



Awarding more than what was claimed for does not crack the armour of a “smash-and-grab” adjudication decision

In *Bell Building Ltd v TClarke Contracting Ltd* [2024], the Technology and Construction Court (TCC) considered whether it should enforce an adjudicator’s decision, where the sum eventually awarded was greater than the sum ostensibly sought on the face of an adjudication referral.

Courts generally will not interfere with a decision an adjudicator makes, regardless of errors of procedure, fact or law, unless it is clear that the adjudicator exceeded their jurisdiction or seriously breached the rules of natural justice. By making a higher award, did this Adjudicator in this case take it upon himself to “value” the work done and thus exceed his powers? This was the central issue before the Court.

Key takeaways:

- **The Adjudicator did not undertake a valuation exercise in the smash-and-grab claim; he merely “corrected the arithmetic” based on submissions made by the responding party. Natural justice was not breached and the Adjudicator did not exceed his jurisdiction in arriving at his decision.**
- **The TCC’s robust approach to the enforcement of adjudication decisions is very much alive.**
- **Parties in adjudication need to tread carefully and avoid submissions that open the door to greater assessments of the sum due—adjudicators can and will act on submissions, so be careful what you argue for.**

Background

TClarke Contracting Ltd (“TCL”) was engaged as the main contractor in respect of the construction of a London data centre. In November 2021, TCL engaged Bell Building Ltd (“Bell”) as a subcontractor under a JCT Design and Build Sub-Contract 2016 Edition (the “Contract”) to supply and install new sub- and superstructures at the property.

In April 2023, Bell issued interim payment application number 18 in the gross sum of c.£2.9m. TCL responded by serving a purported Pay Less Notice in the reduced sum of c.£710k, and paid that amount.

The parties fell into dispute as to whether the Pay Less Notice served by TCL was valid. Bell referred the dispute to adjudication and sought payment in the gross sum of c.£1.4m plus VAT (the “Claim”) - less than half the sum notified in Bell’s payment application nr. 18. Bell had based its calculation on sums that TCL had already paid, including sums paid in respect of a subsequent payment cycle (application nr. 19).

Adjudicator's Award

In the adjudication, TCL challenged Bell’s calculation of the c.£1.4m sought. TCL’s position—which the Adjudicator accepted—was that only payments made in respect of payment cycle nr. 18 could be taken into account.

In September 2023, the Adjudicator determined that the Pay Less Notice was invalid and ineffective. Recalculating the value of the Claim to remove the payment made against subsequent application nr. 19, the Adjudicator awarded Bell the sum of £2,129,672.69, plus VAT, interest and costs (the “Decision”). As such, the Decision was approximately £700k more than the £1.4m Bell had initially claimed.

Enforcement Proceedings

In response to the Adjudicator’s Decision, TCL initiated proceedings under Part 8 of the Civil Procedure Rules (“CPR”) in which it sought a binding declaration that the Pay Less Notice was valid and

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the Adjudicator's Decision should not be enforced. In advancing its claim, TCL relied on several variations to the Contract which were relatively complex in nature.

The process under Part 8 of the CPR involves fewer procedural steps than the full-blown Part 7 procedure. The courts have, however, emphasised repeatedly that Part 8 is suitable only for questions which are unlikely to involve substantial disputes of fact.

In its judgment dated 29 April 2024, the Court refused to make a Part 8 declaration on the basis that it was "*plainly inappropriate*" to use the short-form Part 8 process in this instance. Disputes involving contract variations ordinarily would require witness evidence to resolve, and TCL's claim should therefore proceed as a conventional Part 7 claim.

For its part, Bell issued enforcement proceedings in May 2024. TCL sought to defend the enforcement action, arguing that properly analysed, this was a technical smash-and-grab adjudication. By awarding more than had been claimed by Bell, the Adjudicator had carried out a valuation exercise, and in so doing had exceeded his jurisdiction. Further, since there was no prior suggestion that he might award a greater sum, that the Adjudicator had breached the rules of natural justice.

Bell countered that its adjudication referral gave the Adjudicator licence to grant "*such other relief as is necessary, just and equitable to resolve the dispute.*" Recalculating the amount to be paid was therefore within the scope of the referral, Bell argued.

Held

Mr. Jonathan Acton Davis KC, sitting as a Deputy High Court Judge, rejected TCL's submissions and granted summary judgment enforcing the Decision, for the following reasons:

1. The Adjudicator acted within jurisdiction and natural justice was not breached.

It is only if adjudicators go off on a 'frolic of their own', or decide a case upon a factual/legal basis not argued/advanced by either side without giving the parties opportunity to comment, that breaches of natural justice come into play. Here, the Adjudicator had licence to grant whatever relief was deemed necessary, and both parties were aware of the material the Adjudicator relied upon to do so, including TCL's own submissions regarding the quantum of the Claim. Therefore, the Adjudicator's Decision "*was a product of responding to and accepting the case advanced by TCL... he did not carry out a valuation: he corrected the arithmetic*".

2. TCL's submissions opened the door to the Adjudicator's Decision.

The TCC restated the key legal principles surrounding jurisdiction, among them the principle that the ambit of an adjudication may unavoidably be widened by the defence(s) advanced by the responding party. In this instance, TCL's defences to the quantum of the Claim "*opened up the possibility of a different, greater assessment of the sum due than claimed.*" There was no arguable defence to enforcement of the Decision and Bell was entitled to summary judgment.

Analysis

Challenges to the enforcement of adjudicators' decisions rarely succeed—this case serves as a reminder of just how difficult it can be to successfully argue that an adjudicator lacked jurisdiction or materially breached the rules of natural justice.

The greater lesson? Be vigilant in submissions when responding to an adjudication referral. The responding party's arguments could inadvertently widen the scope for larger awards—be careful what you argue for.

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