SMASH AND GRAB ADJUDICATIONS: A PATHWAY THROUGH THE THICKET

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In a significant decision for the construction industry, the UK Court of Appeal has 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 separate adjudication to determine the true value of an interim application, provided that it does so after it has paid the notified sum. In doing so, a happy medium has been found between maintaining a contractor's cash-flow throughout the duration of the project, and an employer's ability to later redress any overpayments made.

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The decisions at first instance and in the Court of Appeal in *S&T (UK) Ltd v Grove Developments Ltd* [1] were both delivered by heavyweights of the construction industry and so merit particular respect. The first instance judge was Mr Justice Coulson, now himself on the Court of Appeal. Meanwhile former Technology and Construction Court mainstay and Court of Appeal judge, Sir Rupert Jackson (who retired at the beginning of March 2017), was invited back to deliver the leading judgment in the Court of Appeal.

The Court of Appeal's confirmation of the first instance decision should be welcomed by both contractors and employers, as well as others in the construction industry who have seen the reputation of adjudication as a dispute resolution mechanism undermined by opportunistic contractors seeking to take advantage of very large payment applications at the last interim stage.

"SMASH AND GRAB"

The proliferation of "smash and grab" tactics since *ISG Construction Ltd v Seevic College* [2] means that many in the construction industry will not require any further explanation.

For those fortunate to be uninitiated, "smash and grab" occurs where a contractor unexpectedly submits a very large interim or final interim payment application and the employer fails to submit a valid payment notice and/or thereafter fails to submit a valid pay less notice. In such circumstances, the contractor's application can (subject to the particular contract) become a 'default payment' notice which entitles the contractor to payment of the sum applied for by the contractual final date for payment.

The implications can be very serious for an employer, particularly towards the end of a project, where there may be little or no opportunity for them to correct the overpayment at the next interim stage (because there isn't one), or where subsequent payments are less than the sum paid out to the contractor pursuant to its 'default payment' notice.

Where the validity of an employer's pay less notice is adjudicated in favour of the contractor, Mr Justice Edwards-Stuart's decision in *ISG v Seevic* meant that the employer is then prevented from commencing a further adjudication challenging the valuation of the contractor's interim application. As a consequence, employers could be left waiting months or even years before they could seek redress under the final account or by way of costly TCC proceedings.

As Mr Justice Coulson pointed out in his judgment at first instance in *S&T v Grove*, the effect of *ISG v Seevic* was that "…at the very time when the cases show that the right to adjudicate as to the 'true' value is most needed, it will not be available".

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BRIEF FACTS

The parties entered into a JCT Design and Build 2011 contract for the construction of a new Premier Inn Hotel at Heathrow Terminal 4. The contract sum was around £26m with completion due 10 October 2016, although the project was not in fact completed until 24 March 2017.

Ironically, *Grove Developments* was not a tale of "smash and grab", but the facts gave rise to the same effect. The contractor, S&T, did not submit an unexpected increase in their interim notice, as in reality the divergence between the parties' valuations had been present for months. However, as events transpired, S&T's last interim application showed that they valued the contract at nearly £40m instead of the original £26m figure. S&T's final interim application, arriving after practical completion but far in advance of any final account determination, looked very much like the classic "smash and grab". The employer, Grove, issued a separate payment notice, but accepted this was out of time. It also submitted a pay less notice that was in time, but S&T argued it was defective and an adjudication on the point found in S&T's favour.

In line with *ISG v Seevic*, Grove could not therefore bring an adjudication on the "true value" of S&T's interim application, so commenced court proceedings.

THE COURT OF APPEAL VERDICT

At first instance, Mr Justice Coulson was highly cognisant of the significance of his judgment to the construction industry, concluding that:

> "…I do not consider that the conclusions which I have reached strike at the heart of the adjudication system. On the contrary, I believe that it will strengthen the system, because it will reduce the number of 'smash and grab' claims which, in my view, have brought adjudication into a certain amount of disrepute."

Sir Rupert Jackson commenced his judgment in a similar vein, noting that the issue of whether an employer was entitled to adjudicate as to the value of an interim payment notice was "…of great importance to the construction industry."

He conducted a rigorous analysis of the conflicting authorities of the lower courts and was at pains to point out that, although his findings ultimately mean that *ISG v Seevic, Galliford Try* [3] and *Kersfield* [4], have been reversed on the issue of secondary valuation adjudications, this was in no way a criticism of the judges in those cases:

> "We are all trying to hack out a pathway through a dense thicket of amended legislation, burgeoning case law and ever-changing standard form contracts."

Those in the construction industry will have some sympathy with Sir Rupert Jackson's eloquently stated sentiments.

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The Court of Appeal agreed with all the reasons provided by Mr Justice Coulson as to why an employer is entitled to open up the question of the valuation of an interim application after an adjudicator has found that it is payable. Sir Rupert Jackson noted that when the interim application becomes payable it does not mean that the true value of the work is also then conclusively established, emphasising the distinction between an obligation to pay a notified sum under section 111 of the Housing Grants, Construction and Regeneration Act 1996 (as amended by the Local Democracy, Economic Development and Construction Act 2009) (the "Amended Act") and a true valuation of the work done:

> "… section 111 is not the philosopher's stone. It does not transmute the sum notified by one or other of those three documents into a true valuation of the work done…"

Similarly, he found resonance in the distinction between the language in the JCT contract as to the "sum due" versus the "sum stated as due", indicating that the "sum *stated* as due" clearly leaves open the possibility for later review.

Sam Prentki also contributed to this article. He has since left the firm.

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