# CONSTRUCTION UPDATE: THE END FOR SMASH AND GRAB?

Aidan Reay

# Smash and Grab

Per Coulson J in *Grove Developments Ltd v S&T(UK) Ltd* [2018] EWHC 123 (TCC) at [13]:

*“a "smash and grab" claim, the phrase currently used in the construction industry to describe these large payment applications made at the end of the works but before the final account.”*

*“This expression has been reflected in a number of the authorities. Although it is a pejorative term, I do not believe that the court can shy away from this generic description when it is freely used by the industry.”*

# *ISG Construction Ltd v Seevic College* [2015] 2 All ER Comm. 545

- The contractor sought payment under an interim payment application for a substantial sum.
- No payment notice was served by the employer.
- No pay less notice was served by the employer.
- The contractor commenced an adjudication on the interim payment application and this was decided in its favour.
- Before a decision was made on the first adjudication, the employer commenced an adjudication on the question of the true value of the works under the interim payment notice. This was decided in the employer's favour.

- The contractor brought a claim for enforcement of the first adjudication decision and for a declaration that the second adjudication was invalid.
- The contractor succeeded.
- Per Edwards-Stuart J at [28]:

> *"I agree also with His Honour Judge LLoyd's conclusion that if the employer fails to serve any notices in time it must be taken to be agreeing the value stated in the application, right or wrong. In my judgment, therefore, in that situation the first adjudicator must be in principle taken to have decided the question of the value of the work carried out by the contractor for the purposes of the interim application in question."*

# *Galliford Try v Estura* [2015] EWHC 412 (TCC)

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In order to mitigate the effects of the employer being unable to challenge the true value of the works by adjudication, the court, whilst granting summary judgment of £4.075m, only allowed judgment to be enforced up to £1.5m with the balance being stayed.

# *Adam Architecture Ltd v Halsbury Homes Ltd* [2017] EWCA Civ 1735

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- Contract for the architects services entered into in October 2015.
- Work commenced by architects.
- In early December 2015, the developers inform the architects that certain functions are not to be performed by them but by other architects.
- Architects treat this as a the end of the contract and cease work.
- Architects issue an invoice for work done to date for £46,239.
- No payment made and no pay less notice served.
- Architects commence adjudication and succeed.
- Architects awarded £45,490 plus interest and costs.

- Still no payment made.
- Architects commence proceedings to enforce adjudication award.
- Developers commence part 8 proceedings seeking declarations that:
  a) The pay less regime did not apply to the invoice.
  b) The developer was not liable to pay the invoice;
  c) The adjudicator's decision was unenforceable
- This succeeded at first instance and the Architects' claims were dismissed.

Judgment at first instance summarised by Jackson LJ as:

*"i) Halsbury's email to Adam dated 2nd December 2015 was a repudiation of the contract of engagement.*
*ii) Adam accepted the repudiation by (a) its two emails of 2nd December, (b) stopping work on 2nd December, (c) its letter dated 3rd December with the invoice dated 30th November attached.*
*iii) Even though Halsbury did not intend to pay the invoiced sum, it was not contractually required to serve a pay less notice, for three separate reasons:*
*a) The contract had been discharged, so that neither party was required to perform its primary obligations under the contract.*
*b) The invoice sent on 3rd December was a final account within the meaning of the last sentence of clause 5.14 of the RIBA Conditions, with the consequence that the invoiced sum was not "the notified sum" as defined in the first sentence of clause 5.14.*

*"c) The invoice sent on 3rd December was a termination account under clause 5.17 of the RIBA Conditions, with the consequence that the invoiced sum was not "the notified sum" as defined in the first sentence of clause 5.14.*
*iv) Accordingly Halsbury was entitled to the declaration which it sought.*
*v) In those circumstances, the issue upon which the adjudicator had reached his temporarily binding decision was now finally decided.*
*vi) Therefore the court would not enforce the adjudicator's decision, but would instead dismiss Adam's claim in the enforcement proceedings."*

The grounds of appeal were:

*"i) Even though the contract of engagement only required pay less notices in respect of interim applications, section 111 of the 1996 Act required pay less notices in respect of both interim applications and any final account or termination account.*
*ii) The judge erred in his decision on repudiation. Alternatively, he ought not to have dealt with that complex issue in Part 8 proceedings.*
*iii) The court has not decided the dispute which was the subject of adjudication. Therefore the court ought to have enforced the adjudicator's decision."*

- The Architects succeeded on appeal.
- Dealing with the first ground, the Court of Appeal held that the requirement for pay less notices in s.111 of the 1996 Act does apply to final accounts and termination accounts just as to interim payments.
- Per Jackson LJ at [48]:

> *"If I look at the language of the statute, both as it was and in the current version, it seems to me clear that section 111 relates to all payments which are "provided for by a construction contract", not just interim payments. I do not think that it is permissible to read into that perfectly sensible and workable provision words which are not there."*

- Per Jackson LJ at [65]:

> *"Let me now draw the threads together. Section 111 of the 1996 Act applies to both interim and final applications for payment. I reach this conclusion on the basis of the clear words of the Act and also in the light of the authorities cited. Therefore if Halsbury wished to resist paying Adam's final account or termination account, then (subject to the repudiation issue) it was obliged to serve a pay less notice. I therefore uphold the first ground of appeal."*

- The threat to smash and grab came in an aside where Jackson LJ said:

> *"62 The next authority cited by counsel is Harding (trading as M.J. Harding Contractors) v Paice and another [2015] EWCA Civ 1231; [2016] 1 WLR 4068 . That case proceeded on the current version of the 1996 Act. The claimant building contractor sought an injunction to restrain the employer from proceeding with an adjudication to determine the sum properly due to the contractor following termination of the contract. The basis of the claim was that a previous adjudicator ordered the employer to pay the full amount shown as due on the contractor's final account pursuant to section 111 of the 1996 Act. That was because of the employer's failure to serve a valid pay less notice."*

*"63 Mr Justice Edwards-Stuart dismissed the claim. The contractor appealed to the Court of Appeal, which dismissed the appeal. The court held that the employer's failure to serve a pay less notice meant that the employer had to pay the full amount shown on the contractor's account and argue about the figures later. The employer duly paid that sum.* ***The employer was now entitled to proceed to adjudication in order to determine the correct value of the contractor's claims and the employer's counterclaims."*** (Emphasis added)

# *Grove Developments Ltd v S&T (UK) Ltd* [2018] EWHC 123 (TCC)

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- The parties were engaged constructing a new Premier Inn at Heathrow.
- The contract sum was over £26million.
- Contractual completion date was 10 October 2016. Practical completion was achieved 24 March 2017.
- Three adjudications took place.
- The first decided that the Schedule of Amendments were part of the contract.
- The second concluded that S&T was entitled to an extension until 9 January 2017 but no longer.
- The third adjudication decided that Grove's pay less notice was invalid.
- On the face of it, S&T was entitled to £14million under interim payment application no.22. Grove, however, was of the view that the value of the work was £1.4million and that this was off-set by Grove's entitlement to liquidated damages.

The issues:

*"(a) **Issue A** : whether or not Grove's Pay Less Notice complied with the requirements of the contract;*

*(b) **Issue B** : whether, even if the Pay Less Notice did comply with the contract, the result in the third adjudication in S&T's favour should still be enforced;*

*(c) **Issue C** : whether in principle, at this stage, Grove is entitled to commence a separate adjudication seeking a decision as to the 'true' value of interim application 22;*

*(d) **Issue D** : whether Grove's notices in respect of liquidated damages were properly issued. This is a separate and discrete issue from the previous three."*

Of the third issue, Coulson J said at [4]:

*"I am aware that **Section 6**, which deals with Issue C (whether an employer has the right to adjudicate the 'true' value of an interim application, in circumstances where their payment notice and/or pay less notice is deficient or non-existent) will be of particular interest to the construction industry, so I make no apologies for its length."*

- Issue A was decided in Grove's favour.
- Its notice had been valid and so the third adjudication had been incorrect in its conclusion.
- S&T nonetheless sought to contend that the notice was arguably invalid on another basis, namely that it was out of time under the JCT terms if the Schedule of Amendments was ineffective.
- This was rejected by Coulson J in deciding issue B against S&T.
- Issue C was also decided against S&T. Grove was entitled to commence adjudication to determine the true value of the work. Per Coulson J at [138]:

  > *"Cash-flow must not be confused with the contractor retaining monies to which he has no right."*

- On issue D, the court again found for Grove. This turned on the timing of notices and whilst Grove's conduct in sending the notices minutes apart might not have been in the spirit of what was intended in the contract, it was in line with the letter of the contract.

# Is this the end for smash and grab…?

# Thank you

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