

Construction Law Update

Clarity on *S&T v Grove Development* – True Value Adjudications

In the case of *Kew Holdings Limited v Donald Insall Associates Limited*, the Technology and Construction Court (the “TCC”) considered the relevance of true value adjudications in circumstances where the outstanding adjudication award has already been enforced by summary judgment.

Background

Kew Holdings Limited (“Kew”) is the registered proprietor of ‘The King’s Observatory’ (the “Property”). Donald Insall Associates Limited (“DIA”) was retained by Kew to provide architectural services in relation to the conversion and refurbishment of the Property into a private residence.

In 2018, the parties were in dispute concerning DIA’s entitlement to unpaid fees. DIA referred the dispute to adjudication and a sum of £202,509 was awarded in its favour. Kew failed to pay the award and DIA subsequently commenced enforcement proceedings. In February 2019, summary judgment was granted to DIA in the sum of £208,287.84 but again Kew failed to make payment. Consequently, a charging order was granted over the Property in respect of the outstanding judgment sum.

In September 2019, DIA commenced court proceedings for a sale order in respect of the Property to enforce the judgment sum; those proceedings are currently ongoing.

In March 2020, Kew commenced proceedings claiming damages from DIA of £2m citing allegations of inadequate drawings, advice and overcharging for services. In April 2020, DIA issued an application seeking an order that Kew’s claim is struck out or a stay of proceedings is ordered unless Kew paid the judgment sum within seven days. Alternatively, DIA sought an order that Kew pay a sum of £700,000 into the TCC as security for DIA’s costs in the proceedings.

Issues before the TCC

Kew did not oppose the application to stay the proceedings pending payment of the judgment sum but opposed the other applications to strike out the proceedings and/or for security for costs.

Application to strike out Kew’s claim(s)

DIA contended that Kew’s claim had been wrongly commenced without having discharged the payment required by the adjudicator’s decision. DIA relied upon *S&T (UK) Ltd v Grove Developments Ltd* and *M Davenport Builders Ltd v Greer* to argue that a paying party is not entitled to commence a fresh claim to determine the parties’ entitlements unless and until the amounts determined as payable in a prior adjudication were discharged.

The Court of Appeal in *S&T v Grove* held that the adjudication regime did not have the effect of trumping the prompt payment regime contained in the Housing Grants, Construction and Regeneration Act 1996 as amended (the “Act”). As a result, the Act was construed as “prohibiting the Employer from embarking upon an adjudication to obtain a re-valuation of the work before he has complied with his immediate payment obligation”.

Similarly, in *Davenport v Greer* the employer was prohibited from relying upon a ‘true value’ adjudication as a defence or set-off against the contractor’s summary judgment application to enforce an unpaid adjudicator’s award. Further, in *Davenport*, it was noted as follows:

“...it seems to me consistent with the policy underlying the adjudication regime that a defendant who has discharged his immediate obligation [of payment] should generally be entitled to rely upon a subsequent true value adjudication and that a defendant who has not done so should not be entitled to do so.”

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Considering *S&T v Grove* and *Davenport*, the TCC noted that it was clear from such authorities that Kew would not be entitled to start a further adjudication in respect of DIA's fees without first paying the outstanding adjudication award. Also, Kew would not be entitled to rely on any subsequent true value adjudication as a defence to the enforcement of the outstanding adjudication award.

However, such issues did not arise in this case as the TCC had already enforced the adjudication award by giving summary judgment in favour of DIA. As such there was nothing in the Act or the authorities that would make these proceedings unlawful or an abuse of process. The Act provides that adjudication awards are binding only until disputes are finally determined by legal proceedings, arbitration or agreement. The Act expressly contemplates the commencement of legal proceedings to establish parties' rights by way of final binding determination.

Noting the Court of Appeal's analysis in *S&T v Grove* that adjudication provisions are subordinate to the payment provisions in the Act (and hence there is a hierarchy of obligations), the TCC noted that the right to bring legal proceedings and seek remedies was more fundamental and clear words would be needed to make a party's right to access justice subordinate to the payment provisions of the Act.

On that basis, DIA's strongest argument to strike out Kew's claim was Kew's persistent refusal to pay the judgment sum and comply with the enforcement order. In circumstances where Kew accepted that it was bound to pay the judgment sum but failed to do so, it was unreasonable to pursue its claim for damages against DIA without first honouring the adjudicator's decision and summary judgment of the TCC, in flagrant disregard of the "pay now, argue later" principle of the Act.

However, the TCC held that striking out Kew's claim would be draconian. DIA could be protected by way of a stay of proceedings unless and until the judgment was satisfied but it was held that Kew should be

allowed to pursue its claims once it had paid the outstanding judgment sum.

Accordingly, the TCC dismissed DIA's application to strike out Kew's claim(s) but stayed the proceedings pending payment of the judgment sum.

Security for Costs

The TCC considered whether it would be just to make an order for security having regard to all circumstances of the case. Kew submitted that the Property provided adequate long-term security for DIA but the TCC disagreed.

In circumstances where Kew had continuously disregarded court orders and where there were doubts over the adequacy of the Property as security, there was ample evidence that Kew could not and/or would not pay the sums ordered by the TCC. Kew was ordered to pay the sum of £600,000 into the TCC as security for DIA's costs in the proceedings.

Analysis

This case offers an important analysis of *S&T v Grove* in the context of a party's non-payment of an adjudicator's award in circumstances where that award has already been enforced by way of summary judgment. In such contexts, a party taking issue with an adjudication award is entitled to bring legal proceedings and seek remedies as a matter of precedence; however, the court will place much reliance on that party's persistent refusal to pay a adjudicator's award that was been enforced through summary judgment.

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