

MORE ON TRUE VALUE ADJUDICATIONS

- ▶ Can a subsequent true value adjudication decision be used as a defence in enforcement proceedings to avoid paying an initial adjudicator's award?

In the case of *M Davenport Builders Ltd v Greer and another* [2019] EWHC 318, the first reported case since the Court of Appeal decision in *Grove* on similar issues, the claimant contractor (**Davenport**) was engaged to carry out some works under a construction contract with Greer that made no provision for payment or adjudication. As a result, the provisions of the Scheme for Construction Contracts applied (by virtue of s108 and s109 of the Housing Grants, Construction and Regeneration Act 1996 ("the Act")).

There was a dispute in respect of Davenport's final account payment application and this dispute was referred to adjudication (**First Adjudication**). In the First Adjudication, as a result of Greer's failure to issue a payment notice or pay less notice the adjudicator held that Davenport was entitled to £106,160.84. Following the First Adjudication, Greer commenced a further adjudication in an attempt to determine the true value of the works (**True Value Adjudication**). The adjudicator in the True Value Adjudication concluded the gross value of the final account and held that no sum was due to Davenport.

Davenport commenced proceedings in the TCC to enforce the decision in the First Adjudication. Greer sought to rely on the award in the True Value Adjudication by way of set off or counterclaim. As such the central question for the Court was whether Greer was required to make the payment arising from the First Adjudication, despite there being a decision in the True Value Adjudication that no payment was due.

Unsurprisingly Stuart-Smith J held that "it should now be taken as established that an employer who is subject to an immediate obligation to discharge the order of an adjudicator based upon the failure of the employer to serve either a Payment Notice or a Pay Less Notice must discharge that immediate obligation before he will be entitled to rely upon a subsequent decision in a true value adjudication". Accordingly Greer was obliged to pay the sum from the First Adjudication despite the decision in the True Value Adjudication because Greer had not discharged its immediate payment obligation and thus could not rely on the result of the True Value Adjudication unless and until it had done so. Stuart-Smith J made reference to cashflow within the industry in support of this decision. This principle applies to true value adjudications in the final account and interim payment context.

However, despite finding that the decisions of Coulson J and the Court of Appeal in *Grove* are clear and unequivocal that the employer must make payment before it can commence a true value adjudication Stuart-Smith J went on to add (based on the Court of Appeal decision in *Harding*) "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". Unfortunately, however, he felt that it would be unhelpful for him to decide whether or in what circumstances the Court may restrain the subsequent true value adjudication leaving uncertainty around this issue. He was also not required to determine whether the adjudicator in the True Value Adjudication in this case had jurisdiction.

As such, Stuart-Smith J did not take the opportunity to provide the practitioner with useful guidance as to what type of circumstances would allow parties to commence a second, true value adjudication, despite having not disposed of the obligation to make payment from an earlier adjudication and when an adjudicator in a true value adjudication, therefore, would (or would not) have jurisdiction

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