

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Dispatch

Resisting enforcement: set off

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

The case here followed the hearing of CNO's application for summary enforcement dated 21 March 2024 of an adjudication decision dated 5 March 2024. Caldwell invited the court to exercise its discretion to set off or withhold enforcement of the decision on the basis of a second adjudication decision dated 14 April 2024. Caldwell did not make any jurisdictional challenge or allege that there had been any breach of natural justice.

In the first adjudication, Caldwell had not issued a payment notice or pay less notice in response to an interim payment application made in December 2023. The first adjudicator decided that the amount stated in the application of around £253k was due, plus interest and costs. Caldwell did not pay that sum and referred a further dispute to a second adjudication seeking the "proper valuation of the final account" dating from September 2023, and repayments of any sums found to have been overpaid by CNO. Caldwell requested that a valuation be made in respect of the same items considered in the first adjudication.

CNO said that the second dispute related to the same, or substantially the same, subject matter. The adjudicator disagreed and made a decision that Caldwell pay CNO £90k. Caldwell paid £64k, asserting that they were entitled to withhold statutory CIS contributions from the payment.

Kelly J referred to the "well-established" legal principles applicable to adjudication enforcement set out by O'Farrell J in *Bexheat Ltd v Essex Services Group Ltd* [2022] EWHC 936 (TCC) (see [Dispatch, Issue 263](#)):

- "(1) Where a valid application for payment has been made, an employer who does not issue a valid payment notice or pay less notice must pay the 'notified sum' in accordance with section 111 of the Act;*
- (2) Failure to pay the notified sum entitles the contractor to seek payment of the sum by obtaining an adjudication award;*
- (3) Unless otherwise directed by the adjudicator, the parties are required to comply with the decision immediately;*
- (4) The courts take a robust approach to enforcement, regardless of errors of procedure, fact or law, unless in excess of jurisdiction or breach of natural justice;*
- (5) When a party is required to pay a 'notified sum', that party may embark upon a true valuation of the work done, but only after it has complied with the immediate payment obligation under section 11 of the Act."*

No one disagreed with this. Instead, Caldwell argued, on a factual basis, that the second adjudication did not relate to the same payment cycle because it related to the September 2023 application and was for the valuation of the works. The first adjudication related to CNO's December 2023 application.

When it came to set off, the judge referred to the decision of Smith J in *FK Construction Ltd v ISG Retail Ltd* [2023] EWHC 1042 (TCC):

"The general position is that adjudicators' decisions which direct the payment of money by one party to another are to be enforced summarily and expeditiously ... No set off or withholding against payment of that amount should generally be permitted ...

... There are, however, at least three limited exceptions to this general position:

- (i) a first, 'relatively rare', exception will be where there is a specified contractual right to set off ...*
- (ii) a second exception may arise where it follows logically from an adjudicator's decision that the adjudicator is permitting a set off to be made against the sum otherwise decided to be payable ...*
- (iii) a third exception may arise in an appropriate case, at the discretion of the court, where there are two valid and enforceable adjudication decisions involving the same parties whose effect is that monies are owed by each party to the other ..."*

CNO said that, as Caldwell had not issued enforcement proceedings in respect of the second adjudication, the court could not exercise its power to order a set off. Caldwell said that it had raised the issue of set off in its evidence in response to CNO's application to enforce the first adjudication.

Kelly J was clear that it was "not appropriate" for the court to consider exercising its power to order a set off here. Caldwell had not argued either of the two usual defences to enforcement: a lack of jurisdiction or a breach of natural justice, instead inviting the court to exercise its discretion and order a set off:

"Set off is not generally permitted in respect of an adjudicator's award. Such awards are to be enforced summarily and expeditiously."

The judge also referred to the guidance given by Akenhead J in the case of *HS Works Ltd v Enterprise Managed Services Ltd* [2009] EWHC 729 (TCC) who had set out the steps that needed to be taken for the court to determine questions of set off. The first was for the court to decide whether both decisions were valid. If not, or if it could not be determined whether each was valid, it was unnecessary to go further. Here, CNO had it made it plain that the second adjudicator did not have jurisdiction. No application had been made by Caldwell to determine whether or not that was correct.

Although this was sufficient to deal with the issue, the judge went on to consider the merits of the set off argument. The judge said that Caldwell's argument that the true value adjudication decided in the second adjudication was not in respect of the same payment cycle as the first adjudication because it dealt with an application of a different date was "too simplistic".

Here, it was "immediately clear" from consideration of the disputes referred in the two adjudications that the subject matter and

the sums claimed were the same. All of the work which was the subject matter of the interim payment applications of September and December 2023 had, in fact, been completed by mid-2023. Although the first adjudication was made on a smash and grab basis, the adjudicator decided that CNO had notified a sum in its interim payment application which was not the subject of a payment notice or a pay less notice. The first adjudicator, amongst other issues, decided that if sums claimed and included in the December 2023 interim payment application were incorrect for any reason, Caldwell could and should have issued a payment notice or a pay less notice so that those amounts did not become due:

"When the parties agree that all of the work had been done and they were in a final account process, it is wholly artificial to assert that the payment cycles were different."

Finally, the judge did not agree that Caldwell was entitled in any event to deduct money to take account of statutory CIS payments. If either adjudicator had intended those deductions to be made from the decision, that would have been set out in their decision.

Case update: JCT termination provisions

Providence Building Services Ltd v Hexagon Housing Association Ltd

[2024] EWHC 962 (15 August 2024)

We discussed this case in [Dispatch, Issue 290](#). Providence had brought a Part 8 claim seeking a declaration against Hexagon as to the proper construction of clause 8.9 of the 2016 JCT Design and Build Contract between the parties. On appeal, Stuart-Smith LJ said that the dispute raised in an issue about the proper construction of the contract that was: *"simpler to state than ... resolve: can the Contractor terminate its employment under clause 8.9.4 of the JCT Form in a case where a right to give the further notice referred to in clause 8.9.3 has never previously accrued?"*. In the TCC, the judge, finding in favour of the employer, Hexagon, had held that the answer to this question was "no". The CA disagreed.

Clause 8.9 of the Contract set out the circumstances in which Hexagon could terminate its employment under the Contract:

"8.9.1 If the Employer:

1. does not pay by the final date for payment the amount due to the Contractor in accordance with clause 4.9 and/or any VAT properly chargeable on the that amount ...

the Contractor may give to the Employer a notice specifying the default or defaults (a 'specified' default or defaults).

8.9.3 If a specified default or a specified suspension event continues for 28 days from the receipt of the notice under clause 8.9.1 or 8.9.2, the Contractor may on, or within 21 days from, the expiry of that 28 day period by a further notice to the Employer, terminate the Contractor's employment under this Contract.

8.9.4 If the Contractor for any reason does not give the further notice referred to in clause 8.9.3, but (whether previously repeated or not):

.1 the Employer repeats a specified default; ...

then, upon or within 28 days after such repetition, the Contractor may by notice to the Employer terminate the Contractor's employment under this Contract."

Under Payment Notice 27, issued by the employer's agent, Hexagon was obliged to pay the sum of £260,000 on or before 15 December 2022, but it did not do so. Providence served a Notice of Specified Default under clause 8.9.1 of the Contract. The agent issued a further relevant Payment Notice, number 32, in the sum of £360,000. Hexagon did not pay by the final date of payment.

Providence, therefore, issued a Notice of Termination under clause 8.9.4, relying on the Notice of Specified Default of December 2022, and the repetition of that specified default. There was also, without prejudice to the contractual termination, an acceptance, or purported acceptance, of Hexagon's repudiatory breach. Providence did not give a notice under clause 8.9.3.

Hexagon subsequently paid the sum claimed but challenged the validity of the Notice of Termination. They then accepted, or purported to accept, Providence's repudiatory breach on 31 May 2023.

Clause 8.9 set out to define the circumstances in which the contractor can terminate its employment as a consequence of the employer's default. The clause set out a sequence of events that may properly lead to termination. The question to be addressed is, simply and only, whether the contractor has given further notice, not whether the giving (or not) of the notice can be given the (non-contractual) description of being the result of a decision or the taking of an active step.

For the judge, although he accepted that the drafting could have been of better quality, the natural and probable meaning of clause 8.9.4 was that it applied to a case where no right accrued to give a further notice under clause 8.9.3. The words *"for any reason"* in clause 8.9.4 were wide enough to cover cases where the reason that a notice had not been given under clause 8.9.3 was because the right to give that notice had never arisen. Accordingly, Providence was entitled to give notice under clause 8.9.4 of the Contract and terminate its employment.

The intention of the clauses was to encourage and cause the party concerned to comply with their contractual obligations (in this case, the obligation to pay by the final date), and a repetition of a previous specified default was the trigger entitling the wronged party to terminate.

The CA recognised that this would potentially allow a contractor to terminate for repeated default even where either the underpayment was very small or the delay was very short. However, this was a commercially acceptable allocation of risk, especially given the potential for a serial defaulter to escape significant consequences if they managed to end their defaults within the 28-day period.

In reaching his decision, Stuart-Smith LJ cautioned against relying on the development of standard form wording from previous versions as an aid to interpretation unless a change has been made to respond to the effect of a particular decision of the courts, a change in legislation or a widely publicised event, referring to the words of Aikens LJ in *The Rewa* [2012] EWCA Civ 153:

"Whilst there may be occasions when this has to be done in order to assist in solving a problem of an ambiguous wording, I would generally discourage such exercises in 'the archaeology of the forms'. In most cases, it makes the task of interpretation of contractual wording unnecessarily over-elaborate and it can add to the expense and time taken in litigating what should be short points of construction."

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world. Dispatch is a newsletter and does not provide legal advice.

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