WATSON FARLEY
&
WILLIAMS

BRIEFING

STAMPING OUT SMASH AND GRAB ADJUDICATIONS?

APRIL 2018

- ENGLISH COURT SIGNALS AN END TO "SMASH AND GRAB" ADJUDICATIONS
- WHERE PAYMENT OR PAY LESS NOTICE IS INVALID, EMPLOYER REMAINS ENTITLED TO COMMENCE A SECOND ADJUDICATION
- PAY LESS NOTICES CAN INCORPORATE DOCUMENTS BY REFERENCE

In his last substantial judgment in the Technology and Construction Court ("TCC")[1] before joining the Court of Appeal, Coulson J (now Coulson LJ) has sought to stamp out the increasingly popular practice of "smash and grab" adjudications by contractors and held that, in circumstances where an employer's payment notice or pay less notice is deficient or non-existent, the employer remains entitled to commence a second adjudication to determine the 'true' value of the sum applied for by the contractor.

"THIS CASE REPRESENTS A WIN FOR EMPLOYERS WHO NOW HAVE GOOD GROUNDS TO SEEK THE RETURN OF ANY OVERPAYMENT IN FRESH ADJUDICATION PROCEEDINGS."

This case represents a win for employers who now have good grounds to seek the return of any overpayment in fresh adjudication proceedings, even if they have not served the relevant notices correctly or even at all.

Background

Grove Developments Ltd ("Grove") and S&T (UK) Ltd ("S&T") entered into a construction contract which incorporated the JCT Design and Build 2011 contract pursuant to which S&T was engaged to design and build a new Premier Inn Hotel at Heathrow Terminal 4. The contractual completion date was 10 October 2016 but practical completion was not achieved until 24 March 2017.

S&T submitted an interim payment application one week after practical completion, claiming £14m more than Grove's previous valuations – a typical "smash and grab"

[1] *Grove Developments Ltd v S&T (UK) Ltd* [2018] EWHC 123 (TCC)

application. In response, Grove submitted a payment notice and a pay less notice. A dispute then ensued as to the validity of these notices.

In adjudication, it was decided that the notices were invalid and that S&T was therefore entitled to be paid the full £14m (this being the full "notified sum" under section 111 of the Housing Grants (Construction and Regeneration) Act 1996).

In the meantime, and in anticipation of this potentially adverse result, Grove asked the TCC to determine, among other things, whether it was entitled to commence a separate adjudication seeking a decision as to the 'true' value of S&T's interim application.

This question is of particular significance because, given that practical completion had been achieved, there was no subsequent interim payment round at which Grove could quickly recover the £14m overpayment. Indeed, unless it was entitled to commence a new adjudication concerning the 'true' value of the interim application, it would have to wait months, or years, until the final account process was completed.

The judgment

Entitlement to adjudicate the 'true' value of an interim application

Coulson J framed this question as follows:

"…can an employer, whose payment notice or pay less notice is deficient or non-existent, pay the contractor the sum stated as due in the contractor's interim application and then seek, in a second adjudication, to dispute that the sum paid was the 'true' value of the works for which the contractor has claimed?"

"THE COURT, AND BY EXTENSION AN ADJUDICATOR, HAS AN INHERENT POWER TO OPEN UP, REVIEW AND REVISE ANY EXISTING CERTIFICATES, NOTICES OR APPLICATIONS."

In his view, the answer was "yes":

1. Citing *Henry Boot*[2], the judge noted that the court, and by extension an adjudicator, has an inherent power to open up, review and revise any existing certificates, notices or applications;
2. There is no statutory limit on the power or jurisdiction of an adjudicator that would prevent them from reviewing an interim application;
3. The dispute in the second adjudication would simply be a different dispute to that which was determined in the first, confronting a separate issue. Therefore it followed that it must be capable of being referred to adjudication. If not, this would be an "unwarranted restriction" on Grove's ability to adjudicate any dispute "at any time", in accordance with section 108(2)(a) of the 1996 Act;
4. The contract expressly differentiated between a "sum due" (i.e. the 'true' valuation), and the "sum stated as due" in the relevant notices. Therefore, as a matter of contractual construction, even after the employer had paid the "sum stated as due" in the contractor's notice, the 'true' valuation remained open to question;
5. It would be unfair to allow a contractor to launch an immediate attack on a pay less notice (as is envisaged by sections 111(8) and (9) of the 1996 Act), if the employer did not have a corresponding right to challenge the contractor's application notices, and there was no justification for such a one-way street in statute or the JCT standard form contract; and

[2] *Henry Boot Construction Ltd v Alston Combined Cycles Ltd* [2005] 1 WLR 3850

6. There was no material difference between, on the one hand, the payment rights and obligations of the parties in respect of interim payments and, on the other, those arising in respect of the final payment. Past cases have held that a prohibition on an employer commencing a second adjudication as to the 'true' value only applies to interim applications, and not to the final application. Coulson J rejected the view that such differing treatment is justified, stating this approach had no basis in the contract nor in statute.

Tellingly, these conclusions were supported by the Court of Appeal cases, including *Rupert Morgan v Jervis*[3] and *Harding v Paice*[4].

Coulson J then confronted the line of TCC authorities, including most notably *ISG v Seevic* and *Galliford Try v Estura*[5], in which Edwards-Stuart J held that, if an employer fails to serve the notices in time or with proper contents, it must be deemed to have agreed that the amount claimed by the contractor is the 'true' value of the relevant interim application.

"THERE IS NO BASIS ON WHICH AN EMPLOYER CAN, BY VIRTUE OF ITS (LACK OF) RESPONSE TO A 'SUM STATED AS DUE' IN THE NOTICE, BE DEEMED TO HAVE AGREED TO THE FINAL 'SUM DUE'."

Coulson J rejected this approach. He said there was no basis in fact for any such alleged agreement, nor was there a basis for deeming any such agreement existed. In his view "the concept of a deemed agreement … is not only unjustified, but it is also an unnecessary complication, given the clear distinction in the contract between 'the sum due', on the one hand, and 'the sum stated as due' on the other." That is, there is no basis on which an employer can, by virtue of its (lack of) response to a 'sum stated as due' in the notice, be deemed to have agreed to the final 'sum due'. Coulson J therefore concluded that the approach in those TCC cases was contrary to "first principles", contrary to the Court of Appeal authorities and should not be followed.

However, he made sure to reiterate that a second adjudication "cannot act as some sort of Trojan Horse to avoid paying the sum stated as due". The adjudications will still be dealt with in strict sequence and the employer will still be required to pay up in the first instance.

It was acknowledged that these valuation problems only become fully apparent in the situation of a penultimate payment application, where it might be months or years before the 'true' value of the application is determined via the final account process. It is during this period that the second adjudication provides an important remedy to employers. After all, valuation disputes in earlier interim applications can simply be dealt with during the next interim payment round.

The validity of pay less notices

Another issue dealt with in the judgment was the validity of Grove's pay less notice. The 1996 Act requires a pay less notice to specify the basis on which the sum considered to be due is calculated. Here the validity of Grove's notice was disputed because it referred back to a detailed calculation found in a document emailed to S&T on an earlier date.

Coulson J confirmed what was already established in the case law, namely that:

[3] [2003] EWCA Civ 1563
[4] [2015] EWCA Civ 1231
[5] [2015] EWHC 412 (TCC)

"A pay less notice will be construed by reference to its background, in order to see how a reasonable recipient would have understood it. The court will be unimpressed by nice points of textual analysis, or arguments which seek to condemn the notice on an artificial or contrived basis."

"A PAY LESS NOTICE CAN INCORPORATE A DOCUMENT BY REFERENCE, PROVIDED THAT IT IS CLEARLY REFERRED TO AND THAT ITS CONTENTS CLEARLY AND COMPREHENSIVELY SET OUT THE RELEVANT CALCULATION."

Coulson J went on to hold that a pay less notice can incorporate a document by reference, provided that it is clearly referred to and that its contents clearly and comprehensively set out the relevant calculation. He considered that it was "idle to speculate on all the many ways in which the process of referring to another document might go wrong", and that the only thing that matters is whether any such difficulties actually presented themselves. Here, there was no suggestion that S&T was unsure about what was being referred to. The pay less notice was therefore valid.

Conclusion

As Coulson J remarked, the conclusion he reached as to the right to adjudicate the 'true' value of a claim "will strengthen the [adjudication] system, because it will reduce the number of 'smash and grab' claims which … have brought adjudication into a certain amount of disrepute".

It should be noted that the door has not yet fully closed on "smash and grab" adjudications; indeed, this decision has the same status as the TCC decision in *ISG v Seevic*, and so it may be open to a judge to revisit the issue in a future TCC case. However, given that the Court of Appeal cases support Coulson J's conclusions, and given that Coulson J is an eminent figure who recently ascended to the Court of Appeal himself, this decision is highly likely to be followed in the future.

FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this Briefing, please speak with the authors below or your regular contact at Watson Farley & Williams.

REBECCA WILLIAMS
Partner
London

+44 20 3036 9805
rwilliams@wfw.com

ANDREAS EFSTATHIOU
Senior Associate
London

+44 20 7863 8983
aefstathiou@wfw.com

Publication code number: 61611216_3