

Set-off and Adjudication

A thorny issue in adjudication has been whether the losing party may set-off against a sum an adjudicator has decided is due.

The general position is that valid adjudication decisions should be enforced without set-off or cross-claims. Any set-offs should be raised in the adjudication and not in enforcement proceedings (*Rok Building v Celtic Composting Systems* [2009]). However, in *Balfour Beatty Construction v Serco* [2004] Jackson J (as he then was) considered that where it follows logically from an adjudicator's decision that one party is entitled to recover a specific sum, that party may set-off that sum against monies payable to the other party pursuant to the adjudicator's decision. Secondly, where such entitlement has not been determined expressly or impliedly by the adjudicator's decision then the question of set-off will depend upon the terms of the contract and the circumstances of the case. It should be noted that the decision itself is the actual award and any other finding in relation to the rights of the parties that forms an essential component or basis for that award (*Hyder Consulting (UK) v Carillion Construction* [2011]). In *Squibb Group v Vertase FLI* [2012] Coulson J considered there were two possible exceptions to the general rule. Firstly and rarely, there may be clear words permitting set-off, provided these do not offend the requirement for immediate enforcement of the decision. Secondly, if the adjudicator's decision is in the nature of a declaration as to the proper operation of the contract payment machinery and the adjudicator identifies a sum that should be the subject of that machinery then, if a withholding notice can legitimately be served in accordance with those contractual payment provisions, the set-off may give rise to an arguable defence.

Akenhead J has helpfully summarised the position in the recent case of *Thameside Construction Company v Stevens & Anor* [2013]:

“(a) The first exercise should be to interpret or construe what the adjudicator has decided. In that context, one can look at the dispute as it was referred to him or her. That can involve

looking at the Notice of Adjudication, the Referral Notice, the Response and other "pleading" type documents. One can have regard to the underlying construction contract. Primarily, one needs to look at the decision itself.

*(b) In looking at what the adjudicator decided, one can distinguish between the decisive and directive parts of the decision on the one hand and the reasoning on the other, although the decisive and directive parts need to be construed to include other findings which form an essential component of or basis for the decision (see **Hyder**).*

(c) The general position is that adjudicators' decisions which direct that one or other party is to pay money are to be honoured and that no set-off or withholding against payment of that amount should be permitted.

*(d) There are limited exceptions. If there is a specified contractual right to set-off which does not offend against the statutory requirement for immediate enforcement of an adjudicator's decision, that is an exception albeit that it will be a relatively rare one. Where an adjudicator is simply declaring that an overall amount is due or is due for certification, rather than directing that a balance should actually be paid, it may well be that a legitimate set-off or withholding may be justified when that amount falls due for payment or certification in the future. (See **Squibb**).*

*(e) Where otherwise it can be determined from the adjudicator's decision that the adjudicator is permitting a further set-off to be made against the sum otherwise decided as payable, that may well be sufficient to allow the set-off to be made (see **Balfour Beatty**).*"

In *Thameside*, Akenhead J decided that it would be wrong to interpret the adjudication decision to mean that the adjudicator expected the losing party to be able to set-off an undisputed claim for liquidated damages. This was not a case that fell into any of the main exceptions. It was of course open to the losing party to adjudicate or go to final dispute resolution in respect of the liquidated damages claim.

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