

Construction Law Update

True Value Adjudications and Stays of Execution

In the case of *Broseley London Limited v Prime Asset Management Limited (Trustee of the Mashel Family Trust)*, the Technology and Construction Court (the “TCC”) considered the applicability of true value adjudications as well as applications for stays of execution.

Background

In December 2017, Prime Asset Management Limited (“PAML”) contracted with Broseley London Limited (“BLL”) for BLL to carry out refurbishment works at Stanley House in Chelsea, London. On 11 July 2019, BLL submitted a payment application to PAML for the sum of £485,216.17 plus VAT (“Valuation 19”). PAML failed to issue a payment notice and the pay less notice given was late. Accordingly, Valuation 19 should have been paid by PAML to BLL by 1 August 2019.

On 9 August 2019, BLL commenced adjudication proceedings and sought payment of Valuation 19. The adjudicator decided that PAML should have paid BLL the claimed sum (“Decision 1”).

There have since been two further adjudications and notably, in the third adjudication, BLL obtained a declaration that it had lawfully terminated the contract on 29 September 2019 (“Decision 3”).

BLL applied to the TCC for summary judgment to enforce Decision 1. PAML, on the other hand, sought a stay of execution for the entire judgment sum for about two months to allow a true value adjudication to take place. PAML claimed that there was a real dispute as to the final account and that, if a proper evaluation of the account between BLL and PAML was conducted, a substantial sum would be found due and owing to PAML from BLL. PAML also claimed that the stay should be granted due to the probable inability of BLL to repay the judgment sum due to its worsening financial position.

The Issues

The TCC accepted that there was a genuine dispute in respect of the final account, but stated that this must be set against the crucial factor that PAML had been extremely slow to show any signs of proper commitment to ascertain the true value of the account with BLL.

The first issue considered by the TCC was whether PAML could raise a true value final account adjudication without first paying the sum awarded in Decision 1. Counsel for PAML argued that it could do this by virtue of Decision 3 and therefore the true value adjudication would concern the final account post-termination.

Citing the Court of Appeal’s decision in *S&T (UK) Ltd v Grove Developments [2018]*, the TCC stated that once the sum in Valuation 19 had been found payable in Decision 1, the effect was that PAML (having not paid the amount awarded in Decision 1) could not commence a true value adjudication as to Valuation 19 but must instead commence litigation. The ability to mount an adjudication that concerned the determination of a notional final account where the amount of that final account was dependent upon the validity of Decision 1, without prior payment of the sum awarded in Decision 1, would be a “*remarkable intrusion*” into the principle in *S&T v Grove*.

Accordingly, the TCC held that PAML could not seek to challenge the sum awarded in Decision 1 without first paying the amount held due in Decision 1.

The second issue considered was whether a stay of execution could be granted pending resolution of the true value of the final account in Part 7 proceedings.

The TCC drew particular attention to Coulson on Construction Adjudication, outlined as follows:

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“A failure by the defendant to pursue its cross-claim or challenge with diligence may itself be a bar to a successful application for a stay of execution”.

Since Decision 1 dated 12 September 2019, PAML had made no attempt to obtain a ruling as to the amount due and was therefore not proactive in obtaining a final determination. Accordingly, the TCC considered this sufficient to refuse the application for a stay of execution.

The TCC also offered a brief analysis of the grounds for the application for a stay based upon BLL’s financial position and corporate affairs. The TCC confirmed that the burden rested squarely with PAML to prove that it would be improbable for BLL to repay the judgment sum at the end of the trial of the underlying issues between the parties. Taking COVID-19 into account, the TCC considered that the assessment of BLL’s financial position would be more difficult, thereby making PAML’s position more difficult. Had PAML moved with due diligence and in accordance with *S&T v Grove*, it could have determined its alleged entitlements before the COVID-19 situation transpired.

Counsel for PAML stated that there was a real risk that any future final judgment would go unsatisfied by virtue of BLL organising its affairs with the purpose of disposing/dissipating the adjudication sum such that it would not be there to be repaid. Noting the seriousness of the allegation, the TCC held that PAML had failed to satisfy the applicable heavy burden of proof in this regard.

Accordingly, the TCC found that there would be judgment against PAML for the sum awarded in Decision 1 plus VAT and interest.

Analysis

This case affirms that true value adjudications have limited applicability and cannot be commenced at a party’s leisure. The principle of *S&T v Grove* holds strong and, as such, a party cannot use a true value

adjudication as a means to stall or withhold payment awarded in a contingent adjudication decision.

Moreover, parties who fail to be proactive in pursuing crossclaims or challenges with diligence run the risk of having their application for stays of execution refused.

Lastly, this case sheds light into the practical difficulties that COVID-19 may have when assessing a party’s financial position. It is fair to say that the degree of uncertainty surrounding the issue of COVID-19 has impacted every aspect of daily life, including that of the judicial system. Indeed, this hearing took place by telephone conference due to COVID-19.

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