

John Graham v Technicas Reunidas UK Ltd - Importance of earlier adjudicators' decisions / arbitrators' awards?

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This case involved an application by John Graham Construction Limited (“John Graham”) for summary judgment to enforce an Adjudicator’s decision dated April 2021 (the “Decision” or “Adjudication 4”) against Technicas Reunidas UK Ltd (“TR UK”). TR UK had partially complied with the Decision, but left unpaid £355,724.95 in respect of a disputed contra charge for provisional costs incurred appointing another subcontractor to carry out John Graham’s abandoned works.

The case provides guidance to those considering resisting enforcement of an adjudicator’s decision on the basis that it conflicts with an earlier decision (or arbitrator’s award).

Background

1. TR UK employed John Graham as its sub-contractor in respect of the construction of the Tees Renewable Energy Plant (the “Project”). An acrimonious history between the parties exists, including four adjudications and two arbitrations.
2. In February 2019, John Graham referred a dispute relating to the scope of works on the Project to adjudication (“Adjudication 1”) in which it was successful. The Adjudicator agreed that the scope was limited.
3. Adjudication 1 was challenged by TR UK through arbitration (“Arbitration 1”), the upshot of which was a final and binding resolution. Arbitration 1 issued two partial awards (together “Award 1”) concluding, in favour of TR UK, that the decision in Adjudication 1 was wrong (therefore, Award 1 overturned the earlier decision in Adjudication 1). The scope of work was not limited as John Graham alleged.
4. After Award 1, John Graham referred a dispute “as to the correct value of Interim Payment Application Number 47” to adjudication (“Adjudication 4”). Adjudication 4 included the disputed contra charge.
 - 4.1 TR UK’s argument in response to Adjudication 4 was that John Graham had failed to complete works within its scope as defined in Award 1, those works had to be completed by others and TR UK was entitled to deduct from John Graham the costs incurred.
 - 4.2 To this John Graham said it was not in breach of contract for refusing to carry out the works because it was simply following the temporarily binding decision in Adjudication 1. TR UK said that John Graham had done so at its own risk, and that Award 1 established that John Graham was in breach of contract.
5. The Adjudicator in Adjudication 4 found that TR UK was not entitled to levy the contra charge (“Adjudication 4 Decision”). TR UK paid the sums ordered by the Adjudicator, except the portion relating to the contra charge, which it said was in excess of the Adjudicator’s jurisdiction.
6. On 30 September 2021, John Graham commenced proceedings for summary judgment to enforce the Adjudication 4 Decision seeking payment of the unpaid contra charge (plus interest).
7. This was resisted by TR UK on the basis that by the Decision in Adjudication 4, relating to the contra charge, the Adjudicator:
 - “(1) undermined and in substance overrode Award 1;
 - (2) failed to act in accordance with the powers granted to him by the Subcontract; and
 - (3) answered the wrong question”.
8. John Graham denied that the Adjudicator had acted outside his jurisdiction and in any event, claimed TR UK had waived its right to raise a jurisdictional challenge at this stage.

Issue 1: “Undermining the Award”

9. The Adjudicator did not undermine the arbitration award. The Court flagged a key distinction to be drawn between “on the one hand, the nature of the first decision (what it decided) and the consequences of that decision”. The Adjudicator was not “re-deciding something that was not before him” nor did he “re-open” the dispute.

10. The Adjudicator considered TR UK’s case, but rejected it as a matter of causation. He may have failed to apply Award 1 correctly, but he did not undermine it.

Issue 2: “No Power”

11. Essentially this was the same argument as in Issue 1, but looked at it through the prism of the contractual provisions (relevant terms), rather than the general law. This issue failed (similar reasons were given as to the above).

Issue 3: “The wrong question”

12. The Court said that at the most general level of abstraction, the relevant question for the Adjudicator to decide was “was the Defendant entitled to levy the Contra Charge?”. The Adjudicator decided that TR UK was not so entitled. The error relied upon by TR UK (if any) was found in the Adjudicator’s reasons for not accepting TR UK’s position. This is not the same as answering the wrong question. The Adjudicator had addressed the breach and the loss flowing from this breach in his findings. He concluded that the loss claimed in the contra charge did not flow from the breach of contract. The judge said “Whether it is right or wrong is immaterial; it was the Adjudicator’s answer to the correct question”.

Court’s Decision

13. Ultimately, the judge disagreed with TR UK and enforced the balance of the Adjudication 4 Decision; it was held that the Adjudicator expressly acknowledged he was bound by Award 1 and he did not answer the wrong question.

Key takeaways

14. The judgment serves as a useful reminder of the general principles in relation to the enforcement of decisions. An Adjudicator is entitled to give a wrong answer to the (right) question referred to him.

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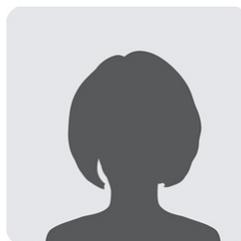


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