

# SET OFF AGAINST ANOTHER ADJUDICATION DECISION? ONLY IN A LIMITED SET OF CIRCUMSTANCES.

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*“...this is a situation where every possible feature of a building contract is in play: defects, delays, valuation disputes and termination/repudiation. In such circumstances, absent ADR or a swift settlement, I do not consider that serial (and nakedly tactical) adjudications are the best method of achieving a comprehensive and binding resolution of the disputes between the parties.”*

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Notwithstanding these prudent comments from Coulson J (as he then was) in *JPA Design and Build Ltd v Sentosa (UK) Ltd* [2009] EWHC 2312 (TCC), it remains common practice for parties to commence multiple adjudications against one another, often for tactical reasons.

For example, party A might obtain a favourable adjudication decision ordering party B to pay it £10,000 due to party B's failure to serve a timely and valid pay less notice. Party B might separately commence adjudication proceedings claiming damages of £12,000 following party A's repudiatory breach of the contract. If party B succeeds in its claim in full or in part, it may contend that it should not be required to make payment of the £10,000 to party A pursuant to the first adjudication decision, because the second decision should be set off against the first.

As we have recently been reminded by the case of *FK Construction Limited v ISG Retail Limited* [2023] EWHC 1042 (TCC), the circumstances in which the court will permit one adjudication decision to be set-off against another are limited. Fundamentally, this is because of the court's well-established, robust approach to adjudication enforcement.

## **FK Construction Limited v ISG Retail Limited**

### **The facts**

The relevant facts are, in summary:

1. FK applied to enforce an adjudication decision of Mr Allan Wood directing ISG to pay c.£1.7m plus interest and costs (the “Wood Decision”).
2. FK and ISG had engaged in six other sets of adjudication proceedings.
3. In one of the decisions (the “Molloy Decision”), which related to the same project as the Wood Decision, the adjudicator had determined that the gross value of the works was c.£3.7m. As ISG had already paid c.£2.8m in respect of FK's works on that project, this suggested that FK's further entitlement on that project was c.£900,000.
4. Three of the adjudications related to a different project, referred to as Project Triathlon. The net effect of the three decisions (the “Triathlon Decisions”) was that FK owed to ISG the sum of c.£67,000.

5. ISG resisted enforcement on the grounds that the court should exercise its discretion to order a set off or withholding against the Wood Decision by reason of the Molloy Decision and/or the Triathlon Decisions.

6. ISG did not otherwise challenge the validity or enforceability of the Wood Decision.

### **Applicable principles**

The general position is that adjudicators' decisions which direct the payment of money by one party to the other are to be enforced summarily and expeditiously unless there is a valid jurisdictional or natural justice defence which renders enforcement inappropriate.

It follows from this general position that, where parties engage in sequential adjudications, the correct approach is generally that parties must comply with each decision in turn at the end of each adjudication. As Jackson J (as he then was) explained in *Interserve Industrial Services Limited v Cleveland Bridge UK Limited* [2006] EWHC 741 (TCC):

*“...Where parties to a construction contract engage in successive adjudications, each focused upon the parties' current rights and remedies, in my view the correct approach is as follows. At the end of each adjudication, absent special circumstances, the losing party must comply with the adjudicator's decision. He cannot withhold payment on the ground of his anticipated recovery in a future adjudication based upon different issues...”*

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

1. First, where there is a specified contractual right to set off. This will be a relatively rare exception because, if the contractual provision offends against the statutory requirement for immediate enforcement of an adjudicator's decision (see section 108 of the 1996 Act and 30.1 of the Scheme), the provision will be struck down as unenforceable.



2. Second, 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. An example might be where an adjudicator is simply declaring that an overall amount is due or is due for certification, rather than directing a balance should actually be paid, a legitimate set off or withholding may be justified when that amount falls due for payment or certification in the future. It is necessary to analyse the decision itself to determine whether this exception arises.
3. Third, 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 court has a discretion in an appropriate case to set one of the decisions off from the other.

### The third exception

ISG sought to rely on the third exception, in relation to which there are two authorities of particular relevance.

The first is *HS Works Limited v Enterprise Managed Services Limited* [2009] EWHC 729 (TCC), where Akenhead J identified the following steps that needed to be considered before the court would permit one decision to be set off against another:

1. 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 step.
2. If both are valid, it is then necessary to consider if both are capable of being enforced or given effect to. If one or the other is not so capable, the question of set off does not arise.

3. 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.
4. 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.

On the facts of the case, the judge determined that the two adjudication decisions he was asked to enforce were valid and enforceable, that the parties and the court were required to give effect to both decisions, and that the practical way forward was to make an order that reflected the net effect of the decisions (rather than ordering one party to pay a sum with the other party then immediately being required to hand back all or the bulk of what had been paid).

The second relevant authority is *JPA Design and Build Limited v Sentosa (UK) Limited* [2009] EWHC 2312 (TCC). JPA had an adjudicator's decision in its favour worth £300,000 and Sentosa had a decision in its favour worth £180,000. The judge permitted Sentosa's claim to set off the £180,000 against the £300,000, referring to the court's "equitable jurisdiction" to set off judgments or orders for payment against one another.

### Smith J's decision

Smith J rejected ISG's claim for a set off (or withholding) either in respect of the Molloy Decision or the Triathlon Decisions on the basis of the guidance given by Akenhead J in *HS Works* for the following reasons:

1. ISG fell at the first hurdle of validity. It had not commenced enforcement proceedings in respect of the Molloy Decision or the Triathlon Decisions, and therefore the court could not consider (nor had it been asked to consider) whether those decisions were valid. This was in contrast to *HS Works* and *JPA*, where the court was dealing with the enforcement of the two decisions simultaneously.
2. Similarly, in the absence of enforcement proceedings in relation to those Decisions, the court could not determine whether the Molloy Decision or the Triathlon Decisions were capable of being enforced.
3. The fact that no separate proceedings had been commenced to enforce the Molloy Decision or the Triathlon Decisions meant that ISG also failed at the third step of the analysis.
4. In these circumstances, the court did not have a discretion to permit a set off or withholding. However, if it had such a discretion, no set off or withholding would have been permitted because (a) there was no suggestion in the Wood Decision that there might be a set off or withholding against the sum due, (b) no payments were due or flowing from the Molloy Decision and ISG had not sought to allege any overpayment in the context of that adjudication and (c) an order in the terms sought by ISG would plainly undermine the court's robust policy of enforcement and would risk undermining the purpose of the 1996 Act.

FK was therefore granted summary judgment enforcing the Wood Decision in full.





## Conclusions

It remains the case that it will be in only very limited circumstances that the court will permit a party to set off one adjudication decision against another. What the decision in *FK Construction* makes clear is that, if a defendant in enforcement proceedings wishes to rely on a second decision to claim a set off (on the basis of the 'third exception'), it is essential for the defendant to have commenced separate proceedings to enforce the second decision. It is also probably necessary for the defendant to convince the court to hear the two sets of enforcement proceedings together. It seems that a failure to do so will likely be fatal to the claim for set off – not least because the court will be unable to consider the validity and enforceability of the second decision.

A further interesting issue that arose in *FK Construction* was whether an adjudication decision in relation to one construction project could be set off against an adjudication decision in relation to another construction project. Smith J noted that this point was "entirely novel", but that it did not need to be determined in light of her other conclusions. Given that it is relatively commonplace for the same parties to be engaged on multiple projects and to engage in adjudications across those projects, this point will almost certainly come before the court again in the future. As a matter of principle, there do not appear to be any good reasons why set off should not be permitted in such a context, provided the criteria set out by Akenhead J in *HS Works* are satisfied.