

HFW

# Resisting enforcement of adjudication decisions: set off or no set off?

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Published on 14 October 2024

The recent TCC decision in *C.N.O Plant Hire Ltd V Caldwell Construction Limited*<sup>1</sup> considered the grounds on which a party can resist enforcement of an adjudication award. The judgment provides useful guidance as to whether set-off is a viable defence to enforcement. The case underlines the objective of the courts to enforce adjudication awards summarily and expeditiously.

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<sup>1</sup> [2024] EWHC 2188 (TCC).



## Background

CNO Plant Hire Ltd (**CNO**) contracted with Caldwell Construction Limited (**Caldwell**) to carry out works at a housing development in Maghull, Merseyside. Various disputes arose between the parties as a result of which three adjudications took place. Two of these adjudications were the subject of this case.

The first adjudication, which was made on a 'smash and grab' basis, concerned CNO's interim application for payment (**Adjudication 1**). Smash and grab adjudications relate to the notified sum – the payee seeks an enforceable decision from that the adjudicator that it should be paid the notified sum. The adjudicator, Mr Latham, determined that CNO was due £253,425.

Caldwell did not pay

CNO the sum due under the Adjudication 1 award. Instead, it commenced a second 'true value' adjudication concerning the valuation of the final account (**Adjudication 2**). CNO objected to the commencement of Adjudication 2 on the basis that it related to the same subject matter as Adjudication 1 and the adjudicator, Mr Lord, did not have jurisdiction. Mr Lord rejected the jurisdictional objection and determined that Caldwell pay CNO £89,480.

Ultimately, Caldwell paid CNO £63,695 in respect of Adjudication 2. Caldwell withheld part of the award sum on the basis of statutory Construction Industry Scheme (**CIS**) tax contributions which it maintained it could deduct from the payment. CNO subsequently commenced these proceedings to enforce the

award made in Adjudication 1 against Caldwell.

## Key principles for enforcement

Before dealing with the facts, Kelly J reiterated the principles applicable to adjudication enforcement in relation to a notified sum under the Housing Grants, Construction and Regeneration Act 1996 (**Construction Act**) as set out by O'Farrell J in *Bexheat Ltd v Essex Services Group Ltd*:<sup>2</sup>

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 [Construction] Act;
2. Failure to pay the notified sum entitles the contractor to seek payment of the sum

2 [2022] EWHC 936 (TCC).

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- 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; and
  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[1] of the [Construction] Act."<sup>3</sup>

The Court also considered the general position that adjudicators' decisions are to be enforced summarily and expeditiously. No set off or withholding against payment of that amount should generally be permitted, subject to some limited exceptions described by Smith J in *FK Construction Limited v ISG Retail Limited*.<sup>4</sup> These are:

1. Where there is a specified contractual right to set off;
2. 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;
3. 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.

### The decision

CNO argued that, following the guidance in *FK Construction*, the Court could not exercise its discretion to order a set off between the sums due in Adjudications 1 and 2. This was because Caldwell had not chosen to issue enforcement proceedings in respect of Adjudication 2.

The Court agreed with CNO. The two principal defences to an adjudication decision are for a breach of natural justice or a lack of jurisdiction to conduct an adjudication. Caldwell did not formally rely on either of these defences, but on a third argument claiming set off as a means of defence to enforcement of the award.

The grounds for allowing set off are restrictive given the potential for a consideration of set off between adjudication decisions to slow down their prompt enforcement. In these circumstances, the Court concluded that it would be "unfair" for it to exercise its power to order a set off. It was open to Caldwell to start separate enforcement proceedings for Adjudication 2 and to ask the Court to consider the two applications together. However, Caldwell chose not to do so.

The Court placed particular

weight on CNO's objections to the jurisdiction of the adjudicator in Adjudication 2. Had Caldwell commenced enforcement proceedings for the award in Adjudication 2, CNO would be afforded a full opportunity to raise its concerns regarding jurisdiction. As a result of Caldwell's approach, CNO was deprived of this opportunity. The Court concluded, as a result, that it would not be appropriate to exercise its power of set off.

The Court also considered whether, on the facts, CNO's set off argument had any merit. Caldwell argued that Adjudications 1 and 2 related to different payment cycles and so did not each address the same disputed issues.

The Court found that the subject matter and sums claimed in Adjudications 1 and 2 appeared to be the same. As a result, the policy of swift enforcement of adjudicators' decisions would be seriously undermined if the Court allowed a set off order taking account of the Adjudication 2 decision without first requiring payment of the sum decided in Adjudication 1. Accordingly, Kelly J confirmed that she would not have ordered a set off in any event. This decision further underlines the reluctance of the courts to frustrate prompt enforcement of an adjudication decision on the basis of subsequent true value adjudication decisions.

<sup>3</sup> *C.N.O Plant Hire Ltd V Caldwell Construction Limited* [2024] EWHC 2188 (TCC) at 76.

<sup>4</sup> [2023] EWHC 1042 (TCC).

The Court also rejected Caldwell's submission that it was entitled to deduct money from the sums awarded in Adjudication 2 in respect of statutory CIS payments. If the adjudicator had intended for such deductions to be made from the award sum, this would have been made clear in the decision.

### Comment

This decision is a useful reminder that the English courts will generally enforce adjudication decisions without delay and with very few exceptions. We often deal with large projects that can generate multiple adjudications. Parties to multiple adjudications should be clear that, save in particular cases, the courts

will generally require payment of enforceable adjudication decisions without consideration of set off. In order for set off to be a viable possibility, at the very least, enforcement proceedings in respect of each of the adjudication decisions.

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Arpan is a lawyer in HFW's construction team, with a particular focus on Knowledge Management. His work involves supporting the international construction team on all aspects of KM as well as working direct for the team's clients on their training and development needs. In addition to his main KM focus, Arpan also provides support on the contentious cases the team undertakes.

Arpan is an experienced international construction lawyer, qualified in both India and England & Wales. He has worked on a wide range of projects including oil & gas facilities, renewables, airports, hospitals and power plants across a range of jurisdictions. He has experience of arbitration, adjudication and court proceedings, involving the usual cross-section of construction disputes, such as delay, variations, defects and termination.

Arpan is also co-author of the book *International Commercial Arbitration and its Indian Perspective*.



### James Stewart

James is an Associate in the construction team at HFW, based in London.

He specialises in dispute resolution in the construction and engineering sectors and qualified in 2022.

He has worked on cases acting for employers, contractors and insurers on a variety of projects, both in the UK and internationally.

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