

Construction Law Update

Life after *S&T v Grove*; TCC Guidance on ‘Smash and Grab’.

In *M Davenport Builders Ltd v Greer & Anor* [2019], one of the first cases to consider the enforcement of a ‘smash and grab’ adjudication since the Court of Appeal’s landmark ruling in *S&T(UK) Ltd v Grove Developments Ltd* [2018], the TCC was asked to consider whether the Adjudicator’s decision in a ‘true valuation’ dispute could be set-off against an Adjudicator’s decision in a ‘smash and grab’ dispute. Mr Justice Stuart-Smith decided ‘no’.

Background

Mr and Mrs Greer (“the Greers”) engaged M Davenport Builders Limited (“Davenport”) to undertake certain works at a building in Stockport. The contract did not contain any of the required provisions relating to payment dates or adjudication, therefore, the relevant parts of the Scheme for Construction Contracts provisions applied.

Davenport issued an application for payment of its final account in June 2018. The Greers failed to issue a payment or pay less notice in accordance with the provisions of the Scheme and failed to make payment.

The Adjudications

Davenport subsequently commenced a ‘smash and grab’ adjudication and was awarded the sum claimed in its final account, around £106,000. The Greers did not pay the sum awarded by the Adjudicator.

Six days after the ‘smash and grab’ decision was received, the Greers commenced an adjudication of their own in relation to the ‘true valuation’ of the final account. The Adjudicator proceeded and decided that the ‘true valuation’ of the ‘true’ gross value of the final account was £867,557.54. This meant that, in nett terms, no further sum was payable to Davenport.

Davenport made an application to enforce its ‘smash and grab’ decision by way of summary judgment, against which the Greers sought to set-off the Adjudicator’s decision in the ‘true valuation’ dispute.

The question before the Court was therefore whether the Greers could use the ‘true valuation’ decision as a defence, set-off or counterclaim to the enforcement of the smash and grab decision.

The Court’s starting point was the now well-known Court of Appeal judgment in *S&T*. In *S&T*, Jackson LJ held that s111(1) of the Construction Act 1996 (as amended) (the “Act”) created an “immediate” payment obligation where a payment application had been made and a payment or pay less notice had not been issued. Such an entitlement was to be preferred to a party’s entitlement to adjudicate pursuant to s108 of the Act.

As a result, it was decided in *S&T* that an employer is prohibited from embarking upon an adjudication to obtain a re-valuation of the work before making the “immediate” payment of a ‘smash and grab’ adjudication.

In one of the first reported applications of the *S&T* approach, Stuart-Smith J readily endorsed the Court of Appeal’s findings and refused the Greer’s attempts to set-off the ‘true valuation’ decision from the ‘smash and grab’ decision. Davenport’s ‘smash and grab’ decision was enforced.

However, an interesting practical point was raised when Stuart-Smith J considered the Court of Appeal’s earlier decision in *Harding v Paice* [2016]. In that case Harding attempted to prevent a ‘true valuation’ adjudication being launched on the grounds that Paice had failed to comply with its obligations under a ‘smash and grab’ decision prior to commencement of the ‘true valuation’ adjudication.

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The Court of Appeal “*refused to restrain*” the ‘true valuation’ adjudication, despite the fact it had been *commenced* prior to payment of the ‘smash and grab’ award. This may have been because, prior to a decision being made in the proceedings, Paice made payment, however, this fact was not recorded in the final judgment.

Faced with these seemingly conflicting authorities Stuart-Smith J held that the Court of Appeal in *S&T* were “*clear and unequivocal*” in stating that payment had to be made prior to commencement of a ‘true valuation’ adjudication. However, and notably Stuart-Smith J went on to decide that this did not mean that the Court would “*always restrain the commencement or progress of a true value adjudication commenced before the employer had discharged his immediate obligation.*”

Analysis

Whilst this case confirms in clear terms the Court’s enthusiasm to apply *S&T*, and, in particular, underlines the principle that a party’s immediate obligation to pay a notified sum “trumps” a party’s right to adjudicate upon a ‘true valuation’ dispute, it does raise a practical question as to when, and at what point, the Court will interfere should any such ‘true valuation’ adjudication be commenced.

For example, whether an Adjudicator will have jurisdiction if appointed prior to payment of an alleged notified sum which has not yet been subject to an adjudicator’s decision, does not yet have benefit of express judicial guidance.

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