

Insights

CAN YOU SMASH & GRAB AND ARGUE ABOUT TRUE VALUE IN THE SAME ADJUDICATION?

Feb 13, 2024

SUMMARY

In the case of *Bellway Homes Limited v Surgo Construction* [2024] EWHC 10 TCC, the court addressed whether it is possible to start a smash & grab adjudication but also a claim based on true value adjudication as a secondary position. Despite novel arguments to the contrary, the court determined that these are not separate disputes but rather form a single dispute that could be determined in one adjudication.

BACKGROUND

The dispute arose from a sub-contract between Roundel Manufacturing and Surgo Construction, the Defendant and main contractor, for the installation of kitchens in a building development project. Roundel made an application on 22 December 2022 for payment of £152,225.23 (the “Application”), for which the Defendant did not issue any payment notice or payless notice, and the sum was not paid.

ADJUDICATION

Roundel referred the matter to adjudication in March 2023. The adjudicator identified two arguments being put forward, namely (i) a “smash & grab” due to the lack of a payment notice or a payless notice and, alternatively, (ii) that the adjudicator should determine the “true value” of the Application.

The adjudicator found that Roundel’s Application was not a valid default payment notice and turned to the true value entitlement, assessing the value of the works to be £146,118.82 and ordering the payment of such sum together with the accrued interest.

Following the adjudicator’s decision, Roundel assigned its rights in the sums due to the Claimant, Bellway Homes Limited.

COURT ENFORCEMENT

At the enforcement hearing, the defendant argued that:

- Multiple disputes had been referred and the adjudicator had no jurisdiction to decide more than one dispute.
- Alternatively, if there was jurisdiction to determine the dispute, the jurisdiction was limited to deciding the “smash & grab” aspect of the adjudication.

SINGLE VS MULTIPLE DISPUTES

It is well established that save by consent it is not possible to refer more than one dispute to adjudication. Both parties therefore drew on the leading case *Witney Town Council v Beam Construction (Cheltenham) Ltd* [2011] EWHC 2332 (TCC), which established that if one claim cannot be decided without deciding the other claim, it establishes a clear link between the arguably separate claims and points to there only being one dispute.

The Defendant argued that two completely separate assertions were being advanced, as the entitlement to payment via the smash & grab route could easily be decided without reference to the true value of the work done. The Claimant argued that there was a close connection between the issues amounting to one overarching dispute: namely what sums are payable as a result of the Application, either through the smash & grab or true value route.

Baldwin J held that this was a single dispute for the following reasons:

1. The wording of the notice of adjudication clearly described the dispute as a failure to pay any sum due to the Claimant, whether by means of a notified sum or a substantive amount due.
2. It would be adopting an over-legalistic approach to characterise these as separate disputes.
3. The Defendant took a legalistic approach; there was no reliance upon a factual matrix demonstrating true independence of the disputes.
4. Two routes were advanced to the same goal of determining the sum owed by the Defendant to Roundel.
5. While the smash & grab claim could be decided independently, it was not an arguably separate claim as envisioned in *Witney*. The Defendant’s argument that the true value dispute was subservient to the smash & claim dispute in fact supported the view that the former could not be decided without deciding the latter.
6. It is not unique to disputes between parties that such issues are combined within one adjudication referral as alternative outcomes.

7. Overall, the dispute can fairly and much more straightforwardly be described as a single, disputed claim for a sum due.

EXCESS OF JURISDICTION

The Defendant also contended that if the adjudicator found that the Application (that is, the payment application under the contract) was not a valid default payment notice, it could not be used to determine the true value of the works.

The court rejected this argument, maintaining that the adjudicator's discussion of the Application's validity did not mean he was rejecting the payment application as capable of being an application for payment in any circumstances. The decision was therefore enforced.

COMMENTARY

It is common for parties in disputes to put forward alternative grounds for a claim. This case serves as a helpful clarification that alternative claims are allowed even in adjudication, despite the fact that adjudication only allows for the referral of a single dispute.

The court adopts a wide approach in interpreting what constitutes a single dispute and is unlikely to find that there are multiple disputes unless the disputes are vastly different in nature. This is so even when there are a number of elements to a contractor's claim, for example claims for payment for measured work, variations, loss and expense and a claim for an extension of time (EOT) (*David McLean Housing Contractors Ltd v Swansea Housing Association Limited* [2001] EWHC 830 (TCC)), where the court still decided that they constituted a single dispute. More recently, in *Prater v Sisk* [2021] EWHC 1113 (TCC), it was decided there was one dispute which included the correct subcontract completion date, the status of provisional sums, and Sisk's entitlement to deduct indirect losses (see our [earlier Insight](#) discussing this case).

This can possibly be explained by Akenhead J's remark in *Witney* that almost every construction contract is a commercial transaction and parties cannot broadly have contemplated that every issue between them would necessarily have to attract a separate reference to adjudication. It would be in line with parties' presumed intention and policy reasons, such as saving time and costs as well as reducing the amount of unnecessary disputes, to have related issues arising from the same construction contract to be determined in the same adjudication. This underlines the difficulty in succeeding in this jurisdictional challenge, which can also be seen in our [earlier Insight](#) discussing the outcome of *Quadro Services Ltd v Creagh Concrete Products Ltd* [2021] EWHC 2637 (TCC).

CONCLUSION

This case highlights the difficulty in arguing a lack of jurisdiction on the basis that more than one dispute has been referred to adjudication. More specifically, it shows that parties can raise a smash

& grab adjudication at the same time as a true value adjudication. In reality, smash & grab adjudications are usually commenced in order to avoid the need for a true value adjudication or at least to postpone it until payment has been made. This is therefore unlikely to bring an end to smash & grab adjudications.

This Insight was co-authored by Yorkie Fong and Shy Jackson.

RELATED PRACTICE AREAS

- Construction Disputes
- Commercial Construction & Engineering

MEET THE TEAM



Shy Jackson

London

shy.jackson@bclplaw.com

[+44 \(0\) 20 3400 4998](tel:+442034004998)

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be “Attorney Advertising” under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP’s principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.