

Smash & Grab is here to stay

Bexheat Limited v. Essex Services Group Limited¹

May 2022



By Michael
Craik

I read recently that lawyers (well, not all lawyers and not only lawyers) are generally an unhappy bunch because they charge by the 6-minute unit, with 10 units making the billable hour. This, according to a professor of law and theology, means lawyers end up accounting for every moment of their working lives, dividing it into 'billable' or 'non-billable' time. The consequence of this is that lawyers have an unhealthy attitude to the way they spend their time, focussing on short-term billable goals rather than longer-term, non-billable ones such as mentoring junior lawyers, or calling their mum.

So, for those of you who manage your working life in 6-minute billable units, I start this story at the end before getting into the detail, i.e. for the reader who is not unhappy with their working life. If you only read the 'moral of this story' (and I will not be offended), I recommend using the remaining 5 minutes of the 6-minute unit to call your mum, dad, spouse, son, daughter etc because it's good to talk.

The moral of this story

Serve your payment and 'pay less' notices on time because if you don't you (or your client) will have to pay the 'notified sum', i.e. what the contractor or sub-contractor etc applied for, before you can try to rectify the problem by starting a 'true valuation' adjudication.

Of course, you can always 'adjust' the payment position by way of the subsequent interim payment application but unless you have included a bespoke 'repayment' clause in your building contract (this can be provided on payment of a piece of silver), any subsequent adjustment will be on paper only. Indeed, it could take several months before the account is in 'balance' again and you also run the risk of missing another payment notice or 'pay less' date thereby making a bad situation even worse.

Bexheat v. Essex - The tale of two adjudications

The two adjudications went as follows:

Date	Adjudication No. 1 (Interim payment no. 22)	Adjudication No. 2 (Interim application no. 23)
19 July 2021	Bexheat's Interim Application No. 22 for c.£1.8m gross and c.£680K net	
13 August 2021	Essex serves 'pay less' notice giving a net due of c.£5k	
17 August 2021		Bexheat's Interim Application No. 23 for c.£2m and c.£850k net
18 August 2021	Bexheat's Notice of Adjudication sought: 1) Interim valuation of c.£2m; 2) Net payment of c. £800k; and 3) Interest.	
	Essex claimed: 1) True value of Bexheat's application was c.£8k; and 2) £nil was due.	
12 October 2021	First Adjudicator decided: 1) True value was c.£1.3m; 2) Bexheat entitled to net payment of c.£141k; and 3) Interest.	
	Essex paid in full	
14 October 2021		Final date for Essex to serve a 'pay less' notice
15 October 2021		Essex gives 'pay less' notice
		Essex makes no payment
18 October 2021		Bexheat starts adjudication seeking the net sum of c.£700K
12 November 2021		Second Adjudicator decided: 1) Essex failed to give a 'pay less' notice;

		2) Bexheat entitled to c.£700k claimed; and 3) Interest.
		Essex did not pay

Essex started its own, third adjudication, but after a hearing the Third Adjudicator thought better of it and promptly resigned, i.e. let the court resolve this one which was probably a wise decision.

The Key Issue – first ‘true valuation’ v second ‘smash & grab’

Bexheat wanted its £700k and started court proceedings on 23 November 2021 with the key issue being, as the judge made clear:

“A material issue in these proceedings is the impact of the First Adjudication Decision; whether it affects the validity of the Second Adjudication Decision and whether [Essex] is entitled to rely on the ‘true valuation’ in the First Adjudication against any obligation to satisfy Interim Application 23 and/or the Second Adjudication Decision.”

So, the key issue was whether Essex could make use of the first adjudicator’s decision as the ‘true value’ of interim payment 22 as a defence in the dispute over interim payment 23? The judge said ‘NO’ for (in summary) the following reasons:

- First, despite the fact that the first adjudicator’s decision (12 October) on the ‘true value’ came before the final date (14 October) for the ‘pay less’ in the second adjudication, the two adjudications concerned different interim valuations for different periods. In addition, the ‘true value’ was not adjudicated upon as part of the second adjudication because the second adjudicator decided no ‘pay less’ notice meant the ‘notified sum’ was due and payable;
- Second, Essex did not raise the binding nature of the first adjudicator’s decision on the ‘true value’ in its defence to the second adjudication. If raised, it would have been a defence based on the second adjudicator’s jurisdiction (or lack of it) but as Essex did not raise the issue at the time of the second adjudication and did not reserve its position, Essex could not raise it later in the enforcement proceedings, i.e. the ‘use it, or lose it’ principle when raising jurisdiction defences; and
- Third, and in any event, section 111 of the 1996 Act requires the payer to serve a ‘pay less’ notice where it wishes to pay less than the ‘notified sum’. Essex should have raised the first adjudication ‘true value’ decision in the ‘pay less’ notice, which Essex did not.

Contractual right of set-off – failed too

Essex tried to make use of a contractual right to set-off a sum due from Bexheat in defence of the £700k awarded against Essex in the second adjudication. The judge rejected this argument too because section 108 of the 1996 Act provides that an adjudicator’s decision is binding until finally resolved by legal or arbitration proceedings or through agreement.

This is repeated in paragraphs 21 and 23 of the Scheme. As such, an unqualified contractual right of set-off 'offended' the statutory requirement that Essex comply with the second adjudicator's decision.

Contractual right of joinder – failed also

Essex also tried to rely on a contractual 'joinder' of disputes provision, arguing that the second adjudicator should have dealt with the 'true valuation' of interim valuation 23 at the same time as dealing with Bexheat's 'smash & grab' claim. This too was rejected by the judge because, having decided no effective 'pay less' notice had been served and the £700k was due and payable, there was no need for the second adjudicator to consider the 'true value' point. This again illustrated the principle of 'pay first, argue second'.

Stay on enforcement due to insolvency – rejected

Essex's final throw of the dice was that any enforcement of the second adjudicator's decision should be stayed (suspended) because Bexheat would, due to its financial position, be unable to repay the money. Despite Essex submitting independent expert forensic accounting evidence, the judge rejected this argument too because, amongst other things:

"[Bexheat]'s financial position is substantially the same as it was at the time the Contract was entered into. Any adverse movement in its financial position would be accounted for by [Essex]'s failure to pay the sum awarded in the Second Adjudication".

Conclusion

Call them what you want, but these 'smash & grab' adjudications are here to stay. If your payment notice or 'pay less' date, you cannot complain (other than to your Contract Administrator) and you will have to hand over the cash before heading off to get a 'true valuation'. The fact that the recipient may be a little 'dodgy' financially and your hard-earned cash, borrowed from the bank could, if handed over, disappear into the black hole of insolvency (well into the liquidator's back pocket) may not be sufficient to protect you, i.e. you still have to pay.

This is why I will continue to advise my clients and their professional team to ensure, at the start of any project, that all payment dates are written down. Despite the relentless advance modern technology I continue to use the SASCO (other brands do exist) wall planner and coloured stickers to remind me of the key dates. That is, I consider, a product of my youth and a diet of Blue Peter and sticky-backed plastic.

¹ [2022] EWHC 936 (TCC)