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Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Dispatch

Adjudication: content of pay less notices

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

This dispute here arose out of the construction of a new Premier Inn Hotel at Heathrow Terminal 4. The contract incorporated the JCT Design and Build Contract 2011. The contractual completion date was 10 October 2016. Practical completion was not achieved until 24 March 2017.

There had been three adjudications. In the second, S&T were awarded a partial extension of time. The third decided that Grove's Pay Less Notice of 18 April 2017 was invalid. This last decision meant that, on the face of it, S&T were entitled to be paid in excess of £14 million pursuant to their interim application no. 22. Grove had already commenced Part 8 proceedings which came before Mr Justice Coulson in his last decision as a judge at the TCC.
The first issue was whether or not Grove's pay less notice complied with the contractual requirement to specify the basis of the calculation. Mr Justice Coulson noted that:

"A pay less notice will be construed by reference to its background, in order to see how a reasonable recipient would have understood it. The court will be unimpressed by nice points of textual analysis, or arguments which seek to condemn the notice on an artificial or contrived basis. One way of testing to see whether the contents of the notice are adequate is to see if the notice provides an adequate agenda for a dispute about valuation and/or any cross-claims available to the employer."

Here, the pay less notice did properly set out the basis of the calculation. The Judge referred to a detailed spreadsheet attached to the payment notice which would have permitted the reasonable recipient to understand precisely how Grove's valuation was made up. In contrast to the notice in Muir, (see Dispatch 209) there were detailed figures for every separate element of the works. The same spreadsheet had been used by each party to identify their differences. Further, there was no objection in principle to a notice referring to a detailed calculation set out in another, clearly identified document. In the view of the Judge, that was how things are commonly done. Accordingly, S&T's argument came down to a submission that even though it was plain on the face of the pay less notice where the detailed calculation could be found, the notice was invalid because the spreadsheet was not re-sent and was instead only referred to. That argument was "artificial and contrived"

The Judge recognised that if a party incorporates a document already sent by reference, and does not re-send it, then that party takes the risk that something may go wrong with the technology or the mode of delivery of the first document. Equally, the words of reference, or the precise document being referred to, might be unclear. However, that had not happened here. The Judge also noted that there was at the time no suggestion that S&T did not know precisely what was being referred to in the pay less notice, something which may explain the lengthy delay before the point was first taken.

Adjudication: consequences of failing to serve a pay less notice

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The Judge then considered whether Grove was entitled to commence a claim for a finding as to the true value of the sum due. In other words: can an employer, whose payment notice or pay less notice is deficient or non-existent, pay the contractor the sum stated as due in the contractor's interim application and then seek, in a second adjudication, to dispute the sum that was due?
Mr Justice Coulson said that there were six separate reasons why the answer to that question was yes.

First, the court can decide the 'true' value of any certificate, notice or application and that, as part of that process, it has an inherent power to open up, review and revise any existing certificates, notices or applications. Therefore in any case where the parties have conferred upon an adjudicator the power to decide all disputes between them, the adjudicator has the same wide powers as the court.

Second, there is therefore no limitation on the nature, scope and extent of the dispute which either side can refer to an adjudicator. For example, paragraph 20 of the Scheme, says that an adjudicator may open up, revise and review any decision taken or any certificate written by any person referred to in the contract unless the contract states that the decision or certificate is final and conclusive. There is therefore also no limit on the power or jurisdiction of an adjudicator which would prevent him or her from doing the same.

Thirdly, the dispute which the employer would wish to raise in the second adjudication is a different dispute from that which was determined in the first. In the first adjudication, the issue would be whether or not the employer's payment notice and/or pay less notice was deficient or out of time. If the adjudicator in the first adjudication found that the employer's notice(s) was deficient or out of time, then the contractor would have an unanswerable right to be paid the sum stated in its own application or payment notice. That is the only jurisdiction given to the adjudicator who will not be concerned with any detailed matters of valuation.

Fourthly, the words in the JCT contract expressly differentiate between "the sum due" (clause 4.7.2) on the one hand, and "the sum stated as due" in the payment notice or the pay less notice (clause 4.9), on the other. The Judge asked why the contract deliberately uses different terms. "The sum due" is identified in clause 4.7 because that is the result of the contractual mechanism designed to calculate the contractor's precise entitlement (the "true" valuation). It is the process by which the correct amount, calculated to the penny, is arrived at. That is a very different thing to "the sum stated as due." Clause 4.9 provides that, in the absence of a payment notice and/or a pay less notice from the employer, it is "the sum stated as due" which will be payable.

Fifthly, the right for an employer to refer the dispute about the true valuation to adjudication, once he has paid the sum stated to be due, arises from considerations of equality and fairness. It is not controversial that, if an employer serves a payment notice or a pay less notice which is in a lower sum than that for which the contractor has applied, the contractor can refer the dispute about the "true" value to adjudication. It would be wrong in principle to prohibit the employer from doing that which the contractor can do: there can be no justification for such radically different treatment.

Sixthly, the Judge concluded that there was no difference between the payment rights and obligations of the parties in respect of interim payments, and those arising in respect of the final payment.

Mr Justice Coulson went on to analyse the relevant CA and TCC cases. He noted that in *Rupert Morgan Building Services v Jervis* [2003] EWCA Civ 1563, LJ Jacob's approach was that: "without a valid pay less notice, the employer, must pay up, but if they have overpaid, they "can raise the matter by way of adjudication". In Mr Justice Coulson's view:

"the Court of Appeal authorities all point the same way. An employer who has failed to serve its own payment notice or pay less notice has to pay the amount claimed by the contractor because that is "the sum stated as due". But the employer is then free to commence its own adjudication proceedings in which the dispute as to the 'true' value of the application can be determined."

The Judge also considered the numerous cases in the TCC. Here the Judge disagreed with the approach of Mr Justice Edwards-Stuart in the cases of *ISG v Seevic*, and in *Galliford Try v Estura* (Dispatch 178), that by failing to serve a notice in time or with proper contents, the employer had agreed, or must be deemed to have agreed, that the amount claimed was the "true" value of the interim application. He noted that there is usually no basis in fact for any alleged agreement. Nor is there any basis for deeming any such agreement either. What has happened is that the employer has failed to serve a proper pay less notice, and has therefore raised no effective challenge to "the sum stated as due". So that stated sum is due under the contract. But this does not mean that the employer can be deemed to have agreed that that sum represents the "true" value of the application

Mr Justice Coulson noted that in the *Galliford Try* case the Judge recognised that, because of the likely delay until the final account, there was the risk of injustice if the whole sum was paid over to the contractor. That led to a stay of execution in respect of more than half the sum which had been 'agreed' as due. The stay was an attempt to do justice but in the view of Mr Justice Coulson, it was still unsatisfactory: because if the employer was to be deemed to have agreed the full amount claimed, how could they be entitled to a stay of execution in respect of any part of it.

Finally, Mr Justice Coulson considered what he termed the "doomsday scenario" or the suggestion that if an employer could start a second adjudication as to the "true" value, it would destroy the policy underlying the 1996 Act. He did not agree. One of the purposes of the 1996 Act was to ensure that the contractor was entitled to maintain proper cash-flow. Here, the contractor would not be prejudiced in respect of cash-flow at all, because he would be recovering the full amount for which he had claimed in his interim application. That amount would have to be paid by the employer. The Judge said that if a second adjudication took place thereafter, which concluded that the contractor had over-claimed, the contractor would have to repay the amount of the overpayment. A contractor should not be entitled to hang on for lengthy periods to sums to which, on a proper analysis, he was not entitled.

Cash-flow must not be confused with the contractor retaining monies to which he has no right. Mr Justice Coulson concluded that:

"In addition, I note that the contractor has always had the right to raise the question of the true value of a pay less notice in a second adjudication, and it has never been suggested that that is somehow contrary to policy or the operation of the 1996 Act. The sky has not fallen in, just because the contractor has a residual right to challenge the 'true' value of the sum stated as due in a pay less notice. I am confident that there will be no significant adverse consequences if the employer is able to exercise a similar right.

"For all these reasons, therefore, 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."

Liquidated damages: employer notices

Grove Developments Ltd v S&T

[2018] EWHC 123 (TCC)

The final issue arose out of liquidated damages ("LADs") notices served by Grove. Under clause 2.29.1.2 Grove was required to serve a notice stating that it "may" require payment or withholding of LADs. This was termed a "warning notice". Clause 2.29.2 then provided for a second notice, termed the deduction notice, under which an employer "requires" the contractor to pay LADs and/or notes that that the employer "will" withhold or deduct liquidated damages. Here, the warning notice was sent by Grove to S&T on 18 April 2017. The metadata showed that it was sent at 17:01 and received at 17:03 by S&T. The deduction notice was sent on the same day. The metadata showed that it was sent immediately, the Judge stressed that this meant, seconds, after the warning notice.

There was no dispute that Grove sent, and S&T received, the warning and deduction notices pursuant in the correct sequence. The issue raised by S&T was that the deduction notice was invalid because they were not given time to read/understand/digest the warning notice. Mr Justice Coulson said that he had "some sympathy" with S&T's complaint about the brevity of the interval. However, on analysis of the contract terms as a whole, he did believe that it is possible to say that what Grove did was contrary to the contract. Clause 2.29 does not have a specified period between the warning notice and the deduction notice. Mr Justice Coulson noted that this made commercial sense. In respect of the LADs, the warning notice can only be issued after the non-completion notice. So by the time the warning notice is issued, the delay has already occurred. Therefore provided the two sets of notices were served in the correct sequence and were received in the correct sequence, they cannot be said to be defective. That was the position here.

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