

Neutral citation number: [2024] EWHC 1713 (TCC)

Construction – Adjudication enforcement – Summary judgment – Whether the court could correct an incontrovertible error in the adjudicator’s approach to the quantification of damages on an application for summary judgment – Whether issue of law capable of being raised by way of partial defence to the summary enforcement of an adjudicator’s decision – Whether decision severable – Adjudicator’s decision enforced only in part – Hutton Construction Ltd v Wilson Properties (London) Ltd [2017] EWHC 517 (TCC), [2017] BLR 344 applied

Case No: HT-2024-LIV-000011

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS

IN LIVERPOOL

TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Liverpool Civil & Family Courts
35 Vernon Street
Liverpool
L2 2BX

Tuesday 28 May 2024

Before:

HIS HONOUR JUDGE HODGE KC
Sitting as a Judge of the High Court

B E T W E E N:

ISG RETAIL LTD

Claimant

- and -

FK CONSTRUCTION LTD

Defendant

MR SEAN BRANNIGAN KC (instructed by **Mantle Law (UK) LLP**, London) appeared on behalf of the **Claimant**

MR SIMON HARGREAVES KC (instructed by **Addleshaw Goddard LLP**, Manchester) appeared on behalf of the **Defendant**

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APPROVED JUDGMENT

JUDGE HODGE KC:

1. This is my extempore judgment on the hearing of an application by the claimant, ISG Retail Ltd (to which I shall refer as **ISG**), dated 12 April, and issued on 15 April, 2024, for the summary enforcement of an adjudicator's decision. The underlying dispute concerns works executed by the defendant, FK Construction Ltd (to which I shall refer as **FK**), as sub-contractor, whilst acting under a construction contract for the claimant, as main contractor, in relation to works to a distribution centre located at London Gateway Logistics Park, Essex.
2. The claimant (and applicant), ISG, is represented by Mr Sean Brannigan KC. The defendant (and respondent), FK, is represented by Mr Simon Hargreaves KC. Both leading counsel have submitted detailed, and helpful, written skeleton arguments, which I have had the opportunity of pre-reading. Happily, both skeleton arguments comply with the guidance for TCC adjudication enforcement claims of being reasonably short and succinct.
3. The decision in question was issued by the adjudicator, Mr Peter Aeberli, on 21 March 2024, although it was subject to a minor correction four days later on 25 March 2024. The adjudication decision relates to two separate categories of work. The first relates to what were described as the '**pallet store defects**'. In relation to these, the decision ordered FK to pay the sum of £191,740.86, plus interest of £6,122.57, to ISG within seven days of the date of the decision. There is no issue as to that part of the adjudicator's decision; and I will give summary judgment in those sums, together with interest subsequent to the date of the adjudicator's decision.
4. The second part of the decision relates to what were described as the 'rooflight underdrawing works', to which I shall simply refer as the '**rooflight works**'. In relation to

these, FK was ordered to pay £370,180, plus interest of £33,214.78, plus any applicable VAT, to ISG. The decision also provided that if ISG were to pay, as it has, an amount in respect of the adjudicator's fees, FK was to reimburse that amount to ISG within seven days of a written request to do so. It seems to me that that sum is also payable to ISG.

5. Nothing has yet been paid pursuant to the adjudicator's decision. ISG says it falls to be enforced in the usual way. FK has raised a limited natural justice objection; but ISG submits that the court can dismiss that objection fairly briskly.
6. Prior to the issue of this Part 7 claim form, in the Technology and Construction Court in Liverpool on 15 April 2024, FK had already issued a Part 8 claim in the Technology and Construction Court in London (on 8 April 2024). That claim is proceeding under case number HT-2024-000133. In response to ISG's application for summary judgment, FK issued an application notice, dated 26 April, and filed on 29 April, 2024, seeking that its Part 8 claim should be heard alongside the summary judgment application, or that the two sets of proceedings should be consolidated. I can conveniently refer to that application as the **'joinder application'**.
7. On the same day as the Part 7 claim form was issued (on 15 April 2024), His Honour Judge Cadwallader, sitting as a judge of the Technology and Construction Court, made an order in the usual form with a view to bringing the summary judgment application on for hearing today. In response to the joinder application, on 30 April 2024, Judge Cadwallader made an order directing that the joinder application would be considered at the summary judgment hearing. It follows that both applications are before me today.
8. There is a considerable volume of evidence in support of, and in opposition to, the summary judgment, and the joinder, applications. The claimant's evidence takes the form of three witness statements from ISG's solicitor, Mr Gurbinder Grewal, a solicitor and partner in Mantle Law (UK) LLP. Those witness statements are dated 12 and 26 April, and 8 May 2024. The evidence from FK comes in the form of two witness statements from its solicitor, Mr Paul Leonard O'Kane, a solicitor and partner in Addleshaw Goddard LLP, FK's solicitors. Those witness statements are dated 26 and 30 April 2024.

9. The most important parts of the witness evidence are, I think, to be found in paragraph 27 of Mr Grewal's witness statement of 26 April and following, and in paragraphs 34 and following of Mr O'Kane's second witness statement of 30 April 2024.
10. In addition to the skeleton arguments, which I have pre-read, Mr Hargreaves (for FK) filed a calculation earlier today, which Mr Brannigan has only had a brief opportunity of considering before this hearing started remotely (by Teams) at two o'clock this afternoon. Mr Hargreaves accepts that there is a slight error in the figure he has provided for the amount FK had been paid up to the breach of contract; the figure should be £54,239.60 rather than £57,989.65. The former (and lower) figure features elsewhere in his calculations.
11. It is, I think, unnecessary to set out the detailed chronology relating to the adjudicator's decision; to the attempt by FK to get him to correct that decision; and to the subsequent, and minor, addition to the decision, which effectively rejected FK's application for the decision to be corrected. The date for payment under the adjudicator's decision was 28 March 2024. On that date, FK wrote to ISG's solicitors indicating its intention to challenge the decision, under Part 8 of the Civil Procedure Rules, on the basis that the adjudicator had failed properly to consider and give effect to a set-off argument advanced by FK, and had erred in his calculation of ISG's measure of damages.
12. As I say, FK has commenced its Part 8 claim, and ISG has commenced this Part 7 claim and seeks summary judgment thereon.
13. There is no dispute between the parties as to the adjudicator's jurisdiction to make the decision that he did.
14. For ISG, Mr Brannigan, submits that FK's first, and primary, argument, that there has been a breach of natural justice because the adjudicator did not consider, or deal with, FK's defence of set-off, is misconceived. He has taken me to the helpful observations of Constable J in his recent decision in *Home Group Ltd v MPS Housing Limited* [2023] EWHC 1946 (TCC) at paragraph 50. In his skeleton argument, Mr Brannigan cites the first three of the legal principles which Constable J distilled from the authorities. (There is a fourth principle, but

it relates to spot-checks and sampling, which has no present relevance.) That case concerned the time constraints which the party which was resisting adjudication enforcement argued had impacted upon its ability to respond fairly to the issues in the adjudication: see paragraph 42. The case was not concerned with an error of the kind that is asserted by FK in the present case. The asserted breach of natural justice in that case was the alleged failure to allow sufficient time to respond to an adjudication claim. Suffice it to say that Constable J reaffirmed the accepted principle that an error by an adjudicator will not ordinarily affect enforcement of his decision. I do not find Constable J's observations on the relevant legal position of particular assistance in the present case, insofar as he was considering issues of breach of natural justice.

15. The substance of Mr Brannigan's submissions are that, even on its own evidence, FK recognises that its set-off case was dealt with by the adjudicator. Rather, its challenge to his decision is essentially on the basis that, whilst the adjudicator considered its set-off argument, FK is unhappy with the way in which he addressed it. In summary, Mr Brannigan submits that this is a prime example of what Chadwick LJ characterised in *Carillion v Devonport Royal Dockyard* [2005] EWCA Civ 1358 as "*simply scrabbling around to find some argument, however tenuous to resist payment*".
16. Mr Hargreaves (for FK) submits that in his calculation of the damages payable in respect of the rooflight works, the adjudicator failed to perform the task that he accepted needed to be undertaken of seeking to put the innocent party – in this case ISG – in the position it would have been in had there been no breach of contract on the part of FK. The adjudicator had, correctly, identified the basis upon which he should approach that task at paragraph 89 of his decision, which not affected by the correction that he made on 25 March. At paragraph 89, the adjudicator stated that it was common ground that in assessing ISG's loss and damage, resulting from FK's breach of contract in stopping work on the rooflight works, the sum which would have been payable by ISG to FK, had it completed those works, should be credited against the costs that ISG had incurred in bringing in others to complete those works, or more correctly, had reasonably incurred having regard to its duty to mitigate its loss. It is, of course, for ISG to prove its loss. Once it has done that, FK has the burden of proving a failure to mitigate.

17. In the paragraphs of his decisions that followed, the adjudicator found that the value of the work that had to be undertaken by ISG to remedy FK's breach was £826,473.46. From that, there had to be deducted the total cost that would have been payable to FK had it carried out all the works, in the sum of £760,000. On a straightforward application of the principles stated at paragraph 89 of the decision, that £760,000 should have been deducted from the £826,473.46 to arrive at the loss suffered by ISG. However, there had, in addition, been works carried out by FK up to the date of its breach of contract. The adjudicator determined that the value of those works was £303,706.54. Of that, only £54,239.60 had been paid by ISG to FK. There is no challenge to any of those figures as determined by the adjudicator.
18. The adjudicator set out his assessment of the loss and damage that ISG had suffered as a result of FK's breach of contract at paragraph 100. He arrived at a figure of £370,180 (net of VAT), which is the figure, together with interest, which is sought to be enforced on this summary judgment application in relation to the rooflight works. At paragraph 100, the adjudicator went on to determine how he had calculated that figure: £826,473.46 were the costs to complete, plus £303,706.54 properly payable to FK for works carried out by it, less £760,000, being the total valuation of the rooflight works had they been carried out and completed by FK. All of those figures were net of VAT.
19. Mr Hargreaves submits that that calculation was erroneous: Rather than adding in £303,706.54 as the amount payable for the value of the works carried out by FK, the adjudicator should only have added in £54,239.60, representing the amount that ISG had actually paid to FK for those works. In other words, the adjudicator had overvalued the second deduction by £249,466.94 because that figure was already comprehended within the £760,000. By allowing a further deduction in respect of that amount, there was effectively a double-counting on the part of the adjudicator. Mr Hargreaves challenges the adjudicator's award in respect of the rooflight works to that extent under the principle set out in the case of *Hutton Construction Ltd v Wilson Properties (London) Ltd* [2017] EWHC 517 (TCC), reported at [2017] BLR 344. Mr Hargreaves has taken me through Coulson J's decision in that case from paragraph 10 through to paragraph 22. Mr Hargreaves acknowledges that if the court accepts his partial defence to this summary judgment application on the basis of the *Hutton* decision, then the court should substitute the correct figure of £120,713.06 for the

adjudicator's award in respect of the rooflight works of £370,180 (i.e. £370,180 – 249,466.54).

20. Mr Hargreaves's primary argument is that there was a breach of natural justice in the way in which the adjudicator undertook his calculation of the sum due in respect of the rooflight works which makes the whole of that part of his adjudication decision unenforceable because it is impossible to sever the good from the bad part of his calculation.
21. However, I am satisfied that there was no want of natural justice here. As it seems to me, this is not a case in which the adjudicator has completely ignored a submission from one of the parties. It is clear, both from his original decision, and from the way in which he approached the application by FK for it to be corrected, that the adjudicator did have regard to FK's submissions; he simply did not agree with them. I do not consider that this is properly a case of want of natural justice.
22. However, it does seem to me to be clear that there was a miscalculation of the amount that was actually due to ISG for FK's breach of contract. Instead of including a sum in respect of the cost of FK's works which ISG had actually paid, the adjudicator took instead the sum that was payable for the works that had actually been performed, even though the majority of the value of those works had not been paid over to FK.
23. I am entirely satisfied that there was an error of approach on the part of the adjudicator on the basis of the actual figures he had found. The question is whether that is the sort of error which can operate to reduce the amount of the adjudicator's decision on an application for summary enforcement of that decision.
24. The mistake arose from including a notional sum (£3303,706.54) as an addition to the claim for damages sustained by ISG when, in fact, what should have been taken is the actual sum that had been paid (£54,239.60). I accept that that is an incontrovertible error on the part of the adjudicator.
25. In the course of his oral submissions, Mr Brannigan emphasised that this was not an arithmetical error on the part of the adjudicator. Rather, it was a difference in the application of his selected methodology. At paragraph 89, the adjudicator had correctly

identified, as common ground between the parties, that the measure of damages was the difference between what ISG had had to pay to an alternative contractor and what it would have paid to FK but for FK's breach of contract. Mr Brannigan submits that the adjudicator set out his approach to the quantification of damage at paragraph 100 of his decision. He took the view that that was the correct method of quantification. He did not incorrectly transpose any figures; rather, his decision reflected his methodology. That methodology involved no mixing up of particular sums; it was a deliberate approach on his part. That is reinforced by the fact that FK asked him to correct what it said was an error in his methodology, and he refused to do so. He was clear in his response to the application to correct his decision: that this was not a clerical error, but what he had intended to do.

26. Moreover, the pleaded case of FK, in the details of its Part 8 claim, characterises the error as one of law and breach of natural justice. I was taken to the details of the claim and, in particular, to paragraph 22(4) and the forms of declaratory relief sought at paragraphs 27(2) and 27(4), both of which characterise the adjudicator's error as one of law.
27. In summary, the adjudicator's decision was founded upon the approach he took to the calculation of damages; there was no arithmetical error in that approach; rather, any error related to the approach itself. This is not a case of miscalculation. It is, as FK have characterised it, an error of law. If the adjudicator got the ultimate figure wrong, then that was the consequence of the approach the adjudicator adopted in identifying the particular sum that was to be deducted. He took the view that that was the amount of the valuation of the works performed by FK at the time of its repudiatory breach of contract. Even when the alleged error was pointed out to him, the adjudicator confirmed his original decision, adding a further explanation as to why he rejected the criticisms advanced by FK.
28. In summary, this was the approach that the adjudicator decided to take. There was, if anything, an incorrect approach, and not an arithmetical error.
29. In the course of his submissions, Mr Hargreaves reiterated his submission that the adjudicator had made an error in setting about his calculation. He had ignored the submissions that FK had made to him as to how to go about the task. He persisted in that approach, even when his error was pointed out to him. He did not deduct the element of the

valuation that had not been paid to FK, even though the need to do so had been drawn to his attention. Mr Hargreaves submits that the adjudicator twice ignored a very simple submission about how to go about the task of calculating the damages for breach of contract. Mr Hargreaves submits that that amounted to a breach of natural justice. That breach of natural justice tainted the whole of the rooflight works part of the decision, and rendered the whole of it unenforceable. If part was tainted, it could not be severed, so as to enable ISG to enforce the good part.

30. Mr Hargreaves accepted that, if driven to rely upon the *Hutton* principle, then the over assessment of damages could, and should, be reduced to the amount that should properly have been assessed on the figures found by the adjudicator.

31. Those were the submissions.

32. As I have already indicated, I am satisfied that the adjudicator did make an error in his approach to the assessment of damages. Essentially, adopting an algebraic formulation, the adjudicator applied the formula:

$$a = b + c - d \text{ where}$$

a is the amount of the adjudicator's award in respect of the rooflight works;

b is the cost of retaining another contractor to complete the works, which the adjudicator quantified in the sum of £826,473.46;

c is the amount payable to FK, quantified in the sum of £303,706.54, and

d is the total value of the rooflight works, had they been completed by FK, in the sum of £760,000.

On that basis, a equals £370,180.

33. I am entirely satisfied that the adjudicator fell into error in taking as c the costs of the works payable by FK, even though only £54,239.60 had, in fact, been paid to FK for those works. In my formulation, c should have been £54,239.60, representing the cost of the works actually paid by ISG, rather than the figure taken by the adjudicator of £303,706.54, representing the amount payable in respect of those works. Had the adjudicator taken that approach, the amount of his award, a , would only have been £120,713.06. The error was in giving ISG the benefit of the value of the works, when it had paid only a fraction of the costs

of them. The fallacy was to have regard to the amount payable of £303,706.54 when £249,466.94 of that had not been paid and was included within the £760,000. As a result, the same sum was taken into account twice.

34. The question is whether the court can correct that error when granting summary judgment to enforce the adjudicator's decision. Notwithstanding the able arguments advanced by Mr Brannigan, I am satisfied that the court can make the necessary adjustment. It is not in any way departing from the figures that were adopted by the adjudicator; rather, it is simply correcting an error in his approach to the application of those figures.
35. I am satisfied that that is an error that can be corrected within the limited confines of the exceptions to the inviolability of an adjudicator's decision, in the context of a summary judgment application, as recognised by Coulson J in *Hutton*. At paragraph 14 of his decision in *Hutton*, Coulson J recognised that in 99 cases out of 100, the fact that an adjudicator had got it wrong will be irrelevant to any enforcement application. At paragraph 17, Coulson J recognised that in order to resist summary judgment on the basis of a Part 8 claim, the defendant must be able to demonstrate three things:
- (a) That there is short, and self-contained, issue which arose in the adjudication, and which the defendant continues to contest.
 - (b) That that issue requires no oral evidence, or any other elaboration beyond that which is capable of being provided during the interlocutory hearing set aside for the enforcement; and
 - (c) That the issue is one which, on a summary judgment application, it would be unconscionable for the court to ignore.
36. I am satisfied that all three of those factors are present in the instant case. The mistake made by the adjudicator is a short, and self-contained, issue which arose in the adjudication, and which the defendant continues to contest. That issue requires no oral evidence, or any other elaboration beyond that which is capable of being provided during this short interlocutory hearing. The issue is one which it would be unconscionable for the court to ignore on this summary judgment application. If the court were to do so, ISG would recover a windfall sum, approaching some quarter of a million pounds.

37. At paragraph 18, Coulson J gave some examples of the situations in which a defendant would be entitled to resist summary judgment on the basis of a Part 8 claim:

“What that means in practice is, for example, that the adjudicator's construction of a contract clause is beyond any rational justification, or that the adjudicator's calculation of the relevant time periods is obviously wrong, or that the adjudicator's categorisation of a document as, say, a payment notice when, on any view, it was not capable of being described as such a document. In a disputed case, anything less would be contrary to the principles in *Macob Civil Engineering Limited v Morrison Construction Limited* [1999] EWHC 254 (TCC), [1999] BLR 93, *Bouygues (UK) Limited v Febrey Structures Limited* [2016] EWHC 1333 (TCC) and *Carillion Construction Ltd v Devenport Royal Dockyard Limited* [2005] EWCA Civ 1358, [2006] BLR 15”.

At paragraph 19, Coulson J stressed that it was “*axiomatic that such an issue could still only be considered by the Court on enforcement if the consequences of the issue raised by the defendant were clear-cut*”.

38. I am satisfied that that is so in the present case. It is entirely clear, on the figures found by the adjudicator, by what amount his decision on the rooflight works issue falls to be reduced in amount. There is no “*arguable inter-leafing of issues*” of the kind that Coulson J considered would almost certainly be fatal to any suggestion by the defendant that their challenge falls within this limited exception.
39. I am satisfied that this issue was one which was capable of, and has been, dealt with shortly at this enforcement hearing. We have not yet even reached the end of the two hours allotted for this hearing, despite the length of this extempore judgment. This is not a case of an application being resisted by a disgruntled defendant in abuse of the court's process. Here, the defendant is simply pointing to an error in the adjudicator's approach to the quantification of damage on the figures he had actually found.
40. I do not consider that the defendant's characterisation of the error as one of law precludes it from raising this point by way of defence. As I pointed out to Mr Brannigan, one of the examples offered by Coulson J of a situation where a defendant might legitimately challenge an adjudicator's decision is where his construction of a contract clause is “*beyond any rational justification*”. An issue of construction is, of course, an issue of law and therefore

it cannot be the case that merely because an issue is one of law, it is incapable of being raised by way of defence to the summary enforcement of an adjudicator's decision.

41. The issue of law is one as to the adjudicator's approach to the quantification of damages. At paragraph 89 of his decision, he had already set out the basis on which the damages were to be quantified. In one sense, that agreed basis was deficient because it failed to recognise that if any sums had been paid by ISG to FK in respect of the rooflights works, then they would also represent a loss. The adjudicator made provision for that; but he did so, not by taking the actual costs of the works, but a valuation of those works which was far in excess of the amount that had actually been paid, and thus far in excess of the additional loss that ISG had suffered.
42. I am satisfied that it would be right for the court to correct that error, and that it would be unconscionable for the court to ignore it.
43. For all those reasons, therefore, I uphold FK's limited defence to the enforcement of the decision in respect of the rooflight works. Instead of the amount awarded by the adjudicator of £303,706.54, the court should enforce that part of the decision to the extent of only £120,713.06. The court will therefore grant summary judgment accordingly.
44. That concludes this extempore judgment.

End of Judgment

Having been informed that there were no admissible offers of settlement, the court determined that costs should follow the event. The court's order was as follows:

- 1 The claimant's application for summary judgment is granted.
- 2 Judgment for the claimant in the sums of:
 - (i) £120,713.06 plus interest of £12,236.64 (up to 28 May 2024) and from 29 May 2024 to the date of payment at a daily rate of £20.67;
 - (ii) £191,740.86 plus interest of £9,426.69 (up to 28 May 2024) and from 29 May 2024 to the date of payment at a daily rate of £48.59; and
 - (iii) £18,000 plus interest of £196.08 (up to 28 May 2024) and from 29 May 2024 to the date of payment at a daily rate of £4.56.

3 The defendant is to pay the claimant's costs, summarily assessed in the sum of £46,586.

4 The sums at paragraphs 2 and 3 are to be paid to the claimant in cleared funds by 4pm on 11 June 2024.

5 No order on the defendant's application to consolidate Claim No HT-2024-LIV-000011 and Claim No HT-2024-000133.

Transcript of a recording by Acolad UK Ltd
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