



Neutral Citation Number: [2024] EWHC 2188 (TCC)

Case No: HT-2024-LDS-000009

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

21 August 2024

The Court House
Oxford Row
Leeds LS1 3BG

Before :

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

Between :

C.N.O PLANT HIRE LTD

Claimant

- and -

CALDWELL CONSTRUCTION LIMITED

Defendant

Mr Adam Beaumont (instructed by **Ward Hadaway**) for the **Claimant**
Mr David Fearon (instructed by **Gunner Cooke LLP**) for the **Defendant**

APPROVED JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on 21 August 2024.

Her Honour Judge Kelly

1. This judgment follows the hearing of the Claimant's application for summary judgment dated 21 March 2024 to enforce an adjudication decision made by Mr Latham dated 5 March 2024 in favour of the Claimant against the Defendant. The Defendant resists enforcement, inviting the court to exercise its discretion to set off or withhold enforcement of Mr Latham's award on the basis of a second adjudication decision made by Mr Lord dated 14 April 2024. The Defendant does not assert a defence as a result of a jurisdictional challenge or a breach of natural justice against enforcement of the decision.
2. At the hearing, I had the benefit of written and oral submissions from both Mr Adam Beaumont for the Claimant and Mr David Fearon for the Defendant, both of Counsel.

Background

3. By subcontract made on 20 September 2022, the Claimant agreed to undertake various works on a project at Poverty Lane, Maghull ("the subcontract"). The subcontract itself did not comply with the requirements concerning adjudication set out in section 108 the Housing Grants, Construction and Regeneration Act 1996 (as amended) (the "Act"). The Scheme for Construction Contracts (England and Wales) Regulations 1998 (as amended) (the "Scheme") therefore applied. The parties have taken part in three adjudications, two of which have relevance to this application for enforcement.
4. The first adjudication was dealt with by Mr Latham who gave a decision on 5 March 2024. The dispute referred concerned the Claimant's interim application for payment issued by email on 30 December 2023. The Defendant had not issued a payment notice nor a pay less notice in response to the application. The interim payment application was exhibited to the notice of adjudication and set out the following works:

"Phase 1, 1a and 1b

Earthworks – Plots and External Areas **£367,774.47**

Phases 2 & 3

Earthworks – Plots and External Areas **£119,462.45**

Roads & Footpaths – All Phases

See schedule for breakdown **£173,031.28**

Piling Mats – All Phases

See schedule for breakdown **£30,732.14**

Variations

Refer to Variations tab for breakdown **£668,842.09”**

5. The subtotal of the amounts claimed was £1,359,842.44. From that sum was deducted previous payments made to the Claimant to give the sum claimed of £253,425.56. Mr Latham decided that the amount stated in the application by the Claimant of £253,425.56 was due plus interest of £2,679.88 and a daily rate of interest at £92.00. In addition, the Defendant had to pay the adjudicator’s fees of £8,190.00 plus VAT.
6. The Defendant did not pay the sums decided by Mr Latham. Instead, on 15 March 2024, it referred a further dispute to a second adjudication seeking the “proper valuation of the final account” and repayments of any sums found to have been overpaid to the Claimant. The second adjudication was dealt with by Mr Lord.
7. The dispute referred by the Defendant in the second adjudication referred to an interim payment application made by the Claimant in September 2023 which claimed a gross cumulative sum of £1,359,842.22 with the various works done in different phases claimed as set out above. In the second adjudication referral, the Defendant referred to the gross cumulative sum claimed by the Claimant in respect of phases 1, 1a and 1b as being £367,774.47, that is the same sum for the same work as was considered by Mr Latham in the first adjudication. The Defendant valued that phase in the gross cumulative sum of £319,659.88. The Defendant referred to the respective valuations of phases 2 and 3. The Claimant claimed £119,462.45 and the Defendant asserted that the phase was only worth £98,758.65. It is not necessary to set out in detail the remaining matters referred to in the second adjudication referral save to note that the Defendant asked for a valuation to be made in respect of the same items considered in the first adjudication.

8. The Claimant challenged Mr Lord's jurisdiction to deal with the second adjudication referral on the basis that the dispute related to the same, or substantially the same, subject matter. The Claimant provided Mr Latham's decision to Mr Lord and asserted that the interim payment application in September 2023 and the interim payment application in December 2023 were for the same works.
9. Mr Lord decided that he did have jurisdiction to deal with the matter. On 14 April 2024, Mr Lord issued his decision that the Defendant pay the Claimant £89,480.94 plus VAT within seven days. On 18 April 2024, the Defendant paid the Claimant £63,695.38. That sum was paid because the Defendant asserted that it was entitled to withhold the Defendant's statutory CIS contributions from the payment.
10. On 15 March 2023, a third adjudication was started by the Claimant in relation to the interim payment notice of September 2023 and claimed payments of £300,456.25 or such other sum as the adjudicator (again Mr Latham) decided proper.
11. I have had the benefit of reading the witness statement of Cathal Kenny, director of the Claimant, dated 21 March 2024 and the witness statement of Daniel Hall, solicitor for the Defendant, dated 19 April 2024, together with the various documents contained within the bundles to which I was taken to during the course of the hearing and directed to in skeleton arguments.
12. I do not propose to rehearse all of the arguments raised, nor all of the evidence referred to during the course of the hearing. However, I record that I read and considered the evidence as a whole, as well as various documents within the hearing bundle to which my attention was drawn, in addition to all those arguments before coming to my decision.

The Law

13. The well-established legal principles applicable to adjudication enforcement were set out by O'Farrell J in *Bexheat Ltd v Essex Services Group Ltd* [2022] EWHC 936 (TCC) at [A/9/35-39];
 - (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.

14. A number of other cases were referred to concerning the challenging of the enforcement of an adjudicator’s decision based on jurisdiction:

- (1) *S&T (UK) Ltd v Grove Developments Ltd* [2018] EWCA Civ 2448 - where a party is required to pay a notified sum but fails to do so, it may not commence a true value adjudication.
- (2) *Broseley London Limited v Prime Asset Management Limited* [2020] EWHC 944 (TCC) - the principle set out in *Grove* prevents a paying party from commencing a true value adjudication without first paying the amount awarded in a previous adjudication decision.
- (3) *Sudlows Limited v Global Switch Estates 1 Limited* [2023] EWCA Civ 813 – to decide whether an adjudicator lacks jurisdiction as to a dispute previously referred, the adjudicator should give a robust and common sense answer, looking to see what the earlier adjudication actually decided and considering the need for flexibility to prevent a party re-adjudicating a claim.
- (4) *Lidl Great Britain v Closed Circuit Cooling Limited* [2023] EWHC 3051 (TCC) - whilst there is no blanket principle on commencing a true value adjudication before satisfying an award made in respect of an interim payment application, the *Grove* principle does prevent a paying party from commencing a true value adjudication on matters which were subject to a decision on the same payment cycle “insofar as they are matters which could have been the subject of the pay less notice served in respect of the particular notified sum in question”.

15. Whilst Mr Fearon argues that the comments of Sir Rupert Jackson in the *Grove* case are obiter and should not be accepted without considering the other authorities and the

particular factual matrix in this case, it does not seem to me that Counsel do in fact disagree on the law. The Defendant is arguing its case on a factual basis, that the second adjudication conducted by Mr Lord did not relate to the same payment cycle because it related to the September 2023 interim payment application and was for the valuation of the works. The first adjudication made a decision on the Claimant's December 2023 interim payment application. It was argued that the adjudication therefore was not in respect of the same matters upon which Mr Latham gave his decision in the first adjudication and the court should exercise its discretion to set off.

16. The principles in respect of the set off were stated by Joanna Smith J in *FK Construction Limited v ISG Retail Limited* [2023] EWHC 1042 (TCC) as follows at [20]:
- “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...”
17. The judge also quoted Akenhead J’s decision in *HS Works Ltd v Enterprise Managed Services Ltd* [2009] EWHC 729 (TCC) at paragraph 40 setting out the steps which needed to be considered before the court should permit a set-off:
- “(a) First, it is necessary to determine at the time when the court is considering the issue whether both decisions are valid; if not or if it cannot be determined whether each is valid, it is unnecessary to consider the next steps.
 - (b) If both are valid, it is then necessary to consider if, both are capable of being enforced or given effect to; if one or other is not so capable, the question of set off does not arise.
 - (c) If it is clear that both are so capable, the court should enforce or give effect to them both, provided that separate proceedings have been brought by each party to enforce each decision. The court has no reason to favour one side or the other if each has a valid and enforceable decision in its favour.
 - (d) How each decision is enforced is a matter for the court. It may be wholly inappropriate to permit a set off of a second financial decision as such in

circumstances where the First Decision was predicated upon a basis that there could be no set off”.

The Issues

18. The issues to be determined are:

- (1) As the Defendant has not issued enforcement proceedings in respect of the second adjudication, should the court consider exercising its power to order a set off?
- (2) Should the court permit a set off on the facts of this case?

As the Defendant has not issued enforcement proceedings in respect of the second adjudication, should the court consider exercising its power to order a set off?

19. The Claimant argues, pursuant to the *FK Construction Limited* case that the Defendant falls at the first hurdle in respect of any possible set off. The only enforcement application before the court is in relation to the first adjudication - Mr Latham’s decision. For whatever reason, the Defendant has chosen not to issue enforcement proceedings in respect of the second adjudication - Mr Lord’s decision.
20. Natural justice or a lack of jurisdiction to conduct an adjudication are the two principal defences to the enforcement of an adjudication decision. It is not adequate, as a means of defence, simply to raise an argument claiming a set off in respect of Mr Lord’s decision in the second adjudication. It was open to the Defendant to issue its own proceedings and apply for Mr Lord’s decision to be enforced and to ask the court to consider the two enforcement applications together. The Defendant chose not to do that. Had an enforcement application been issued by the Defendant, the Claimant would have made further arguments and produced additional evidence in respect of the lack of jurisdiction of Mr Lord for the second adjudication. In the circumstances, it would be unfair in any event to consider the court’s power to order a set off.
21. The Defendant argues that the restriction on consideration of a set off, as articulated by Joanna Smith J in the *FK Construction Limited* case citing the *HS Works Ltd* case, cannot mean that separate enforcement proceedings are required to be commenced before a set off can be considered. The Defendant raised the issue of set off in its evidence in response to the Claimant’s application to enforce the first adjudication and that suffices for the court to consider the exercising its discretion to set off. The

Claimant had the opportunity to respond in more detail to the various matters raised by Daniel Hall in his witness statement. The fact that the Claimant chose not to respond and has failed to deal with the issue of jurisdiction or other matters in evidence should not prevent the court from considering the issue.

22. In my judgment, it is not appropriate for the court to consider exercising its power to order a set off in the circumstances of this case. The purpose behind the court's attitude to adjudication enforcement is well known. Here, the Defendant does not argue either of the two usual defences to enforcement - a lack of jurisdiction or a breach of natural justice relating to the first adjudication itself. Instead, it invites the court to exercise a discretion and order a set off.
23. Set off is not generally permitted in respect of an adjudicator's award. Such awards are to be enforced summarily and expeditiously. Whilst it is right that there are some limited exceptions to that general position, the exception relied upon by the Defendant in this case is that there is a subsequent valid and enforceable adjudication decision made by Mr Lord in the second adjudication so the court should order a set off.
24. Whilst the Defendant argues that it is not necessary for it to have issued enforcement proceedings in respect of the decision of Mr Lord in the second adjudication in order for it to ask the court to consider and enforce that decision, I reject that argument. The guidance given in the judgment of Akenhead J at paragraph 40 of his judgment is clear. He had just considered some earlier case law where there were two adjudication decisions which, if valid, were in conflict. However, in those decisions, the Defendant had not sought to enforce the later adjudication decision by separate proceedings. He then set out the steps which he considered needed to be taken for the court to determine an argument of set off. The first step 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.
25. In the *HS Works Ltd* case, enforcement proceedings had been brought in respect of the relevant adjudications by the Claimant and the Defendant. In those circumstances, the judge determined the validity of each of the adjudication decisions. Having decided

that both were valid, he then went on to exercise his discretion as to whether or not to allow the set-off.

26. In this case, the Claimant had already made it plain that it considers that Mr Lord did not have jurisdiction to make the decision he did to deal with the second adjudication. The Claimant's position was made clear to Mr Lord when dealing with the second adjudication. Regardless of the views expressed by Daniel Hall that, if there is no set off, the Claimant would be in receipt of an "undeserved windfall" and there would have to be further adjudication enforcement proceedings which would increase unnecessarily the costs and add delay, there plainly is a jurisdiction argument which the Claimant intends to raise in respect of Mr Lord's decision.
27. No application has been made by the Defendant to determine whether or not Mr Lord had jurisdiction to make a decision in the second adjudication. Although the issue of the enforceability or otherwise of the decision of Mr Lord was raised by Daniel Hall in response to the Claimant's application to enforce Mr Latham's decision, in my judgment, it was not unreasonable for the Claimant not to respond to the arguments raised in that witness statement in the absence of any application by the Defendant to enforce Mr Lord's decision.
28. Further, I do not necessarily accept Daniel Hall's assessment of the inevitability of the enforcement of Mr Lord's decision considering the contents of the decision under the heading "Technical adjudication v true value adjudication". I do not accept the argument of the Defendant that, regardless of its failure to issue separate enforcement proceedings, the court should nonetheless exercise its discretion and consider the set off sought.

Should the court permit a set off on the facts of this case?

29. If I am wrong and the court should have considered the Defendant's request for the effect of the two adjudications to be set off against each other, I consider the merits of the court exercising its discretion to consider a set-off in any event.

30. As is accepted by the Defendant, if an adjudication decision requires a party to pay a notified sum, if the party fails to pay that sum, it may not start a true value adjudication in respect of a dispute in the same payment cycle. Here, the Defendant argues that the true value adjudication decided by Mr Lord in the second adjudication was not in respect of the same payment cycle because the first adjudication decided by Mr Latham concerned an interim payment application dated December 2023 and its true value adjudication decided by Mr Lord dealt with an interim payment application dated September 2023.
31. In my judgment, that analysis is too simplistic in the particular circumstances of this case. It is immediately clear from consideration of the disputes referred in the first and second adjudication that the subject matter and the sums claimed are 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. A final account application for payment had originally been issued by the Claimant on 12 August 2023 and then reissued, as a result of errors made, on 15 August 2023 and then again on 5 September 2023.
32. Although the first adjudication was made on a smash and grab basis, Mr Latham decided that the Claimant had notified a sum in its interim payment application which was not the subject of a payment notice or a pay less notice. Mr Latham was aware that a partial payment had been made by the Defendant following alleged agreed deductions including CIF deductions and retentions. He was also aware that the Defendant's position was that because the parties had been involved in a final account process since June or July 2023, the Claimant was not entitled to any further payment. He was aware of the various interim payment applications which had been made by the Claimant. He considered the Defendant's argument that various sums claimed in December 2023 were wrong, including because some of the figures had been agreed in different amounts. Mr Latham decided that if sums claimed and included in the December 2023 interim payment application were incorrect for any reason, the Defendant could and should have issued a payment notice or a pay less notice so that those amounts did not become due. The Defendant did not do so and had not provided

any credible authority to establish that incorrect amounts included in an application for payment invalidated the application.

33. In circumstances where, on the face of it, everybody agrees that the applications for payment by the Claimant in both the September and December 2023 are for the same work and arising out of the negotiations and discussions in respect of the final account, I cannot accept the submission that the September 2023 and the December 2023 interim applications for payments were different payment cycles. 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. Even if I am wrong about that, those facts can and should be taken into consideration by the court in deciding whether to exercise its discretion.
34. Further, I do not accept the submission made by the Defendant that it was entitled in any event to deduct money from the monies awarded to take account of statutory CIS payments. If Mr Latham or Mr Lord had intended those deductions to be made from the decision, that would have been set out in each decision. In fact, Mr Latham's decision makes it clear that if deductions were to be made, those details could and should have been set out in a payment notice or a pay less notice. They were not. In those circumstances, the full sum should have been paid by the Defendant following the first adjudication.
35. Mr Latham had plainly considered the relevant background and the nature of the September and December 2023 interim payment applications. Where the Claimant raises (and raised at the time) an issue concerning the jurisdiction of Mr Lord in respect of the second adjudication, it is relevant to the exercise by the court of its discretion to set off that no enforcement application for the decision of Mr Lord has been made.
36. In my judgment, it is not possible to decide whether the Defendant was entitled to commence a true value adjudication when an established process to enforce the decision was available to the Defendant and it chose not to use it. Had the Defendant sought to enforce Mr Lord's decision, the Claimant would have responded, filed

evidence and raised jurisdictional challenges. The court does not have the benefit of that evidence and detailed arguments.

37. In any event, I accept the submission made by the Claimant that an order taking account of Mr Lord's decision in the second adjudication without requiring payment of the notified sum decided by Mr Latham in the first adjudication would seriously undermine the policy of swift enforcement of adjudicators' decisions. I would not therefore, in any event, have ordered a set off in the circumstances of this case.