



One Dispute, One Adjudication, Two Alternatives: Smash & Grab attempt fails but True Value Award survives

In *Bellway Homes Ltd v Surgo Construction Ltd* [2024], the TCC was asked to determine whether an adjudicator had jurisdiction to determine a payee's claim for interim payment based on either a 'smash and grab' basis or a true valuation of the works, and whether these alternative bases of claim in fact comprised two separate disputes.

Background

Bellway Homes Ltd ("**Bellway**") engaged Surgo Construction Ltd ("**Surgo**") as its main contractor for a building development project ("the **Project**"). By a sub-contract dated 2 October 2019, Surgo engaged Roundel Manufacturing ("**Roundel**") to supply and install kitchens in connection with the Project.

On 22 December 2022, Roundel issued a payment application in the sum of £152,225 inclusive of VAT to Surgo ("the **Application**"). Surgo failed to issue either a payment or pay less notice and made no payment to Roundel.

The Adjudication

On 28 March 2023, following Surgo's failure to pay, Roundel referred the matter to adjudication. Roundel's primary case was advanced on what is commonly referred to in the construction industry as a 'smash and grab' basis (that is to say, in reliance solely on the payer's alleged failure to serve a valid payment or pay less notice). In its Referral, however, Roundel continued by stating that, "*Further or in the alternative, and should payment not be awarded on the basis of the default*

payment provisions, then the Adjudicator is requested to ascertain the true value of the Application".

By a decision dated 2 May 2023, the adjudicator, Mr Timothy G. Bunker ("the **Adjudicator**"), instructed Surgo to pay the sum of c.£148k plus VAT and interest to Roundel ("the **Decision**"). In coming to this decision, the Adjudicator determined that for the purposes of facilitating a default smash and grab payment, Roundel's Application failed to meet the tests set out in the Housing Grants, Construction and Regeneration Act 1996 (the "**Act**"), but that it could nevertheless succeed on the true value basis.

Following the adjudication, Roundel assigned all of its rights to the sums due, pursuant to the Decision, to Bellway.

The Dispute

On 16 August 2023, following Surgo's failure to comply with the Decision, Bellway applied for summary judgment to enforce the Decision. Surgo sought to resist enforcement on the basis that the Adjudicator lacked jurisdiction. This was said to be on the basis that multiple disputes had been referred without consent and subsequently determined by the Adjudicator when no jurisdiction to do so existed; and, alternatively, if the Adjudicator did in fact have jurisdiction to determine the dispute, that jurisdiction was then exceeded by the Adjudicator going on to determine a true value payment due to Bellway, having already decided that the Application was invalid in the context of the smash and grab aspect of the adjudication.

Held

The judge, District Judge Baldwin, granted summary judgment to enforce the Decision for the following reasons: -

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The judge rejected Surgo's attempt to separate the smash and grab claim and the true value elements of the dispute as "*to characterise these as separate disputes would be to adopt too legalistic an approach*". Following earlier authorities, the court confirmed that a broad interpretation of the concept of a '*dispute*' and a common-sense approach must be adopted when considering the nature of the dispute and the manner in which it was presented to the Adjudicator. The judge therefore determined that the dispute could fairly and much more straightforwardly be described as a single disputed claim for a sum due.

As to Surgo's second challenge, the judge found that just because the Adjudicator's conclusion was that the Application was not compliant with the statutory requirements for the purposes of succeeding in a smash and grab, that did not mean the Adjudicator was rejecting the Application as being capable of being an application for payment in any circumstances. This was exemplified by the fact the Adjudicator then went on to complete his Decision by continued reference to the "Application".

In summary, the court described the character of this matter as two routes advanced to the same goal of determining a sum owed.

Analysis

The decision will be welcomed by prospective claimants as providing confirmation that a party can advance a true value claim in the alternative to a smash and grab claim, within the confines of a single referral to adjudication, as two alternative routes to recover the same sum due. This avoids the need for multiple adjudications over the same disputed sum.

Claimants must still take care, however, to ensure the redress being sought within their Notice of Adjudication and Referral is framed in such a way as to make it clear what is being asked of the

Adjudicator in terms of their proceeding to consider the alternative case as to true value, should the smash and grab case be rejected.

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