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CONSTRUCTION & ENGINEERING SOLICITORS

Construction Law Update

Valuation of Works Following a "Smash and Grab" Adjudication

In the last few years, many cases have come before the courts relating to so-called "smash and grab" adjudications, which are founded on the argument that the paying party has failed to serve the necessary payment or pay less notice, thereby entitling the payee to sums claimed in a payment application. Some decisions of the courts in these cases have created a degree of uncertainty about whether failure to serve the necessary payment or pay less notice means the paying party is permanently barred from challenging the value of the payee's works. This confusion was addressed in the recent case of *Imperial Chemical Industries Limited v Merit Merrell Technology Limited.*

Background

Imperial Chemical Industries Ltd ("ICI") engaged Merit Merrell Technology Ltd ("MMT") to carry out works associated with the construction of a paint manufacturing facility. The contract was an amended NEC3 Engineering and Construction Contract with an initial value of £1.9m, but the scope of works expanded considerably and ICI paid MMT £20.9m.

In February 2015, ICI wrote to MMT stating that ICI accepted the following repudiatory breaches of contract. MMT alleged that it was actually ICI who was in repudiatory breach and left site. It was ultimately decided by the court that ICI was in repudiatory breach.

Prior to termination of the contract, ICI had failed to serve a payment notice or pay less notice in response to MMT's applications for payment numbers 22 and 23. MMT had commenced "smash and grab" adjudications in relation to each application and was awarded the sums it had applied for, being £7,559,514 in application 22 and £816,093 in application 23. These sums were eventually paid to MMT by ICI.

During subsequent legal proceedings between the parties, ICI argued that it was able to challenge the true value of applications 22 and 23 by taking into account overpayments to MMT (although no such overpayments had yet been established).

MMT argued that the actual payments previously made by ICI are deemed to be the true value of the works and that the value of the works had already been determined on a finally binding basis in the "smash and grab" adjudications.

Did previous "smash and grab" case law prevent ICI from seeking a valuation of the works?

MMT relied upon the case of *ISG Construction Ltd v Seevic College* (2014), in which the court had stated "*in the absence of any notices the amount stated in the contractor's application as the value of the works executed is deemed to be the value of those works*", as support for its argument that the true value of the works had already been finally determined.

The court stated that *ISG v Seevic* did not support MMT's argument, pointing out that in the subsequent Court of Appeal case of *MJ Harding Contractors v Paice* (2015), it was held that it was possible to challenge the valuation of works following a "smash and grab" adjudication because the adjudication had only decided the contractual issue of whether a valued pay less notice had been served. There has also been the Court of Appeal case of *Brown v Complete Building Solutions* (2016), which had a similar result to that in *Harding v Paice*.

The court stated that the different decisions in *ISG v Seevic* and *Harding v Paice* were "*difficult to reconcile*" and that although *ISG v Seevic* had not been overruled, the two subsequent Court of Appeal cases "*cast some real doubt on whether that case would be decided in the same way now*".

The court also found that *ISG v Seevic* did not support MMT's argument because that case was concerned with timing, rather than substantive underlying rights. Although the court in *ISG v Seevic* had held that the

employer was not entitled to seek an interim valuation of the works on whatever date it chose, that was not the same as saying that the amount a contractor is entitled to be paid is always going to be the figure in the most recent interim valuation.

The court also looked at the case of *Galliford Try Building Ltd v Estura Ltd* (2015), in which it was held that following a "smash and grab" adjudication there is nothing to prevent the employer from challenging the value of the works in the next interim payment.

Finally, the court considered the case of *Kersfield Developments (Bridge Road) Ltd v Bray and Slaughter Ltd* (2017), in which it was held that the payment and pay less notice regime simply regulates cash flow and does not affect the parties' substantive rights for the purposes of subsequent interim payments or at final account stage.

Taking all these cases into account, the court stated that "*the amount to which the contractor is entitled as final payment for the works is not definitively decided as the figure in the most recent interim assessment*". In other words, the fact that MMT had won two "smash and grab" adjudications prior to termination of the contract did not prevent ICI from going back and challenging the true value of the works.

The court also pointed out that clause 50 of the NEC3 contract (which the court described as "*central to how the NEC3 contract operates*") requires an interim assessment of the amount due at each assessment date. Such interim assessments could not be said to be definitive or final valuations of the works.

Did repudiation of the contract affect ICI's entitlement to a valuation of the works?

The court stated "*the fact that I have found ICI repudiated the contract does not relieve the parties of an analysis of the value of the works executed by MMT, or freeze MMT's entitlement to payment at the amount it had in fact already been paid (or which had already been included in the most recent interim assessment)*". However, due to the termination for repudiatory breach, the assessment of the value of the works was not to be conducted in accordance with the NEC3 termination procedure.

Analysis

This is another case in which the courts appear to be retreating from the decision in *ISG v Seevic* and it now appears clear that whilst contractors can still bring "smash and grab" adjudication claims, there is scope for employers to seek a proper valuation of the works in subsequent proceedings. It is especially clear that employers have this right where the "smash and grab" occurs at final account stage or where, as in this case, the contract is subsequently terminated. "Smash and grab" adjudications are, nevertheless, likely to remain popular as a quick way of securing a cash flow advantage.