respect of the alleged defects.

On 3 February 2022 CAP applied for a stay of proceedings ("**the Stay**") to enable it to comply with the DRP. On the same day, Kajima made an application under CPR 11 ("Disputing the Court's

## HAWKSWELL KILVINGTON LIMITED

2nd Floor, 3150 Century Way, Thorpe Park, Leeds LS15 8ZB | 28 Queen Street, London EC4R 1BB  
Tel: 0113 543 6700 | Fax: 0113 543 6720 | enquiries@hklegal.co.uk | www.hklegal.co.uk



Jurisdiction”) to strike out the claim on the ground that CAP had failed to comply with the DRP. Kajima argued that any other remedy would wrongly deprive it of a limitation defence.

In response, CAP raised several points, including that the requirement to refer disputes to the Liaison Committee, though ‘*mandatory*’, was not a condition precedent and that it had sought a stay to allow it to comply with the DRP and to follow the pre-action protocol.

## Held

The High Court found that the DRP made completion of the Liaison Committee process a condition precedent to litigation. The Judge, Joanna Smith DBE, nevertheless held that the process was unenforceable owing to uncertainty, and even if it had been enforceable, she would not have exercised her discretion under CPR r.11(1)(b) to do anything more than stay the proceedings.

The Judge described the Stay as the “*default remedy*” where the court was being asked not to exercise its jurisdiction on the basis that there was a breach of the DRP.

This case concerns the outcome of Kajima’s appeal of both of those findings.

## On Appeal

### The Enforceability of the DRP

The Appeal was dismissed. The Court of Appeal (“**CoA**”) held that the Judge had been right to conclude that the DRP was unenforceable on the following grounds:

During the hearing, Kajima developed an alternative argument based solely on the requirement to refer the dispute to the Liaison Committee. The CoA rejected this argument on the basis that whilst the

Court had to endeavour to enforce the agreement between the parties, “*it should not overstrain to do so, so as to arrive at an artificial result*”. To take just the referral in isolation would constitute ignoring all other parts of the process.

Although there might have been sufficient certainty as to the initial obligation to refer the dispute to the Liaison Committee, it was unclear how this would actually be actioned by the parties following a dispute.

It was unclear how the Liaison Committee would seek to resolve the dispute, given the absence of a representative for Kajima. Thus, Coulson LJ could not see how the process could “*provide a means of resolving disputes or disagreements between the parties amicably*” and went on to describe the Liaison Committee as a “*fundamentally flawed body*”.

There was also ambiguity as to when the process could be treated as having come to an end, so it was unclear when the condition precedent would be satisfied.

### The Exercise of Discretion

The CoA found that a stay was not a default remedy in the sense of an automatic relief which the court would grant when a party ignored a contractual DRP. The first instance Judge had simply used the expression “*default remedy*” as a shorthand to describe the usual order that would be made when proceedings were started in breach of a contractual DRP. Even if the Judge had overstated the wide applicability of stays, this had not affected the exercise of her discretion and had the CoA had needed to exercise such discretion it would have come to the same conclusion.

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Tel: 0113 543 6700 | Fax: 0113 543 6720 | enquiries@hklegal.co.uk | www.hklegal.co.uk



## The Limitation Issue

The CoA considered that deprivation of a limitation defence “*is an important element of the balancing exercise but it cannot alone be decisive*”. It observed that *Snookes v Jani-King (GB) Ltd* [2006] was the only identifiable case where the proceedings had been struck out for breach of a DRP. In that case, the limitation factor was only deemed to be decisive when balanced against the Judge’s finding of unreasonableness on the part of the Claimant. In the current case, the CoA agreed with the High Court that CAP had acted reasonably throughout.

## **Analysis**

This case is an important reminder to potential claimants who find themselves caught between a looming limitation deadline and a contractual DRP, that engaging with the DRP and/or seeking a standstill agreement is advisable to avoid having to issue costly protective proceedings.

This decision also demonstrates the Court’s robust approach to dealing with DRP clauses that are considered unenforceable.

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2nd Floor, 3150 Century Way, Thorpe Park, Leeds LS15 8ZB | 28 Queen Street, London EC4R 1BB  
Tel: 0113 543 6700 | Fax: 0113 543 6720 | [enquiries@hklegal.co.uk](mailto:enquiries@hklegal.co.uk) | [www.hklegal.co.uk](http://www.hklegal.co.uk)