ADDLESHAW GODDARD

GROVE DEVELOPMENTS V S&T – SMASH AND GRAB ON THE ROPES?

Mr Justice Coulson's recent decision in *Grove Developments v S&T (UK)* [2018] EWHC 123 (TCC) was his last substantive Technology and Construction Court judgment before his elevation to the Court of Appeal. It's fair to say he went out with a bang.

ISG/Estura undone?

The learned judge took aim squarely at the much maligned precedent created by Mr Justice Edwards-Stuart in *ISG v Seevic* and reinforced by him in *Estura v Galliford Try*. Those cases established that, in the absence of a pay less notice against an interim application, the paying party had to pay the full amount certified and could not subsequently adjudicate on the true value of the work done by that stage.

Mr Justice Coulson held these decisions to be contrary to the approach taken by the Court of Appeal in *Rupert Morgan Building Services v Jervis* [2004] 1 W.L.R. 1867, an old Act case, where Lord Justice Jacob had held that in the absence of a pay less notice a payer must pay now and argue later. Mr Justice Coulson took "*later*" to be any time after having paid, rather than waiting to the next interim or the final certificate. That must be right, and is confirmed in the following passage from Lord Justice Jacob's lead judgment (at paragraph 14(d)):

> "*[this logic] does not preclude the client who has paid from subsequently showing he has overpaid. If he has overpaid on an interim certificate the matter can be put right in subsequent certificates. Otherwise he can raise the matter by way of adjudication or if necessary arbitration or legal proceedings*" (emphasis added)

The word "*otherwise*" here makes clear that an adjudication can be brought on whether there had been an overpayment quite separately from the goings on in later certificates.

Mr Justice Coulson also rejected the finding of Mr Justice Edwards-Stuart in ISG/Estura that in the absence of a pay less notice there was some sort of deemed agreement by the payer that the amount applied for was the true value of the work. In this, he drew attention to the reference at clause 4.9 of the relevant JCT form to payment of the amount "*stated as due*", in contrast to the reference at clause 4.7.2 to the "*sum due*" as an interim payment being the actual value of work done. Mr Justice Coulson took from this distinction that you must pay the sum stated as due, but the question of what was actually due is a separate question which, as long as payment has been made, can be the subject of a further adjudication.

In this author's view, that has a force of logic. Paul Darling QC expressed a staunchly opposed view at a recent Society for Construction Law conference in Leeds. In his respectful opinion, Mr Justice Coulson had invented in *Grove* a term of repayment that did not exist contractually, and had conflated the distinction between procedural (pay what the notices says) and substantive (but what *should* the notices should have said). But Mr Justice Coulson's reliance on and analysis of the express contractual wording – "*sum due*" as contrasted with "*stated as due*" – does suggest that Mr Justice Coulson's decision confirms rather than undermines the contractual intent.

The impact of Grove

Mr Justice Coulson was at pains to underscore that his remarks on this topic were not *obiter*. In truth, they probably were, but will be highly persuasive, and will probably followed by others in the TCC.

Legal commentators have been quick to herald the end of smash and grab adjudications. Mr Justice Coulson himself in the judgment considered that his decision "*will reduce the number of 'smash and grab' claims which, in my view, have brought adjudication into a certain amount of disrepute*".

Jonathan Cope of MCMS offers a contrasting opinion in a recent blog. In his view, payees will continue to have regular recourse to 'smash and grabs' because (a) it avoids arguing about the merits and (b) adjudicators may be more sympathetic to smash and grab claims in the knowledge that any overpayments can be quickly corrected post-payment.

On the second point, Mr Cope points out that Mr Justice Coulson said repeatedly that an adjudication on the true value can only be commenced once the sum stated as due as in fact been paid.

But this seems to cut across the payer's statutory and contractual right to adjudicate at any time. Is an adjudicator really to refuse jurisdiction on a *bona fide* dispute on true value simply because no payment has yet been made – hardly likely. It is much more likely that we will see a resurgence of the cross-adjudications of the past and that, when it comes to enforcement, a decision on the true valuation will be netted off against a decision on what should at the time have been paid.

Concluding thoughts

Mr Justice Coulson has (subject to a successful appeal) rung the adjudication changes once again, but the practical implications of his decision are far from clear.

Who to contact

PETER CLYDE
Managing Associate
0131 222 9532
07928 654588
peter.clyde@addleshawgoddard.com