

Déjà vu in construction adjudications



It is established law that once a dispute has been determined through a construction adjudication the parties cannot seek to commence a second adjudication to determine the same dispute.

Examples of construction adjudication

Bexheat Limited v Essex Services Group Limited (2022) concerned an application to enforce a smash and grab adjudication in the sum of £706,029.62. The application was resisted in part on the basis that the application for payment which was the subject of the adjudication did not reflect an earlier adjudicator's decision which determined the true value of works at an earlier stage of the project. To treat the adjudication as effective (and to permit enforcement of the decision) would be to overwrite the decision made in the earlier adjudication.

In *Essential Living (Greenwich) Limited v Elements (Europe) Limited (2022)* the court was asked to assess the relevance of a true value adjudication to the valuation of the final account.

The effect of an adjudicator's decision is to bind the parties until the dispute in question is finally determined by court or arbitration proceedings or there is a subsequent agreement on the issue in question. The parties cannot seek a further decision by an adjudicator on the same point. To determine whether an existing adjudication decision prevents a subsequent adjudication the correct approach is to ask whether the dispute or difference is the same (or substantially or fundamentally the same) as that which was previously considered. There does not have to be identical factual and legal issues in order for the principle to apply.

If a party wishes to rely upon this principle then it necessitates a jurisdictional challenge to the subsequent adjudication. What this will involve is making clear at the outset that the subject matter has already been



determined by an earlier adjudication, the adjudicator therefore lacks jurisdiction and that participation in the later adjudication is not intended to waive that jurisdictional challenge.

In *Bexheat* it was said that difference in value between works as determined in the first adjudication and the second adjudication was minimal, with the effect that by allowing the second adjudication to be enforced the court would be ignoring the first adjudication. The court rejected that argument for three reasons:

- The adjudications were not considering substantially or fundamentally the same thing. The first adjudication considered true value of works. The second was procedural – had a pay less notice been served in time or not.
- The [Construction Act 1996](#) lays out in clear terms the effect of failure to serve a pay less notice in time – the notified sum is payable. If the jurisdictional challenge was allowed to succeed then it would ignore the express wording of the Act.
- The paying party did not reserve its right to challenge jurisdiction in the adjudication and is treated as having waived the right. Consequently it cannot rely upon the challenge now in any event.

Essential Living was not an adjudication enforcement case but an application seeking guidance in the final account process. The Court, perhaps unsurprisingly, confirmed that the parties could not, by way of further adjudication, seek to revisit the decisions made but also made clear that whether a dispute was already determined in the earlier adjudication required careful analysis of the evidence and argument including the basis upon which the disputed item is being advanced or resisted. The Court carried out such an assessment on an issue by issue basis in order to establish the extent to which matters such as the valuation of variations, the contractual completion date and the contractor's liability for damages for late completion would be caught by the principle. The case illustrates that this not be a straightforward exercise by any means.

What does this mean?

It may not immediately be obvious whether a dispute has been decided in an earlier adjudication. The answer to this question requires a comparison not only of the nature of the relief being sought but also of the dispute the adjudicator is being asked to decide on. *Essential Living* shows that this can be a complex exercise. As a result, if there is a risk that a dispute has been decided in an earlier adjudication the prudent course approach is to participate in the adjudication having first identified and advanced your jurisdictional challenge and made it clear that participation is subject to that reservation. This way you avoid the trap that befell the paying party in *Bexheat* (if it was otherwise able to contend the issue was already determined).

How we can help

From developers, investors and contractors to high net worth individuals, our [construction lawyers](#) offer clients a wealth of expertise, ensuring construction contracts are well drafted and watertight, and disputes skillfully handled.

If you're looking for expert advice, [please get in touch](#).



[Nitej Davda](#)

Partner