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August 30, 2024

CNO Plant Hire Ltd v Caldwell Construction Ltd [2024] EWHC 2188 (TCC): You Can't Set Off What You Won't Show Up With

CNO Plant Hire Ltd v Caldwell Construction Ltd [2024] EWHC 2188 (TCC)

Date: 21 August 2024

Judge: Her Honour Judge Kelly sitting as a Judge of the High Court

Keywords:

Adjudication enforcement, Summary judgment, "Pay now, argue later", Smash and grab adjudication, True value adjudication, Set-off, Jurisdiction challenge, Payment notice / pay less notice, Housing Grants, Construction and Regeneration Act 1996, Scheme for Construction Contracts, Final account, Payment cycle, CIS deductions, Cash flow in construction

Summary

This case examines the principles surrounding the enforcement of adjudicators' decisions and the court's discretion to set off a subsequent adjudication decision against an earlier one, even when the latter has not been the subject of separate enforcement proceedings.

Case Law/ Authorities:

1. *Bexheat Ltd v Essex Services Group Ltd* [2022] EWHC 936 (TCC): Reinforces the principle that "notified sums" must be paid promptly under s111 of the HGCRA 1996, and that adjudicators' decisions are enforceable regardless of errors unless there's a jurisdictional issue or breach of natural justice.
2. *S&T (UK) Ltd v Grove Developments Ltd* [2018] EWCA Civ 2448: Established the rule that a paying party cannot commence a "true value" adjudication before paying a previously awarded notified sum.
3. *Broseley London Limited v Prime Asset Management Limited* [2020] EWHC 944 (TCC): Confirmed that the Grove principle prevents a true value adjudication without first satisfying payment obligations.
4. *Sudlows Ltd v Global Switch Estates 1 Ltd* [2023] EWCA Civ 813: Clarified how to determine whether a dispute has already been adjudicated upon—using a common-sense, flexible approach to jurisdictional overlap.
5. *Lidl Great Britain Ltd v Closed Circuit Cooling Ltd* [2023] EWHC 3051 (TCC): Explored the

boundaries of “same payment cycle” and how it affects a party’s ability to raise a new adjudication without first paying a notified sum.

6. *FK Construction Ltd v ISG Retail Ltd* [2023] EWHC 1042 (TCC): Considered whether one adjudicator’s decision can be set off against another and set out strict conditions for when that’s possible—specifically, that both decisions must be before the court.
7. *HS Works Ltd v Enterprise Managed Services Ltd* [2009] EWHC 729 (TCC): Set out a four-step framework for determining whether a set-off between two adjudicators’ decisions should be permitted.

Background

CNO Plant Hire Ltd ("CNO"), the claimant, entered into a subcontract with Caldwell Construction Limited ("Caldwell"), the defendant, for earthworks and other related works on a project in Maghull. Disputes arose concerning payments under the subcontract, leading to two adjudications:

- **Adjudication 1:** Triggered by CNO's interim payment application for which Caldwell failed to issue a payment or pay less notice, resulting in an award in favour of CNO for the full amount claimed (£570,960.34 plus VAT). Mr. Latham issued the decision on 5 March 2024 [1].
- **Adjudication 2:** Initiated by Caldwell, contesting the valuation of work in CNO's interim payment application that was the subject of Adjudication 1. Mr. Lord, the adjudicator, decided in Caldwell's favour, finding that a lesser sum was due to CNO [1,4].

CNO sought summary judgment to enforce the decision in Adjudication 1 [1]. Caldwell resisted enforcement, requesting a set-off of the sum awarded in Adjudication 2 against the sum awarded in Adjudication 1. Notably, Caldwell did not commence separate enforcement proceedings for the decision in Adjudication 2 [1].

Key Themes:

1. ***Enforcement of Adjudicators' Decisions:*** *The case reinforces the principle that adjudicators' decisions must be enforced promptly, even if a subsequent adjudication reaches a different conclusion. The obligation to comply with an adjudicator’s award is immediate, regardless of any pending challenges or further adjudications.*
2. ***Set-Off Between Adjudications:*** *The court explored whether a party can set off a subsequent adjudicator's decision against a prior decision without seeking formal enforcement of the later adjudication. It clarified that both adjudications must be before the court for set-off to be considered, as seen in ISG Retail Ltd v FK Construction Ltd.*
3. ***"Pay Now, Argue Later" Principle:*** *The case upholds the foundational adjudication principle that payment obligations under an adjudicator's decision must be fulfilled immediately, even if the paying party disputes the decision in later proceedings. This approach ensures cash flow in construction projects while allowing for further resolution through litigation or arbitration.*

Legal Issues and Analysis

The court addressed the following key legal issues:

- **Set-Off of Adjudication Decisions:** Can the court consider setting off an adjudicator's decision against a previous decision when the later decision has not been the subject of separate enforcement proceedings?
- **Principles Governing Adjudication Enforcement:** Reaffirmation of the principle that adjudicators' decisions are generally enforced, even if flawed, unless there's a lack of

jurisdiction or a breach of natural justice.

- **Relationship between Interim Payment Applications and True Value Adjudications:** Consideration of the principle that a paying party cannot initiate a true value adjudication without first fulfilling its payment obligations established in previous adjudications, as determined in cases like S&T (UK) Ltd v Grove Developments Ltd and Broseley London Limited v Prime Asset Management Limited.

The Court's Decision

The court ultimately ruled in favour of CNO, enforcing the decision made in Adjudication 1 for the full amount awarded.

The court rejected Caldwell's argument that the second adjudication effectively superseded the first, emphasising that parties are bound to comply with an adjudicator's decision until the dispute is resolved through litigation, arbitration, or agreement [13]. This obligation to pay, the court noted, is immediate and not contingent upon a subsequent adjudication [13(5)].

Regarding Caldwell's attempt to set off the second adjudication decision, the court highlighted the case of ISG Retail Ltd v FK Construction Ltd [19,20]. This case established that for a set-off to be permissible, the decisions of both adjudicators must be before the court for enforcement [24]. Since Caldwell had not initiated enforcement proceedings for Adjudication 2, the court deemed their set-off request as improper.

Conclusion

The CNO Plant Hire case underscores the courts' robust approach to enforcing adjudicators' decisions. It highlights that a party cannot circumvent its payment obligations under an adjudicator's award by simply obtaining a conflicting decision in a subsequent adjudication without pursuing its formal enforcement. The case emphasises the importance of the "pay now, argue later" principle inherent in the adjudication process.

Key Takeaway:

The court ruled that parties cannot evade their payment obligations under an adjudicator's award by merely obtaining a conflicting decision in a subsequent adjudication without formally enforcing the latter. This decision underscores the robust "pay now, argue later" framework in adjudication, ensuring that parties comply with awards promptly to maintain cash flow, while still preserving their right to contest the decision in future proceedings.

Parting thoughts

In this judicial reminder that cash flow, not cleverness, keeps construction ticking, the court delivered a simple message dressed in complex precedent: ***if you want the benefit of a second adjudication, try enforcing it first.*** *Caldwell Construction attempted to offload its payment obligation to CNO Plant Hire by waving a conflicting adjudicator's decision—one it hadn't even bothered to enforce. That, Judge Kelly made clear, is not how any of this works.*

The decision reaffirms the golden rule of construction adjudication: ***pay now, argue later—and only argue properly if you've brought all your legal ducks to the pond.*** *A "true value" adjudication can't leapfrog a binding smash-and-grab decision.*

This isn't just about formalism; it's about predictability. The court wasn't prepared to entertain a set-off where only one adjudicator's decision had been properly placed before it. Attempting a set-off

under these conditions is like trying to play chess while hiding half your pieces and hoping no one notices. They did.

The result? Caldwell must pay up—fully, immediately, and without deduction. No creative accounting. No second-bite defence. Just the cold clarity of enforcement.

#ConstructionLaw #Adjudication #TCCJudgment #ConstructionDisputes #CashFlowInConstruction #SmashAndGrab #TrueValueAdjudication #PayNowArgueLater #SetOff #AdjudicationEnforcement #HGCRA1996 #SchemeForConstructionContracts #SAndTGrove #BroseleyPrimeAsset #BexheatEssexServices #SudlowsGlobalSwitch #LidlCooling #FKConstructionISGRetail #HSWorksEnterprise #ConstructionPayments #JurisdictionChallenge #SummaryJudgment #CISDeductions

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CIArb Arbitration Panel Member since 2006
CIC Adjudication Panel Member since 2010
Law Society Panel Arbitrator
RIBA Adjudication Panel Member since 2018
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