THE
NATIONAL LAW REVIEW

Pay First, Ask Questions Later: Court of Appeal Ruling on “Smash and Grab” Adjudications in S&T (UK) Limited vs. Grove Developments Limited

Thursday, January 17, 2019

In an eagerly awaited judgment, the Court of Appeal upheld the TCC’s judgment in Grove Developments Limited v S&T (UK) Limited, confirming that the employer may adjudicate to establish the “true value of the sum due” in a second adjudication.

Article By K&L Gates
Kevin GreeneConstruction Law Blog

Construction Law
Global
Litigation / Trial Practice
United Kingdom

Background

In March 2015, Grove Developments Limited (“**Grove**”) engaged S&T (UK) Limited (“**S&T**”) to design and build a new hotel at Heathrow Airport under the JCT Design and Build Contract 2011 with amendments, for a contract value of £26.4m. Following a delay of over 5 months, practical completion was achieved in March 2017. The parties subsequently conducted an adjudication to decide if Grove’s pay less notice dated 18 April 2017 was invalid on the basis that it was served late. The adjudicator decided, in S&T’s favour, that the pay less notice was invalid.

The implication of the decision in the last adjudication was such that Grove were obliged to pay S&T over £14m (i.e. the sum stated as due in S&T’s interim application), rather than £1.4m (i.e. the value of the work that Grove had set out in its pay less notice which was now deemed invalid). Grove brought Part 8 proceedings, asking the Court to declare that the pay less notice was,in fact, valid and that Grove were entitled to commence an adjudication to establish the “true sum due” to S&T in respect of the interim application.

Decision in the TCC

The key issues before the Court were as follows:

- whether Grove’s pay less notice complied with the requirements of the contract;
- whether the adjudicator’s decision on the pay less notice should be enforced; and
- whether Grove would be entitled to commence a separate claim seeking a decision about the “true value” of S&T’s interim application for payment.

Coulson J considered these issues in detail and revisited the findings in *ISG Construction Limited v Seevic College [2014] EWHC 4007 (TCC)* and *Galliford Try Building Limited v Estura Limited [2015] EWHC 412 (TCC),*where it was held that a failure to serve a valid payment or pay less notice meant that the employer had agreed or was deemed to have agreed the value. Coulson J opined that, in his view, such concept of a deemed agreement is an “unjustified… [and] 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”. Coulson J said that there is nothing in the Housing Grants, Construction and Regeneration Act 1996 (the “**Construction Act 1996**”), the Scheme for Construction Contracts 1998 or the parties’ contract which envisaged such a“one-way street” in favour of the contractor.

Coulson J set out six reasons for his decision and held that an employer can commence a counter-adjudication against the contractor to dispute the true value of the works that the contractor has claimed in an interim application for payment, though payment of the amount applied for may have to be made in the meantime. He distinguished between a dispute about valuation and a dispute about the sum stated in a payment notice and held that, as such,"true valuation" of the sum due was not decided in the earlier adjudication between the parties, allowing the parties to commence a further adjudication on the separate issue of valuation. S&T appealed against Coulson J's decision.

Appeal

In the Court of Appeal, Sir Rupert Jackson upheld Coulson J's first instance decision and dismissed S&T's appeal. He confirmed that Grove, as the employer, "having failed to serve a payment notice or pay less notice, is nevertheless entitled to adjudicate to determine the true value of an interim application".

Whilst Sir Rupert agreed with Coulson J that, on the facts of this case, the employer's pay less notice was valid despite referring to a schedule served several days earlier, his view was that the issue of whether the employer had served a payment notice or pay less notice was irrelevant. Section 111 of the Construction Act 1996 created an immediate obligation upon the parties to pay the notified sum and so if the employer failed to pay, the contractor could enforce that failure by starting an adjudication. However, Sir Rupert noted that section 111 is "not the philosopher's stone" and does not "transmute the sum notified… into a true valuation of the work done". In other words, either party can challenge the correctness of the notified sum by way of adjudication.

Sir Rupert also noted in his judgment that "in some instances the judgment may operate harshly, for example in situations where the payee is veering towards insolvency". In answer to this hypothetical argument, he noted that in any case where there is a perceived risk of insolvency, the employer should be scrupulous in serving payment notices and pay less notices in a timely manner.

Implications

The Court of Appeal's judgment affirmed Coulson J's judgment and provided clarification that an employer who fails to serve a valid payment or pay less notice is still entitled to challenge the value of the contractor's interim application for payment, by means of a subsequent adjudication to determine the "true value" of the sum due.

In his first instance judgment, Coulson J stated that he believed his conclusions would strengthen the adjudication system as it would have the effect of reducing the number of "smash and grab" adjudications. With the Court of Appeal affirming Coulson J's judgment and approach, employers now have more options available when they are faced with such "smash and grab" claims.

Saya Lee contributed to this post.