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Frolic Denied: Court Slaps Down Ogilvie's Natural Justice Defence in £1m Adjudication Row - ATG Services (Scotland) Ltd v Ogilvie Construction Ltd (Court of Session) [2024] CSOH 94 (04 October 24)

ATG Services (Scotland) Ltd against Ogilvie Construction Ltd (Court of Session) [2024] CSOH 94 (04 October 2024)

Date: 4 October 2024

Summary

This case involves ATG Services (Scotland) Ltd seeking court enforcement of an adjudicator's decision in their favour against Ogilvie Construction Ltd, which awarded ATG over £1 million in a payment dispute from a construction sub-contract. Ogilvie refused payment, claiming a breach of natural justice by the adjudicator for relying on the English case Jawaby while the case was governed by Scots law. The court rejected Ogilvie's arguments and enforced the adjudicator's decision, reinforcing principles that support upholding such decisions, even if flawed.

Key Themes:

1. ***Enforcement of Adjudicator Decisions:*** *The judgment affirms the principle of enforcing adjudicators' decisions to ensure timely payments, even if flawed [7, 13, 25].*
2. ***Limited Scope of Review in Enforcement Actions:*** *The court emphasises its limited role in reviewing adjudicators' decisions, intervening only in clear cases of natural justice or jurisdictional errors [8, citing [15-19] in Dragados].*
3. ***"Pay Now, Argue Later":*** *The judgment highlights the 1998 Act's policy goal to facilitate cash flow in the construction industry and discourage technical defences delaying payment [7, 25].*
4. ***Natural Justice in Adjudication:*** *The judgment clarifies that while adjudicators must adhere to natural justice, they have considerable leeway in decisions and are not strictly bound to the arguments presented by the parties [8, 16, 17, 18, 19, 21].*

Background

Ogilvie Construction engaged ATG Services as a subcontractor for a housing and care facility in Dalkeith [1]. A dispute arose regarding ATG's interim payment application, which Ogilvie disputed based on improper service, despite acknowledging receipt [4]. The adjudicator, appointed by the Scottish Building Federation, found in favour of ATG, ruling their application valid due to an

established course of conduct, even if the formal service requirements were not strictly met [3, 4]. Ogilvie refused to honour the adjudicator's decision, prompting ATG to seek court enforcement [1].

Legal Issues and Analysis

The court addressed two key issues:

1. **Alleged Breach of Natural Justice by Reliance on an English Precedent (Jawaby):**

Ogilvie's Argument: The defender argued that the adjudicator's reliance on *Jawaby Property Investment Ltd v Interiors Group Ltd* [2016] EWHC 557 (TCC), [2016] BLR 328 without explicit arguments or demonstration of its applicability to Scots law breached natural justice, akin to "going off on a frolic of his own" [5, 6, 10].

Court's Analysis: The court rejected this argument, finding both parties were aware that the issue of prior conduct and its impact on service requirements was contentious. ATG explicitly relied on Jawaby, and Ogilvie had the opportunity to present counter-arguments based on Scots law [18(i)(ii)(ii), 21]. The court noted that Ogilvie's submissions did not substantively argue how Scots law differed from Jawaby's principles [18(i)(ii)(ii), 21]. Even if the adjudicator erred regarding Scots law, this was a legal error within his jurisdiction, not a breach of natural justice [21, 22].

2. **Alleged Inadequacy of the Adjudicator's Reasons:**

Ogilvie's Argument: The defender claimed the adjudicator's reasons were inadequate for failing to explicitly address the absence of a clear basis in Scots law for ATG's reliance on prior conduct [6, 11].

Court's Analysis: The court found the adjudicator's reasons sufficient [18(v)(vi), 23, 24]. The adjudicator considered Jawaby and accepted the argument that an established course of conduct could validate the service of the payment application [15 (re 6.25), 16]. The court reasoned that the adjudicator's decision clearly demonstrated his reasoning: prior conduct could preclude Ogilvie from objecting to the method of service [22]. The court emphasised that adjudicators are not required to provide exhaustive reasons, especially given the summary nature of adjudication [23, 24, 14].

Conclusion

The court rejected Ogilvie's defences and granted decree de plano (immediately) in favour of ATG for the full sum awarded by the adjudicator, plus interest [24, 25]. The court also found Ogilvie liable for ATG's legal expenses on an agent/client scale due to the frivolous nature of their defence, highlighting the potential for such defences to delay payments unjustly [25].

Key Takeaway:

This judgment reinforces the "pay now, argue later" principle in construction disputes. The court affirmed its commitment to upholding adjudicators' decisions, even those with potential errors, as long as they are within jurisdiction and do not breach natural justice. It underscores the importance of engaging substantively with legal arguments rather than relying on technicalities when challenging an adjudicator's decision. The court's decision to award expenses on an agent/client scale further discourages frivolous defences that delay payments.

Ratio & Obiter

Ratio:

An adjudicator's decision will be enforced even if based on an error of law, as long as natural justice is

not breached [20, 22, 24, 25]. The court found no breach of natural justice because:

1. Both parties presented arguments on the defender's acceptance of previous payment applications [21].
2. The adjudicator applied the pursuer's legal principle and considered the authority cited [22, 23].

Obiter:

1. Concern was expressed over case law on natural justice in adjudication creating unnecessary complexity [20, 21].
2. Criticism of the defender's arguments as frivolous and delaying rightful payments [25].
3. Suggestion that judicial policy should discourage weak defences in adjudication enforcement actions [25].
4. Disapproval of unwarranted attacks on adjudicators' professionalism [25].

Parting Thoughts

In ATG v Ogilvie, Lord Sandison was faced with the legal equivalent of someone objecting to a fire drill because it didn't follow the exact route marked on the laminated evacuation plan.

Ogilvie, having lost an adjudication, dusted off the well-worn "natural justice" playbook, claiming the adjudicator had gone rogue by relying on Jawaby, an English case, under a Scots law contract. It was, they argued, a frolic. A detour. A judicial joyride. The court disagreed—firmly, fluently, and with an eloquence usually reserved for handing back a poorly written essay with "see me" in red pen.

The key point was this: the parties had argued the point. Jawaby was cited. The principle of established conduct was on the table. Ogilvie simply failed to rebut it with anything other than a shrug and a muttered, "You've not proved it's Scots." Lord Sandison was unmoved. The adjudicator didn't drift into a frolic—he followed the map the parties handed him. If the defender didn't like the route, it should have offered a better one.

As for the quality of the adjudicator's reasons? They were perfectly serviceable. This wasn't the Supreme Court. This was adjudication—construction law's version of speed dating. If both parties leave with an answer and most of their dignity, the system has worked. Lord Sandison didn't just enforce the award; he delivered a robust defence of the adjudication process, warning against "frivolous" defences that do little more than delay cashflow and cast unwarranted aspersions on competent professionals doing their job under pressure.

The message is clear: if you're going to challenge an adjudicator's decision, bring more than speculative puffery and a vague sense of injustice. Otherwise, expect the court to enforce the decision, with costs, and possibly with a note of judicial exasperation.

This isn't just pay now, argue later—it's don't argue badly, and definitely not later than the payment date.

#ConstructionLaw #Adjudication #ScotsLaw #NaturalJustice #PayNowArgueLater #DisputeResolution #CommercialLaw #Enforcement #CourtOfSession #Jawaby #LegalHumour #ConstructionDisputes

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