Construction Law Update

"Smash and Grab" Adjudications – S&T v Grove: The Appeal

In February this year, Coulson J, as he then was, handed down judgment from the Technology and Construction Court ("TCC") in the case of Grove Developments Limited ("Grove") v S&T (UK) Limited ("S&T"). His decision threw significant doubt on the future of what have become known as "smash and grab" adjudications: whereby the amount applied for in a payment application becomes due based on a failure by the paying party to issue an effective Payment Notice or Pay Less Notice. That judgment was appealed by S&T, and the Court of Appeal has today handed down its eagerly anticipated judgment.

Background

In 2015, Grove engaged S&T to design and build a new hotel at Heathrow Airport. The contract was in a standard form, namely the JCT Design and Build Contract 2011, with certain amendments (the "Contract"). There were three adjudications between the parties. In the third adjudication, it was decided that Grove's Pay Less Notice of 18 April 2017 was invalid, and that S&T was entitled to be paid the full sum applied for in its interim application 22; which provided for a further sum payable to S&T in excess of £14 million. Grove commenced proceedings in the TCC seeking certain declarations. Coulson J held that the Pay Less Notice was valid but, crucially, if that had not been the case, Grove would have been entitled to commence an adjudication to determine the 'true value' of interim application 22 and recover any overpayment. However, since that initial judgment, there has been a lot of debate as to the timing of that 'true value' adjudication i.e. when it could be commenced. Some clarity was needed, and it has now been provided by the Court of Appeal which upheld the first instance decision of Coulson J.

Was Grove entitled to commence an adjudication as to the 'true value' of interim application 22?

The Court of Appeal confirmed that a paying party that has failed to serve an effective Payment Notice or Pay Less Notice is entitled to commence an adjudication to determine the 'true value' of the interim application in question **but only after it has paid over the notified sum.**

The reasoning for this is interesting. Following a lengthy analysis of the relevant line of authorities, the Court of Appeal held the payment provisions of the Housing Grants, Construction and Regeneration Act 1996 (as amended) (the "**Act**") create an immediate statutory obligation to pay the notified sum, and that in order to avoid undermining that payment legislation, the right to adjudicate at any time must effectively be regarded as subordinate to the right to payment. Accordingly, the Court of Appeal concluded that:

"both the Act and the contract must be construed as prohibiting the employer from embarking upon an adjudication to obtain re-evaluation of the work before he has complied with his immediate payment obligations."

Was the Pay Less Notice Valid?

Whilst the above issue will no doubt grab all of the headlines, there were some other key points to take from the Court of Appeal Judgment. S&T had argued that Grove's Pay Less Notice was invalid because Grove's calculation of the sum due was set out in a separate document (incorporated by reference only) that had been issued a number of days before the Pay Less Notice. The Court of Appeal upheld the first instance decision and confirmed that in this instance the Pay Less Notice was valid. However, it made very clear that there was no "*bright line rule*" as to when reference to other documents in a Payment Notice or Pay Less Notice would be permissible, stating that "*It is neither tenable to say that reference to other documents is always permissible nor to say that such reference is never permissible*".

Therefore, referencing back to previous documents/valuations in a Payment or Pay Less Notice remains risky.

HAWKSWELL KILVINGTON LIMITED
CONSTRUCTION & ENGINEERING SOLICITORS

17 Navigation Court, Wakefield, WF2 7BJ | 28 Queen Street, London, EC4R 1BB
Tel: 01924 285719 | Fax: 01924 257666 | enquiries@hklegal.co.uk | www.hklegal.co.uk

Construction Law Update

Timing of notices for liquidated damages

Another key point that was addressed was S&T's argument that Grove was not entitled to deduct or recover liquidated damages due to an alleged failure to follow the Contract. The Contract stipulated that before deducting liquidated damages, Grove had to issue a non-completion notice, a notice that it may withhold or deduct liquidated damages, and a notice that it required S&T to pay liquidated damages. The Court of Appeal rejected S&T's argument that the final notice was invalid because Grove had sent it before S&T had received or digested the previous notice. The Contract simply stated the sequence in which the notices had to be sent but it did not prescribe any timeframe which had to elapse between them and the Court of Appeal refused to imply any such term.

Analysis

This landmark Court of Appeal judgment provides a degree of certainty which will be welcomed by the construction industry. It is now clear that a paying party is under an immediate obligation to pay a 'notified sum', and certainly before referring an associated 'true value' dispute to adjudication.

Therefore, we suspect that many parties will still see a clear and significant commercial advantage in pursuing what has become known as a "smash and grab" adjudication.

Finally, the key message to the industry should be that it has never been more important to ensure that valid and effective Payment Notices and Pay Less Notices are served; thereby avoiding these types of claims and issues in the first place.

This article contains information of general interest about current legal issues, but does not provide legal advice. It is prepared for the general information of our clients and other interested parties. This article should not be relied upon in any specific situation without appropriate legal advice. If you require legal advice on any of the issues raised in this article, please contact one of our specialist construction lawyers.

© Hawkswell Kilvington Limited 2018

HAWKSWELL KILVINGTON LIMITED
CONSTRUCTION & ENGINEERING SOLICITORS

17 Navigation Court, Wakefield, WF2 7BJ | 28 Queen Street, London, EC4R 1BB
Tel: 01924 285719 | Fax: 01924 257666 | enquiries@hklegal.co.uk | www.hklegal.co.uk