



No get-off through set-off: TCC rejects Defendant's attempt to set-off competing adjudication awards

In *FK Construction Ltd v ISG Retail Ltd* [2023], the TCC refused to permit set-offs arising from other adjudication decisions between the same parties.

Background

ISG was the main contractor on a scheme in Avonmouth, Bristol ("**Project Barberr**y"). On 28 September 2021, ISG Retail Ltd ("**ISG**") engaged FK Construction Limited ("**FK**") under a bespoke sub-contract for roofing and cladding works at Project Barberr,y for a sum of £3.4m ("**the Sub-Contract**").

On 27 September 2022, FK issued its application for payment 16 ("**AFP 16**") for the sum of c.£1.7m. ISG failed to issue a payment notice in respect of AFP 16 but on 28 October 2022 it submitted a purported pay less notice ("**PLN**"). A dispute arose as to the validity of the PLN.

The Wood Decision

On 19 January 2023, FK referred the dispute to adjudication. By a decision dated 27 February 2023 ("**the Wood Decision**") the adjudicator, Mr Allan Wood, determined that ISG's PLN was out of time and thus invalid and awarded FK the full value of AFP 16 plus VAT and interest. The adjudicator also held ISG liable for his fees and expenses totalling £8k plus VAT.

Following ISG's failure to comply with the Wood Decision, FK applied to the TCC for summary judgment to enforce the Wood Decision.

The Molloy Decision

There were 3 other adjudications between FK and ISG in relation to Project Barberr,y. The last of these adjudications determined a gross valuation of the Sub-Contract of c.£3.7m ("**the Molloy Decision**"). Given that ISG had already paid c.£2.8m in respect of the Sub-Contract works, this meant FK's further entitlement from ISG was c.£900k.

Project Triathlon

There were also three adjudications in relation to a separate project between the parties, which concerned works at a distribution facility in Essex ("**Project Triathlon**"). The net effect of these adjudications was that a total of c.£67k in respect of the Project Triathlon sub-contract works was owed *from FK to ISG* ("**the Triathlon Decisions**").

Part 8 proceedings in relation to Project Triathlon and Project Barberr,y have been commenced by ISG and are due to be heard alongside each other this month, owing to the materially identical nature of the Sub-Contract terms.

The Set-Off

In the meantime, in reliance on the Molloy Decision, ISG sought to limit enforcement of the Wood Decision to £900k. ISG also invited the Court to deduct a further £67k based on the Triathlon Decisions, arguing that the Court had discretion to order a set off against the adjudicator's award by reason of other adjudication decisions affecting the same parties.

In reply, FK argued there was "*no compelling reason*" why the Wood Decision should not be enforced in full.

Held

The TCC rejected ISG's set off arguments and enforced the Wood Decision in full.

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In so doing the Judge began by considering the four-stage test set out by Akenhead J in *HS Works Ltd v Enterprise Managed Services Ltd* [2009] (“**HS Works**”). The test must be complied with in order for set off to apply to separate adjudication awards between the same parties.

The first step is to determine whether both decisions are valid. The second, is to consider whether they are capable of being enforced. As to the third step, if both decisions are enforceable, the Court should enforce them both provided that separate proceedings have been brought by each party to enforce each decision. If those three steps are satisfied the Court then has discretion to allow set off to apply, where appropriate.

The Judge also had regard to the facts in *JPA Design and Build Limited v Sentosa (UK) Limited* [2009] (“**Sentosa**”), which were in many ways similar to those of HS Works. In that case, Coulson LJ found the two adjudication decisions were valid and enforceable, separate proceedings had been brought in respect of each decision and a set off was therefore appropriate. However, he warned the parties that multiple tactical adjudications would not be the best way of achieving a proper resolution.

The Judge found that the facts in HS Works and Sentosa were “*far removed*” from the present case and “*no clear parallel*” could be drawn. Moreover, on application of the four-stage test, it would not be appropriate to set off the Wood Decision against the Molloy Decision and/or Triathlon Decisions.

In relation to the Molloy Decision, the Court had not been asked to determine the validity or enforceability of the decision, and no separate proceedings been brought to enforce it, meaning that ISG fell short at the first, second and third stage.

The Court also found that it would be inappropriate to set the Wood Decision off against the Triathlon

Decisions, as it could not determine the validity or enforceability of the Triathlon Decisions, and no separate proceedings had been issued in respect of those decisions.

The Judge considered that the wider question of whether an adjudicator’s decision relating to one project could be set off against a decision relating to a different project was “*a point of some interest*” but considered it unnecessary to determine in the present case.

Analysis

This case highlights that enforcement of adjudication awards continues to be strongly supported by the Courts with the options potentially available to a respondent party on enforcement being extremely limited.

While in principle set-off remains one such option where there are competing awards between two parties, the party inviting the court to exercise its discretion to permit set-off must be astute to ensure that all the first three stages of Akenhead J’s four-stage test have been satisfied. It is suggested that such cases will be rare indeed given the further support for the policy of ‘pay now, argue later’ provided by the court in *BexHeat Ltd v Essex Services Group Ltd* [2022] EWHC 936 (TCC).

The further question as to whether an adjudication award in relation to one project can be set off against an adjudication award in relation to a completely different project, but between the same two parties, remains to be decided.

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