

# HOW TO GET AN INJUNCTION TO STOP AN ADJUDICATION – *TWINTEC LIMITED v VOLKERFITZPATRICK LIMITED*

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## CONSTRUCTION

### SUMMARY

This publication considers the recent case of *Twintec Limited v Volkerfitzpatrick Limited [2014] EWHC 10 (TCC)*, where the Technology and Construction Court granted Twintec an injunction to prevent an adjudication from proceeding in circumstances where Volkerfitzpatrick had appointed the adjudicator using an incorrect procedure. The use of that incorrect procedure meant that the adjudicator appointed did not have jurisdiction to decide the dispute and any decision he reached would have been unenforceable.

As well as demonstrating one of the rare and exceptional circumstances in which the court may be willing to intervene to stop an adjudication, the judgment also includes a useful reminder of the many other circumstances where the court would not be willing to intervene to stop an adjudication.

### BACKGROUND

Volkerfitzpatrick and Twintec were, respectively, the contractor and the flooring sub-contractor on a large project to construct a warehouse and wine bottling plant near Bristol.

At the time that Volkerfitzpatrick commenced an adjudication against Twintec, the parties were already involved in court proceedings, alongside the owner of the warehouse and the piling sub-contractor, in relation to allegations that the piles and concrete slab were defective. Volkerfitzpatrick intended to refer to adjudication only one of the many issues in dispute in the court proceedings.

### CONTRACTUAL POSITION

At the beginning of the project, Volkerfitzpatrick and Twintec entered into a letter of intent, which stated that:

- ♦ the parties were not yet in a position to enter into the agreed form of sub-contract;
- ♦ Twintec was, nevertheless, required to start work immediately in accordance with the agreed form of sub-contract; and
- ♦ the letter of intent would then be “superseded” by the terms and conditions of the sub-contract when that sub-contract was eventually concluded.

The sub-contract was never concluded.

### COMMENCING ADJUDICATION

When Volkerfitzpatrick commenced an adjudication against Twintec, it did so in accordance with, and by reference to, the dispute resolution provisions of the agreed form of sub-contract referred to in the letter of intent.

The court concluded that Volkerfitzpatrick was wrong to do so because:

- ♦ the letter of intent in this case contained sufficient information to be a free-standing contract;
- ♦ the letter of intent did not incorporate any of the terms of the agreed form of sub-contract;
- ♦ in particular, the reference in the letter of intent to Twintec undertaking work “in accordance with” the agreed form of sub-contract was only there to ensure that, when the parties eventually entered into the sub-contract (which would have retrospective effect, because it was intended to “supersede” the letter of intent), Twintec would not be in breach of its terms; and
- ♦ it was not necessary to imply the dispute resolution provisions of the agreed form of sub-contract into the letter of intent because, under the letter of intent, the parties were already entitled to refer a dispute to adjudication in accordance with the Scheme for Construction Contracts.

### LACK OF JURISDICTION

The court decided that, because Volkerfitzpatrick had appointed an adjudicator pursuant to dispute resolution provisions that were neither expressly incorporated nor implied into the letter of intent between Volkerfitzpatrick and Twintec, the adjudicator had no jurisdiction to decide the dispute referred to him.

This was the case, the court held, even though the correct procedure to appoint the adjudicator under the Scheme for Construction Contracts was almost identical.

In this respect, the court rejected the argument that this was merely “form over substance” and emphasised that the validity of an adjudicator’s appointment goes to the very heart of the adjudicator’s jurisdiction to decide a dispute. If the adjudicator has been appointed incorrectly, he simply has no jurisdiction to decide the dispute.

## INJUNCTION

As a result, the court concluded that this was one of those rare and exceptional circumstances when a court should intervene to stop an adjudication from continuing. In particular, the court considered that it would not be *"just and reasonable"* to permit an adjudication to continue in circumstances where the resulting decision would be unenforceable.

## ALTERNATIVE ARGUMENTS FOR AN INJUNCTION

Given the court's conclusion that it should grant an injunction, it was not strictly necessary for it to consider Twintec's alternative arguments.

However, it is interesting that in its judgment the court explained in each case why those arguments would have failed and would not have justified the court intervening to stop the adjudication:

- ◆ **The referral of the dispute to adjudication was *"oppressive and unreasonable"*.** The court rejected this argument on the basis that, in order to override Parliament's intention that parties be allowed to refer disputes to adjudication, the referral to adjudication would have to be both oppressive and unreasonable to a *"fairly high degree"*, and such cases would be *"exceptional"*. This was not one of those cases.
- ◆ **The adjudication would undermine and circumvent the case management of the ongoing court proceedings.** The court said that this would not be sufficient to justify an injunction. This is because an adjudication can be commenced *"at any time"*, including during a period when the underlying dispute is the subject of ongoing court or arbitration proceedings.
- ◆ **The adjudication was intended by Volkerfitzpatrick to cause maximum disruption to Twintec, its legal team and its experts.** The court said that Twintec was right not to pursue this point at the hearing, because this would not be sufficient grounds to justify an injunction. In particular, the additional costs, duplication and use of resources in defending an adjudication at the same time as defending court proceedings was simply something that parties to a construction contract have to accept.

## CONCLUSION

The message delivered by the court was clear: an injunction to prevent an adjudication from continuing would only be granted in rare and exceptional circumstances.

You should take legal advice as a matter of urgency if you believe that you are involved in a case where an injunction may be available.

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