

# Enforcement of adjudicators' decisions applying earlier decisions and the (non-existent) concept of the 'unwaivable' jurisdictional challenge (John Graham Construction Ltd v Tecnicas Reunidas UK Ltd)

This analysis was first published on Lexis®PSL on 2 February 2022 and can be found [here](#)

**Construction analysis: The judgment considers: (1) the scope and extent of the court's enquiry into whether a later adjudication decision 'overrides or undermines' an earlier decision (or judgment or arbitral award) so as to be outside the adjudicator's jurisdiction, in particular where the earlier decision interprets a contract and the later decision purports to apply that contract as interpreted to determine financial consequences (paras [29]–[31] and [54]–[58]); (2) when an adjudicator will be considered to have answered the wrong question, in excess of jurisdiction (paras [32]–[34] and [60]–[63]); and (3) (obiter) whether there is such a thing as a jurisdictional challenge that is 'incapable of being waived', as had been considered in *Aqua Leisure International Ltd v Benchmark Leisure Ltd* (at paras [35]–[37] and [75]–[79]).** Written by Neil Dowers, barrister at 4 Pump Court.

*John Graham Construction Ltd v Tecnicas Reunidas UK Ltd* [\[2022\] EWHC 155 \(TCC\)](#)

## What are the practical implications of this case?

The case provides guidance to anybody considering resisting enforcement of an adjudicator's decision on the basis that it conflicts with an earlier adjudication decision (or judgment or arbitral award). It makes clear that the court's review is limited: provided the later decision does not decide again something that has already been decided, the later decision is likely to be enforceable even if there is an error of fact or law in applying the earlier decision. The guidance is particularly welcome in circumstances where earlier judgments and commentaries have used various terms to describe where the rule operates to exclude a later adjudicator's jurisdiction, including 'open up', 'override or undermine', 'decide again (or re-decide)', 'materially decide matters contrary to what has been decided', 'decide the dispute a way materially inconsistent with the earlier decision' (see *Balfour Beatty Engineering Services (HY) Ltd v Shepherd Construction Ltd* [\[2009\] EWHC 2218 \(TCC\)](#); [127 Con LR 110](#) (paras [41] and [67]); *Amey Wye Valley Ltd v The County of Herefordshire District Council* [\[2016\] EWHC 2368 \(TCC\)](#) [2016] BLR 698, para [35]).

This judgment will also be a setback for anyone seeking to argue that certain jurisdictional objections are so fundamental as to be unwaivable. The obiter comments of His Honour Judge Bird QC in *Aqua Leisure International Ltd v Benchmark Leisure Ltd* [\[2020\] EWHC 3511 \(TCC\)](#) suggested that there is a class of jurisdictional objection so fundamental that a party is not able to waive it. Mr Justice Morris considered the authorities, heard argument and (obiter) decided that he was not satisfied that such a separate class exists.

## What was the background?

The defendant was a contractor and claimant its sub-contractor on the Tees Renewable Energy Plant biomass power station project.

In 2018, the parties fell into dispute about the scope of work under the sub-contract: the claimant said its scope was limited to works necessary to achieve certain contractual milestones; the defendant said it included works beyond the milestones.

In 2019, the claimant referred the dispute as to the scope of works to the first in what would be a series of four adjudications between the parties (Adjudication 1). The claimant was successful and the adjudicator declared that the scope of work was limited as alleged.

The defendant challenged this decision in arbitration (Arbitration 1). In 2020 and early 2021, the arbitral tribunal issued two awards, effectively finding for the defendant and reversing Adjudication 1.

In March 2021, after the awards in Arbitration 1, the claimant referred a dispute as to the value of one of its interim payment applications to a further adjudication (Adjudication 4). Adjudication 4 covered a number of issues, including a disputed contracharge. The defendant said that the claimant had failed to carry out works that were within its scope as decided in the first award in Arbitration 1. The contracharge covered what the defendant said were its damages for the claimant's breach of sub-contract in failing to carry out those works.

The claimant said that it was not in breach of contract for refusing to carry out the works because at the time it did so, it was following the temporarily binding decision in Adjudication 1. The defendant said that was wrong, and that Award 1 established that the claimant was in breach of contract. The defendant did not reserve its position on jurisdiction or raise any argument that a finding along the lines of the claimant's submissions would be in excess of jurisdiction.

The adjudicator decided, essentially, that the claimant was in breach of contract in refusing to carry out the works, but that the loss suffered by the defendant was caused by the parties following the temporarily binding decision in Adjudication 1, not by the breach of contract. The adjudicator therefore decided that the defendant was not entitled to levy the contracharge.

The defendant paid the sums ordered by the adjudicator, except the portion relating to the contracharge, which it said was in excess of the adjudicator's jurisdiction.

The claimant issued proceedings and sought summary judgment to enforce the decision. The defendant defended proceedings on the basis that, by the decision on the contracharge, the adjudicator:

- '(1) undermined and in substance overrode [the first award in Arbitration 1];
- (2) failed to act in accordance with the powers granted to him by the Subcontract;
- (3) *answered the wrong question.*'

The claimant's case was that there was no error outside the adjudicator's jurisdiction and that, even if there had been, the defendant had waived its right to rely on it. The defendant said in turn that it could not have waived the objection because: (1) the jurisdictional error was fundamental and not capable of being waived; and (2) it could not waive the jurisdictional challenge because it did not know of the potential challenge until the decision was issued.

### **What did the court decide?**

The court decided that the adjudicator had acted within his jurisdiction in reaching the decision.

On issue (1), the question for the court was whether the decision in Adjudication 4 undermined or overrode the decision in Arbitration 1 in the sense of deciding again something that had already been decided. The court distinguished between a dispute as to the true construction of contractual terms and a dispute as to the financial consequences of the true construction as found. The adjudicator in Adjudication 4 had not re-decided anything that had been subject of Arbitration 1; the defendant's argument was in substance that the adjudicator had 'failed properly to apply' the decision, which is not a matter going to his jurisdiction.

On issue (2), the argument was essentially the same as on issue (1), though looked at through the prism of the adjudicator's contractual powers rather than powers under the general law. That argument failed for the same reasons as issue (1).

On issue (3), the court distinguished between the question the adjudicator answered and the reasons the adjudicator gave. At the highest level of abstraction, the adjudicator was asked 'was the defendant entitled to levy the contracharge?' and he answered that question. Even if it was appropriate to analyse the issue at the next-highest level of abstraction (eg was the claimant in breach of contract and, if so, what was the loss flowing from that?), the adjudicator answered both of those questions. Whether he had answered any question wrongly had no bearing on his jurisdiction.

On waiver, Morris J considered the authorities and (obiter) stated that he was not persuaded by the comments in *Aqua Leisure* that there is a distinct class of jurisdictional objection (such as where the decision is contrary to a statute) that is so fundamental it cannot be waived. The comments the defendant relied upon from *Aqua Leisure* were obiter and made without the court having heard argument on the point. The concept of an unwaivable jurisdictional objection was inconsistent with the Court of Appeal's decision in *Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd* [2019] 3 All ER 337; [2019] EWCA Civ 27, in which Lord Justice Coulson stated (obiter) that he would have considered a jurisdictional objection arising by operation of law upon the insolvency of the

claimant to have been waived. However, the issue did not arise before Morris J because, even if there had been an excess of jurisdiction (and Morris J found there was not), the defendant could not reasonably have known of that before receiving the decision, and so its failure to raise an objection earlier did not amount to waiver.

#### Case details

- Court: High Court of Justice, Business and Property Courts, Technology and Construction Court (QBD)
- Judge: The Honourable Mr Justice Morris
- Date of judgment: 27 January 2022

Neil Dowers is a barrister at 4 Pump Court. If you have any questions about membership of LexisPSL's Case Analysis Expert Panels, please contact [caseanalysiscommissioning@lexisnexis.co.uk](mailto:caseanalysiscommissioning@lexisnexis.co.uk).

Want to read more? Sign up for a free trial below.

**FREE TRIAL**

The Future of Law. Since 1818.