

True value adjudication: no right to set-off against a smash and grab

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M Davenport Builders Ltd v Greer & Anor [2019] EWHC 318 (TCC) is one of the first cases to consider the enforcement of a 'smash and grab' adjudication since the landmark ruling in *Grove Developments Limited v S&T (UK) Limited [2018]* as affirmed by the court of appeal. The TCC was asked to consider whether the adjudicator's decisions in a 'true valuation' dispute could be set off against an adjudicator's decision in a 'smash and grab' dispute. Stuart Smith J decided 'no'.

Background

The Greers ('the Defendants') appointed Davenport ('the Claimant') to carry out construction works at a building in Stockport. A dispute arose relating to the final account and two adjudications ensued prior to the TCC decision.

The first adjudication saw the Claimant bring a claim due to the Defendants failure to issue a payment or a pay less notice; a 'smash and grab' adjudication. The adjudicator awarded the Claimant £106,160.84 plus interest- this was the amount the Claimant demanded in its final account.

The Defendants did not make the payment required by the earlier adjudication decision. Instead they started their own 'true value' adjudication 6 days later. The second adjudicator decided that the gross value of the final account was just over £867,500 (excluding VAT) and taking into account payments already made, no amount was due from the Claimant to the Defendants.

The present case concerned the Claimant's application to enforce the 'smash and grab' decision by way of summary judgement against which the Defendants sought to set-off the adjudicator's decision in the 'true value' dispute.

The key issue concerning the TCC was whether the Defendants could commence and rely upon a 'true value' adjudication when they had not paid the amount awarded in the 'smash and grab' adjudication.

Decision

Following the decision in *Grove*, the TCC concluded that a 'smash and grab' adjudication creates an immediate payment obligation where a payment application had been made and a payment or pay less notice had not been issued. This immediate payment must be made prior to embarking upon an adjudication to obtain a re-evaluation of the work. The TCC concluded that the immediate payment principle clearly applied both to interim payments (as it was in *Grove*) and final application for payment. Furthermore, the Defendants could not use the decision of

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the 'true value' adjudication as a defence to enforcement of proceedings in relation to the earlier adjudication decision in favour of the Claimant.

However, ambiguity remains over the jurisdiction of the second adjudicator. Indeed, if *Grove* had been applied correctly, the TCC ought to have prevented reliance on the decision of the second adjudicator on the basis that he had no jurisdiction. Instead *Harding v Paice* was applied on the issue of commencement. Although this could be justified on the basis that *Harding* concerned a final account payment whilst *Grove* concerned an interim payment, Stuart-Smith J did not think this way. He stated that there were no good reasons for treating the two situations differently. The problem is that his judgment appears to implicitly create such a distinction. The TCC stated *'the employer must make payment in accordance with the contract... before commencing a true value adjudication. That does not mean that the Court will always restrain the commencement or progress of a true value adjudication commenced before the employer has discharged his immediate obligation'*.

Commentary

Whilst the case follows *Grove* and makes clear that a payer must pay the sum due under a default payment notice before commencing a 'true value' adjudication, the twist lies in the decision that the second adjudicator will not necessarily lack jurisdiction. This means the courts will not always restrain the commencement or progress of

such an adjudication, but the decision cannot be relied upon/enforced until the initial payment has been made.

This confuses the position in *Grove* whereby it was held that the payment obligation must first be discharged before commencement of the adjudication. Whereas the right to adjudicate at any time is fettered in the interim payment context, it is not so for the final accounts payments. On the basis of this case, it appears that a 'true value' adjudication can be referred at any time but not relied upon until the 'smash and grab' award is paid.

Whilst the case underlines the principles 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.

The case will no doubt lead to an increase in 'true value' adjudications being started shortly after 'smash and grab' adjudications. Indeed, payers might work on the basis that, even if they do ultimately have to make payment of the 'smash and grab' adjudication sum, they can immediately start proceedings for the recovery of the overpayment as they will have a valid decision as to the 'true value'.

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