

# “Route to the decision”

*Scottish court rejects challenge to adjudicator’s decision that did not expressly address a material line of defence*



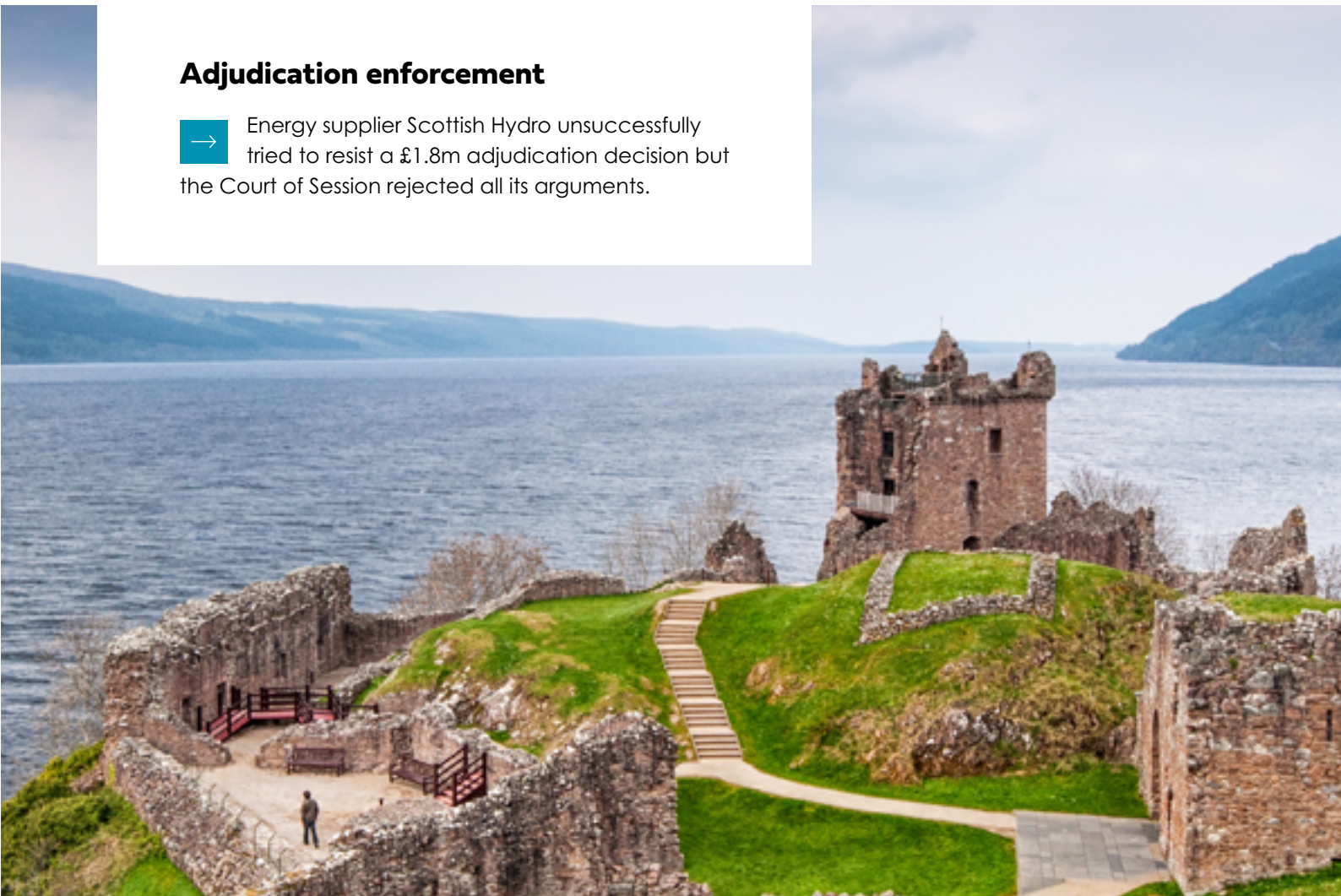
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In *UK Grid Solutions Limited and Amey Power Services Limited v Scottish Hydro Electric Transmission PLC*,<sup>1</sup> the unsuccessful party to an adjudication sought to resist enforcement on the grounds that 1) the adjudicator had failed to address a material defence in the decision and 2) errors in the part of the decision ordering payment rendered it ‘meaningless’. In rejecting those arguments and enforcing the decision, the court summarised the Scottish judiciary’s non-interventionist approach to adjudication.

<sup>1</sup> *UK Grid Solutions Limited and Amey Power Services Limited v Scottish Hydro Electric Transmission PLC* [2024] CSOH 5.

## Adjudication enforcement

→ Energy supplier Scottish Hydro unsuccessfully tried to resist a £1.8m adjudication decision but the Court of Session rejected all its arguments.



## Background

### The parties

The dispute concerned construction works at an electrical substation near Loch Ness in the Scottish Highlands. The construction contract was between Scottish Hydro Electric Transmission PLC (**Scottish Hydro**) and a joint venture consortium of UK Grid Solutions Limited and Amey Power Services Limited (the **JV**).

### The construction contract, the works and the transformers

Under the contract, the JV was responsible for constructing a new substation building and installing related infrastructure (the **works**).

However, Scottish Hydro was responsible for delivering and installing two transformers.

The dispute arose because of delays in Scottish Hydro delivering and installing the transformers.

### The transformer delays and the project manager's assessment

Under the contract, the transformer delay gave rise to a **compensation event** in favour of the JV.

However, the project manager assessed that the transformer delay had had no impact on the costs, key dates or completion date.

The JV did not accept the project manager's assessment on the impacts of the delay and submitted its own, but Scottish Hydro rejected it and valued the JV's claim at nil.

## Adjudication

### The JV's adjudication claim

The JV referred the dispute

to adjudication. It claimed it was entitled under the terms of the contract to an increase in the costs, extensions of time and alleviation from liability for liquidated damages for missed completion dates.

The JV requested that the adjudicator make an order for payment against Scottish Hydro with interest and that he provide reasons for his decision.

### Scottish Hydro's defences

Scottish Hydro denied the JV was entitled to any extension of time because the JV was in *critical and culpable delay* and had failed to meet the contract completion dates due to lack of progress, poor coordination and defects.

In its rejoinder, Scottish Hydro argued that even if the JV was entitled to an increase in the costs in respect of the transformer delays, Scottish Hydro's entitlement to liquidated damages for missed completion dates was deductible as set off (the **set off defence**), reducing any order for payment to nil.

### Prospective vs retrospective assessment of delay events

A significant focus of the parties' submissions and evidence was on whether the delay events should be assessed on a prospective or retrospective basis.

The JV argued for a prospective approach with the impacts of the transformer delays assessed from the date the project manager ought to have instructed the JV to provide quotations.

Conversely, Scottish Hydro argued that the impact of the transformer delays should be

assessed retrospectively, taking account of what had actually happened as a result of those delays.

The adjudicator's decision focused predominantly on this issue.

### The adjudicator's decision

The adjudicator found in the JV's favour. He agreed with the JV's argument that assessment of the compensation event should be prospective and not retrospective:

*I agree with the contractor in the matter. If the compensation event had been assessed in accordance with the Contract, payments would have been made accordingly. Adjudication is a process to facilitate cash flow. Therefore, had the Project Manager certified the payments in accordance with my assessments in a prospective nature, the Employer would be in no worse financial status.*

The adjudicator ordered Scottish Hydro to pay over £1.8 million to the JV, plus more than £98,000 in interest. Unfortunately, there were typographical errors in the part of the adjudicator's decision ordering payment where he had cut and pasted text from the JV's claim:

*I order for payment of £1,834,573.43, or such other sum as the Adjudicator may decide, within 7 days of the Adjudicator's.*

Neither party applied for a correction of the errors in the order for payment.



### Enforcement proceedings in the Court of Session

Scottish Hydro refused to comply with the adjudicator's decision so the JV raised enforcement proceedings in the Court of Session (the **Court**).

### Scottish Hydro's grounds for resisting enforcement

Scottish Hydro sought to defend the enforcement on three grounds:

1. The adjudicator had failed exhaust his jurisdiction because he did not address and determine Scottish Hydro's set off defence in his decision. This was a material line of defence.
2. If the adjudicator did address and reject the set off defence in the decision, he had failed to provide reasons.
3. The errors in the adjudicator's order for payment meant

that it was meaningless and unenforceable because it did not order Scottish Hydro to make payment of a specified sum or specify a time period in which payment was to be made.

### The Court's Decision

#### Summary of the courts' approach to enforcement

Taking a robust approach, the Court rejected all of Scottish Hydro's grounds of defence.

The Court's decision began with a reminder that the statutory construction adjudication regime was introduced to maintain cash flow in the industry and operates on an *argue now pay later* basis. It then provided a summary of helpful guidelines from the caselaw on when the courts will and will not interfere with an adjudicator's decision:<sup>2</sup>

1. The court will only interfere in the

plainest of cases.

2. The court is chary of technical defences.
3. An adjudicator's decision will be binding if they have answered the right questions, even if they are wrong in fact or law.
4. The court will intervene if an adjudicator:
  - a. Was not validly appointed
  - b. Acted outside their jurisdiction
  - c. Did not comply with the rules of natural justice.
  - d. Provided inadequate reasoning.

#### Grounds 1 & 2: The set off defence

*An adjudicator must address and determine a material line of defence*

The Court rejected Scottish Hydro's first and second grounds of defence that the adjudicator had failed to address and determine the set off defence

<sup>2</sup> *Hochtief Solutions AG v Maspero Elevatori SpA* 2021 SLT 528 at [22].

or had failed to give reasons for rejecting it.

The Court accepted that the scope of an adjudicator's jurisdiction includes any ground founded upon by the respondent.<sup>3</sup> It also accepted that Scottish Hydro had raised set off as a defence (even if only in the rejoinder) and that it was a material line of defence.

On that basis, the Court accepted that the adjudicator could not ignore the set off defence, and failure to address and determine it would breach natural justice and make the decision unenforceable.<sup>4</sup>

*The 'route' to the adjudicator's decision showed he had addressed and determined set off*

However, the Court went on to explain that:

*It is not necessary for an adjudicator to deal in his decision expressly with every argument made to him<sup>5</sup> ... provided that he deals with the arguments which are necessary and sufficient to establish the route by which he reached his decision.<sup>6</sup>*

The Court went on to find that on reading the decision in its entirety, the adjudicator had addressed and determined the set off defence as part of the route to reaching his decision, albeit not explicitly.

The Court pointed to the

adjudicator's reference in his decision to Scottish Hydro's arguments and inferred that the adjudicator was referring to its liquidated damages set off defence. The adjudicator's agreement with the JV that the assessment should be prospective was a rejection of that liquidated damages set off defence. His reasoning, the Court inferred, was that the JV's claims had predated, and should have been paid before, Scottish Hydro's claim for liquidated damages arose.

On this basis, the Court rejected Scottish Hydro's first and second grounds of defence on the basis that:

*...it is possible to discern from the adjudicator's decision, reasonably construed against the background of the submissions made to him, both what he decided and the reasons for that decision.*

*Ground 3: The errors in the order for payment*

The Court had little difficulty in rejecting Scottish Hydro's third ground of defence that the adjudicator had failed to order payment of a specified sum or specify a time period in which payment was to be made.

The Court accepted that the

adjudicator's order for payment contained multiple typographical errors, but that:

*...a reasonable reader, informed as to the context of the parties' dispute, who read the decision would have no difficulty in discerning what the adjudicator had decided.<sup>7</sup>*

### Conclusion

The decision demonstrates the Scottish courts' reluctance to interfere with adjudicator decisions and its generous and robust approach to upholding them. Unsuccessful parties are unlikely to avoid enforcement with arguments based on technicalities.

### About the author

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Kate Holland works as a Knowledge Manager in The ADR Centre's Knowledge Management Team, working with BDT. She previously practised as a solicitor in the UK with an international commercial firm and has particular experience in trust law and succession planning.

3 *Hochtief*, above n 2, at [27].

4 *Construction Centre Group Ltd v Highland Council* 2002 SLT 1274 at [19].

5 *Babcock Marine (Clyde) Limited v HS Barrier Coatings Limited* [2019] CSOH 110 at [35].

6 *Citing Balfour Beatty Engineering Services (HY) Limited v Shepherd Construction Limited* [2009] EWHC 2218 (TCC) at [48].

7 *Babcock*, above n 5.