THE IMPACT OF A RECENT DECISION ON "SMASH AND GRAB" AND "TRUE VALUE" ADJUDICATIONS

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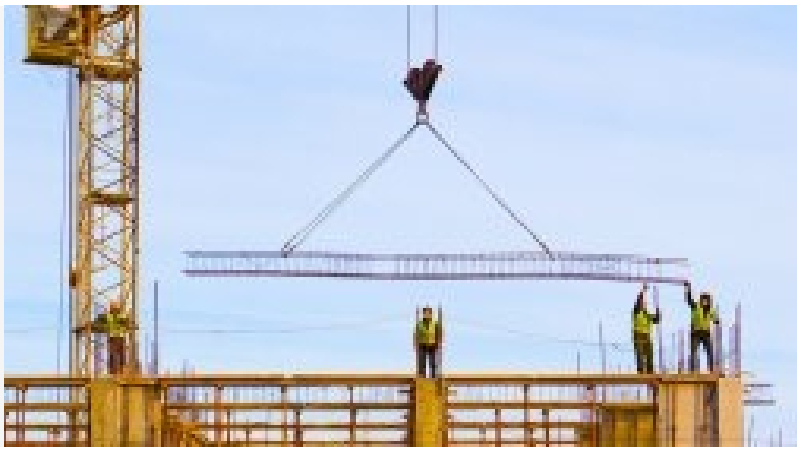

The Technology and Construction Court of England & Wales has provided greater clarity and guidance to the construction industry in a recent decision[1] regarding when a paying party which is the subject of a so called "smash and grab" adjudication may then launch a separate "true value" adjudication. It has also been confirmed that the same rules apply in relation to both interim and final payments. However, questions remain on the circumstances in which a court may restrain the commencement or progress of a subsequent "true value" adjudication where the paying party has not discharged its obligation to pay under a previous adjudication.

"Smash and grab" v "true value" adjudications

The Housing Grants, Construction and Regeneration Act 1996 (the "Act") requires a pay less notice to be issued if a payer wishes to object to paying the amount claimed in an application for payment. Whilst the amendments to the Act introduced in 2009 were intended to improve cash flow, in some cases they have had the opposite effect by encouraging disputes. This is because where a payer fails to serve its pay less notice on time, there is now an automatic right to payment of the amount *claimed* rather than the amount *due*. "Smash and grab" v "true value" adjudications

In an increasing number of cases, where a pay less notice has not been served the payee (usually the contractor) has sought to benefit from the changes to the Act by commencing a "smash and grab" adjudication to recover the claimed amount, as noted in the Court of Appeal's decision in *S&T (UK) Ltd v Grove Developments Ltd*[1] (which was the subject of a previous WFW briefing note). The paying party (usually the client) has then responded to such claims by commencing their own adjudication to determine the amount due. By bringing their own claim, the paying party seeks to reduce any amount awarded in the first adjudication.

Brief facts

In *M Davenport* a dispute arose between the parties to a contract which related to construction operations to be carried out at a building in Stockport. The claimant, M Davenport, submitted a payment application for just over £106,000 based on its final account. The defendants, Mr and Mrs Greer, failed to submit a valid payment notice or notice of intention to pay less. In adjudication Mr Sutcliffe therefore awarded the claimant the sum claimed plus interest (the "Sutcliffe decision"). The defendants failed to pay that sum and commenced a separate "true value" adjudication. In that subsequent adjudication, Mr Sliwinski found that nothing was payable to M Davenport and ordered each side to pay 50% of his fees (the "Sliwinski decision"). The claimant applied to enforce the Sutcliffe decision, but the defendants argued that they were not obliged to pay and sought instead to rely on the Sliwinski decision, as it represented the true value of the works. The question for Mr Justice Stuart-Smith was whether the Sliwinski decision was enforceable by way of defence, set-off or counterclaim.

The verdict

It is clear from *Harding v Paice*[1] that, where a payment notice or a pay less notice is not provided, an adjudication to enforce an application for payment can be brought as a short route to immediate payment and the adjudicator need not undertake a valuation exercise. However, more recently the Court of Appeal commented in *Grove* that, where a contractor has taken this short route to immediate payment successfully, the employer may still commence a separate adjudication so as to ascertain the "true value" of the work being paid for.

Having assessed the case law, Mr Justice Stuart-Smith considered the policy underlying the statutory adjudication regime. It was made clear by Lord Justice Jackson in *Grove* that section 111 deals with cash flow and immediate payment. The judge emphasised that deprivation of cash flow can have a serious adverse influence on a contractor at any stage of the works.

In light of the above, the judge stated that it seemed consistent with the policy that a defendant who has discharged its immediate obligation to pay the sum awarded in an initial adjudication, should be entitled to rely upon a subsequent "true value" adjudication. However, in cases where the defendant has not paid the sum awarded, this should not be allowed. On that basis, the judge agreed with the concerns of Mr Justice Coulson in *Grove* at first instance, who warned that "the second adjudication cannot act as some sort of Trojan horse to avoid paying the sum stated as due". The judge further agreed with Mr Justice Coulson's analysis that it is more desirable to have a "second adjudication as to the "true" value, rather than some sort of ad hoc and partial stay of execution." Accordingly, Mr Justice Stuart-Smith held that the Sutcliffe decision should be enforced. The judge's decision to follow *Grove* in *M Davenport* is notable, given that the comments in the earlier case were only made on an obiter basis.

Moreover, the judge confirmed that there is no reason why these principles are not equally applicable to both an interim application and a final application. However, he did acknowledge that, where a party has not paid the sum due pursuant to an initial adjudication decision, there is a distinction between allowing a party to commence a "true value" adjudication and allowing that party to rely on the result of such an adjudication. Citing *Harding*, the judge reiterated that a court will not always restrain the commencement or progress of a "true value" adjudication commenced before the employer has discharged its obligation to pay under an initial adjudication. However, Mr Justice Stuart-Smith went on to state that deciding on circumstances where the court may restrain such proceedings, or suggesting examples or criteria would be "positively unhelpful".

Conclusion

This last point leaves some uncertainty as to whether the commencement and progress of a "true value" adjudication is likely to be restrained by way of injunction by the court if commenced prior to payment of the sum awarded in the previous adjudication.

However, what is clear is that any decision made in a "true value" adjudication cannot be relied upon until the immediate obligation to pay amounts determined in a "smash and grab" adjudication has been discharged. This makes sense when the policy underpinning the adjudication regime is considered. Though the practice appears to benefit contractors who seek to take the short route to payment, if the paying party can quickly obtain a "true value" decision in its favour, any improvement in cash flow obtained by such a contractor will be short lived.

Nevertheless, the issue remains that employers may be unable to pay excessive or inflated sums awarded in initial adjudications. Alternatively, having paid such sums, employers may be financially unable to pursue a "true value" adjudication. Though this decision appears to offer a degree of flexibility to employers in these circumstances, the hurdle of overcoming their immediate payment obligation remains.

The case is another reminder of the importance of serving a pay less notice. If a paying party wishes to dispute sums claimed in an application for payment they must act promptly to serve the required notices within the timescales set out in the contract, taking legal advice where necessary.

[1] *M Davenport Builders Limited v Mr Colin Greer, Mrs Julia Greer* [2019] EWHC 318 (TCC)

[2] [2018] EWHC 123 (TCC) and [2018] EWCA Civ 2448. See also our Briefing Note of April 2018 (https://www.wfw.com/articles/smash-and-grab-adjudications-a-pathway-through-the-thicket/) in respect of the decision at first instance.

[3] [2015] EWCA Civ 1231

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