After the 'Smash and Grab'

The Court of Appeal has delivered some much-needed guidance as to what happens after a 'smash and grab' adjudication. *S&T (UK) Ltd v Grove Developments Ltd*[i] confirms how and when a party on the receiving end of such a decision can go about securing an assessment of 'true' value.

Since the Construction Act was revamped[ii] , we have all become familiar with the 'smash and grab' adjudication (or the legitimate enforcement of a statutory right, depending which side of the fence you're on). The contractor (or sub-contractor) does the work and submits an application for payment, politely asking to be paid for the work which has been done.

The employer (or main contractor) then submits their own valuation of the works. If they miss this first deadline, they get a second chance to reduce the amount due by serving a Pay Less Notice. Miss that second chance, and an adjudicator is very likely to decide that the entire amount claimed in the contractor's original application for payment must be handed over, plus interest and fees.

Why 'smash and grab' adjudications? Well, if you're on the wrong end, that's how it feels. The other side can put any number they like into an application for payment, provided it isn't fraudulent. If you don't get your notices in you could end up paying the whole amount, even if both parties agree the number is high. Moreover, the adjudication is likely to be swift; a review of the notices (if any) and the time at which they were served. There is no need to actually consider things like facts or evidence when it comes to the numbers claimed. The mere fact of having asked for a particular sum of money is enough.

In the fall out some poor soul on the employer's side gets a dressing down for forgetting to send a letter, the contractor is off to celebrate and the adjudicator is left shaking their head, wondering how people are still making this mistake, even while the next three referrals are sitting in his inbox concerning the very same point.

So how do you recover your losses? You've paid your contractor a million pounds, but you're certain they were entitled to a few thousand at most. How do you get your money back, and does it matter if the smash and grab concerned an interim certificate or a final certificate?

You would be forgiven for struggling to draw definitive conclusions, or find a clear line of authority, given the relevant case law of the last few years. You'd be in good company too. The Court of Appeal was asked to consider the issue in the recent case of *S&T (UK) Ltd v Grove Developments Ltd*[iii] and Sir Rupert Jackson noted that:

> *"I find it impossible to reconcile all of the first instance decisions with one another or to say that all of them are right in every particular… This is not a criticism of any of the judges concerned. We are all trying to hack out a pathway through a dense thicket of amended legislation, burgeoning case law and ever-changing standard form contracts"*[iv]

[i] S&T (UK) Ltd v Grove Developments Ltd [2018] EWCA Civ 2448
[ii] The Local Democracy, Economic Development and Construction Act 2009
[iii] S&T (UK) Ltd v Grove Developments Ltd [2018] EWCA Civ 2448
[iv] Para 102

It does not matter which university you went to, or how many certificates you have on your wall. It does not even matter how many endorsements you have on LinkedIn. If Sir Rupert Jackson found the issue impossible to decipher from previous case law, then what chance did the rest of us have?

How has he (and his colleagues Lord Justice Longmore, Lady Justice King and Lord Justice Coulson who heard the matter when he was in the TCC) resolved the question? Perhaps by cunning verbal dexterity which draws a common line of reasoning between contradictory cases? Or perhaps by identifying an over-arching principle which the various judgments all tangentially obeyed?

No. He's done it with the underused tool of common sense. He has has set out to achieve a fair result. He's also done this without riding a coach and horses through the sanction in the payment legislation that persecutes non-compliance with the notification process.

Singing from the Same Hymn Sheet

If one thing is apparent about the LDEDCA changes to the payment legislation in the Construction Act, it's that the Courts really didn't think much of them. In 2015 and 2016, a string of judges were lining up to tell us so. There were a series of cases which tried to stem the tide of smash and grab.

In round one of *Grove Developments v S&T*[v], Justice Coulson said:

> *"I do not consider that the conclusions which I have reached strike at the heart of the adjudication system. On the contrary,* ***I believe that it will strengthen the system, because it will reduce the number of 'smash and grab' claims which, in my view, have brought adjudication into a certain amount of disrepute"***[vi]

The issue had been troubling Justice Coulson for some time. In 2015, he bemoaned the fact that *"the more baleful effects of the amendments"*[vii] to the Act meant that a *"wholly undeserved windfall"* could be due because someone forgot to send a piece of paper. He went on, in *Caledonian v Mar*, to decide that an application for payment was invalid because it was issued earlier than the contract allowed. The fact that previous invalid applications had been acted on was not enough to convince him to find that the requirements of the contract had been wavered.

In *Henia v Beck*[viii], the JCT contract only required applications for payment to be issued more than seven days before the due date each month. As Justice Akenhead noted, this was an open goal for smash and grab. This arrangement allows a contractor to issue all of their applications for payment on day one of the contract, hoping that in the hailstorm of paper an application is missed. To head off that situation Akenhead found that applications had to be viewed strictly. They had to be free from ambiguity and the payment period they applied to had to be made obvious.

Also in 2015, Justice Edwards-Stuart decided in *Leeds City Council v Waco*[ix] that responding to early applications for payment during the works did not create an obligation to respond to future early applications. In other words, just because you're ahead of the game on one application, you haven't set a precedent for the others. As a result, the application which Waco relied on was found to be invalid and the smash and grab was defeated.

In 2016, in *Jawaby v TIG*[x] , an application for payment was found to be invalid on the grounds that the cover email referred to "*our initial assessment*". This suggested that the email was not clearly labelled as an actual application for payment, requiring a response. The employer was therefore forgiven for ignoring it.

To cut a long story short, by 2016 we had a list of TCC judges who began to follow a seemingly common approach in dealing with smash and grab adjudications: perfect paperwork. If the contractor wanted to rely on the employer's bad administration as a basis for payment, then the contractor had to make sure their own paperwork was similarly free from error.

All was clear, then. We all knew what you had to do in order to commence a smash and grab, or where to look for defences if others came knocking. There was only one murky situation left unclear; once a smash and grab had been successfully committed, how did the losing party get back their overpayment?

The courts stepped in to offer some clarity. However, this time the answers they provided were a little less consistent.

Differences of Opinion

There is a sequence of cases which all sought to resolve one question: what happens after a non-existent

[v] Grove Developments Ltd v S&T (UK) Ltd [2018] EWHC 123 (TCC)
[vi] Para 143
[vii] Caledonian Modular Ltd v Mar City Developments Ltd [2015] EWHC 1855 (TCC)
[viii] Henia Investments Inc v Beck Interiors Ltd [2015] EWHC 2433 (TCC) (14 August 2015)
[ix] Leeds City Council v Waco UK Ltd [2015] EWHC 1400 (TCC)
[x] Jawaby Property Investment Ltd v The Interiors Group Ltd & Anor [2016] EWHC 557 (TCC)

Pay Less Notice? How and when can the party who forgot to put the notice in, or which submitted it too late, recover any overpayment?

When looking at these cases, we need to keep in mind that they naturally only deal with the particular issue which was in front of the Court at that time. The facts of each case are often as important as the relevant principles (particularly in the case of *Galliford Try v Estura*[xi]).

Problems arise when we try and take the particular findings of these individual cases, extrapolate them out and force them to fit a different list of facts, different contract conditions and different underlying issues.

We should therefore be cautious about treating them as some sort of a legal pick 'n' mix: a comment here, an observation there and – hey presto – we're right and the other side is wrong.

In *Science and Technology Facilities Council v MW High Tech Projects UK Ltd*[xii], Justice Fraser cautioned against:

> "*'scrabbling around' trying to find reasons not to comply with an adjudicator's decision … rather than behave as intended by the legislation*"[xiii]

It is perhaps that final line which is important: "*as intended*". If there is any single thread which links the following cases, it is perhaps that the Court sought to do the best it could to be 'fair' and get the 'right result' in each case. However, every time a 'get out' was found, it gave encouragement to those trying to avoid paying up after an adjudicator hasd told them to.

We start off with *ISG v Seevic*[xiv] in 2015. ISG issued their application for payment but Seevic did not issue a Pay Less Notice. Not surprisingly, Seevic was told to pay up in full and it did so. Seevic then launched its own adjudication to find out what the true value of the works should have been at the time, with the aim of recovering any overpayment. The Adjudicator decided that Seevic had overpaid by around £700,000 and ordered ISG to return the sum. ISG declined to do so, and everyone set off for a day in court.

Justice Edwards-Stuart agreed with ISG. So far as he was concerned the 'true' value of the works at the time of the interim application had already been decided. It was the amount which had become due by default. On a literal reading of the LDEDCA and the contract, there was no basis to go and open that decision up. As a result the adjudicator lacked jurisdiction in the second adjudication, so that was not enforced. There was another good reason for finding this way. To allow an employer to seek a 'true' valuation of the works following a successful smash and grab would have undermined the provisions of the Construction Act. There would, in effect, be no sanction for failing to issue a Pay Less Notice so long as one was prepared to go to Court.

In *Galliford Try v Estura*[xv], Justice Edwards-Stuart had to consider a similar issue and he also sought to clarify a point within the ISG case.

Galliford Try was awarded the £4m it had applied for following Estura failing to issue a Pay Less Notice. However it was noted that this large sum was manifestly unjust and would have caused significant financial damage to Estura. As a result, it was decided that only £1.5m of the amount awarded should be paid, with the rest stayed pending a final determination. In essence, the desire to achieve a fair result for both parties trumped the wording of the Construction Act and the weight of previous case law.

Justice Edwards-Stuart also cleared up one niggling point left over from *ISG v Seevic*; the fact that you cannot go back and open up the Adjudicator's decision doesn't mean that you can't correct the mistake on a future payment or Pay Less Notice. All that is set in stone by the adjudicator is the value of the works *at the time of that particular application of payment*.

The saga of *Paice v Harding* was particularly contentious. There has been a string of adjudications, with the aftermath fought in the TCC and then the Court of Appeal. The Court of Appeal was trying to decide what happened if the Pay Less Notice which the employer failed to issue was in respect of a final certificate instead of an interim certificate? In *ISG and Galliford Try*, it was decided that once the value of a certificate was due by default, there was no way to open up that certificate again. The problem becomes immediately obvious: there is no certificate after the final certificate, so can an employer recover any overpayment, or is the contractor entitled to keep their ill-gotten gains?

To resolve the problem, the Court decided that interim and final certificates should be treated differently. If you fail to issue an interim payment notice and Pay Less Notice, then you cannot open up that valuation and correct it. If it is a final certificate, you can.

However, the Court of Appeal then had to consider the case of *Adam Architecture v Halsbury*[xvi]. Here an appeal

[xi] Galliford Try Building Ltd v Estura Ltd [2015] EWHC 412 (TCC)
[xii] Science and Technology Facilities Council v MW High Tech Projects UK Ltd [2015] EWHC 2889 (TCC)
[xiii] Para 23
[xiv] ISG Construction Ltd v Seevic College [2014] EWHC 4007 (TCC)
[xv] Galliford Try Building Ltd v Estura Ltd [2015] EWHC 412 (TCC)
[xvi] Adam Architecture Ltd v Halsbury Homes Ltd [2017] EWCA Civ 1735

was allowed on the basis that section 111 of the Act (i.e. the requirement for a Pay Less Notice to be issued) did apply equally to both interim and final certificates.

In another 2015 case, *Wilson & Sharp v Harbour View*[xvii], the Court had to decide what happened when a contractor became insolvent, but where no Pay Less Notice had been issued against the outstanding application for payment. The Court decided that even though there hadn't been a Pay Less Notice, the employer could still go back and value the works to determine the amount due on the application for payment.

In *Kersfield v Bray and Slaughter*[xviii], it was held that a Pay Less Notice had been served out of time and, therefore, the amount applied for was to be paid. Kersfield argued that it could not afford to pay the full amount and that, as in *Galliford Try v Estura*, this would lead to a manifest injustice. The Court, on this occasion, disagreed and, to rub salt in the wound, held that Kersfield was not permitted to adjudicate on the true value of the application - the reason being that an Adjudicator had already determined the matter, albeit by reference to the default provisions rather than by assessing the facts of the case.

Finally, in *ICI v Merit Merrell*[xix], it was confirmed 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"*

Those interim assessments had been decided by a lack of Pay Less Notices. However, both parties were allowed to argue the true value at final accounting.

So, in summary, interim and final certificates are sometimes different and sometimes the same. You can sometimes open up a previous award in adjudication, and sometimes you can't. You cannot defeat the lack of a Pay Less Notice, unless there is a liquidation, in which case the absence of notice does not matter.

All of the above cases turned on their own unique facts. How then, is a party to a potential litigation to know whether or not they have a strong case? Kersfield ran the same arguments as Seevic, yet was unsuccessful where Seevic won.

Some contracts set the trigger point for the payment process as being the submission of an application for payment by the contractor. If the contractor has managed to secure, by default, a large overpayment relatively early in the works, what incentive is there to submit another application for payment? Surely that will only allow the employer to correct the earlier mistake?

All of these issues have now, we hope, been resolved by the Court of Appeal in *Grove v S&T*.

Grove Developments and S&T (UK): – The Court of Appeal

In *Grove v S&T*, as noted above, the Court found it "impossible" to reconcile the various different judgments over the past few years on the topic of Pay Less Notices and what happens next.

In resolving the conundrum, the Court has (very helpfully) provided a wide range of justifications for its findings. This case turned on a number of things; the wording of the Scheme, the JCT contract and, not least of all, on general principles of fairness.

Firstly, is there really any such thing as the 'true' value of the works?

In *ISG*, the amount became due by default, and therefore it was deemed to be the true value. However, the Court of Appeal disagreed. The case of *Henry Boot v Alstom*[xx] held that a party who disagreed with an Adjudicator's decision was free to go to court or arbitration in order to determine the 'true' value. The court considered that a distinction could be made between an amount depending on whether it had been certified as due, become due by default, or decided by an Adjudicator as the 'true' value of the work.

Next, can an employer adjudicate on the 'true' value of an interim payment when it misses the Pay Less Notice? The Construction Act grants the parties the right to adjudicate on any dispute or difference at any time. It is a right which applies equally to both sides. If the contractor is dissatisfied with the content of a Pay Less Notice, it is able to immediately commence adjudication. Why then, should a contractor be permitted to adjudicate in order to determine the true value of an interim payment when the employer is not?

Operating on principles of fairness and common sense, the Court of Appeal considered that there is nothing to stop the employer from adjudicating on the true value of an amount which has become due by default, anymore than there is to prevent a contractor from adjudicating to find the true value when it receives a Pay Less Notice.

Not quite out of the woods yet, this left the Court of Appeal with the same problem as faced the Judge in *ISG v Seevic*: how is the statutory system of adjudication

[xvii] Wilson and Sharp Investments Ltd v Harbour View Developments Ltd [2015] EWCA Civ 1030
[xviii] Kersfield Developments (Bridge Road) Ltd v Bray and Slaughter Ltd [2017] EWHC 15 (TCC)
[xix] Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd [2017] EWHC 1763 (TCC)
[xx] Henry Boot Construction Ltd. v Alstom Combined Cycles Ltd. [2005] EWCA Civ 814

to be preserved if the employer is able to adjudicate in order to find the true value? In *ISG*, the Judge decided that it would have to correct the overpayment on a later certificate. In *Harding*, the Court held that final certificates were different to interim certificates, so an overpayment could still be corrected at the end of the contract even if the final Pay Less Notice was missed.

However, in *Grove*, the Court of Appeal examined the Act and the Scheme and found that there was no difference at all between Pay Less Notices for interim and final certificates and that there was no basis for pretending that there is, even if the goal was pragmatism:

> *"the only real justification which has been advanced in the cases for prohibiting an employer from commencing a second adjudication, to deal with the dispute about the 'true' value, has been the mantra that it does not really matter, because the prohibition only applies to interim applications, and does not apply to the final application. Again, as a matter of first principles, there seems to me to be nothing whatsoever to justify this different treatment. There is nothing in the Act or the Scheme which draws any such distinction"*[xxi]

> *"Accordingly, in my view, there is no contractual basis for treating interim and final applications/payments in different ways. The contract treats them in the same way. So too should the parties, the adjudicators and the courts. On that basis, therefore, whether what is in dispute is an interim payment or a final payment, the employer has the right in principle to refer to adjudication the dispute about the 'true' valuation"*[xxii]

Here, instead of relying on an artificial distinction between interim and final certificates, the Court of Appeal held that the process for opening them up is the same, and it did so in a way that preserved the temporarily binding nature of the adjudication process.

In *Grove*, the Court of Appeal agreed that, if the Court can go back and look at the 'true' value, then so can an Adjudicator. The Adjudicator would previously have determined the amount to be paid via lack of a Pay Less Notice. However, that is not the same dispute as to how much the true value of the works are. Therefore, if it is a different dispute there is no barrier to a second adjudication.

There is nothing that prevents an adjudicator from deciding in the first instance that an amount is due by default, and then afterwards considering what sum would have been due had a proper valuation been carried out. If a court can do it, then so can an Adjudicator.

What then stops a party on the receiving end of a 'smash and grab' adjudication from refusing to pay up and launching an adjudication on the true value?

Where the Adjudicator decides that an amount has become due by default, then that decision is temporarily binding until the true value is determined by the Court or (now) an Adjudicator. It might be temporary, but it is binding.

> *"the employer must make payment in accordance with clause 4.9 of the contract (or, as I would say, in accordance with section 111 of the Amended Act) before it can commence a 'true value' adjudication"*[xxiii]

The employer has to make payment, in full, of the amount applied for by the contractor. Only after the payment has been made can the second adjudication commence.

Summary

- Interim and final certificates are treated the same.
- There is a difference between an amount which becomes due by default and the 'true' value of the works.
- If a Pay Less Notice is missed, then an Adjudicator will likely decide that the amount applied for becomes due, in full.
- The party on the receiving end has to pay up, in full.
- That same party can start its own adjudication as to the true value, but only after it has paid the amount of the original Adjudicator's decision.

[xxi] Para 86
[xxii] Para 89
[xxiii] Para 110

Final Thoughts

In coming to these conclusions, the Court of Appeal expressly stated (with some apparent regret and reluctance) that the judgments in *ISG* and *Galliford Try* were incorrect. Those two cases took a different line to other authorities, and the Court of Appeal decided that they had been wrongly decided.

Wrongly decided they may have been, but the intention in those earlier cases appears to have been the same as here, to preserve the integrity of the statutory adjudication process and to ensure that the system works fairly for both parties.

In *Grove* the Court of Appeal had the benefit of hindsight. The Court could see the unintended consequences of reasoning adopted in *ISG* and *Galliford Try*, because other parties in later cases were beginning to rely on them.

Allowing Adjudicators to determine the true value after they have determined that an amount became due by default, may be seen as an attack on 'smash and grab'. However, this is not necessarily a bad thing. As stated by Sir Rupert Jackson in the Court of Appeal's judgment, the purpose of adjudication is to maintain cashflow within the industry. That is preserved by the employer having to pay the default amount prior to referring the true value of the works to adjudication. The purpose of adjudication is not to allow contractors access to windfall overpayments unless, or until the employer can take them to court.

One of the purposes of statutory adjudication is to provide a cost effective and swift alternative to court action. It is in the interests of both parties to allow this swifter and cheaper system to determine the true value of construction works, rather than requiring the time and expense of litigation instead.

It seems to me that there is no more justice in allowing a contractor to hold onto overpayments than there is in allowing an employer to underpay. It is surely only right that the same method of resolution is available to both the employer and the contractor.

Of course, the most important lessons are those which prevent any of the above issues from arising in the first place. If applications for payment are not overstated, and if Payment Notices / Pay Less Notices are assessed fairly and reasonably, and if everything is done on time, then none of the issues which the court considered will arise in the first place.

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