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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

Case update: adjudication, pay less notices & liquidated damages

S&T (UK) Ltd v Grove Developments Ltd
[2018] EWCA Civ 2448

We discussed this case in Issue 213. Mr Justice Coulson had held that:

(i) Grove's Pay Less Notice sent in response to interim application 22 complied with the contractual requirements.
(ii) Grove was entitled to pursue an adjudication to determine the correct value of the works (i.e. the true sum due to S&T on interim application 22).
(iii) Grove had complied with the contractual requirements needed to maintain its claim for liquidated damages.
The case was thought to be of such significance to the construction industry that LJ Jackson was invited back to the CA for the appeal.

Was the Purported Pay Less Notice Valid?
The CA noted that section 111 (4) of the Amended HGCRA requires that a Pay Less Notice given by the employer "shall specify"both the sum considered to be due" and "the basis on which that sum is calculated". It was common ground that the notice which Grove sent to S&T on 13 April 2017 satisfied the first requirements, as it stated that the sum Grove considered to be due was £0.00. However, the adjudicator had said that the notice did not specify the basis on which that sum had been calculated. This was even though, the notice said that: "The basis on which this sum is calculated is set out in the Payment Certificate 22 dated 13th April 2017."

The CA noted that this was clearly a reference to a spreadsheet which accompanied Payment Certificate 22. The adjudicator had held that that was insufficient to satisfy the contractual requirement. Mr Justice Coulson had disagreed, saying that the construction of notices must be approached objectively. For the Judge, the question was how a reasonable recipient would have understood the notice. He held that the spreadsheet with figures added in red, which Grove sent on 13 April 2017, properly set out the basis of Grove's assessment of the sum due:

"...There can be no possible objection in principle to a notice referring to a detailed calculation set out in another, clearly defined document. That is how these things are commonly done."

Here, Grove's Pay Less Notice was sent to the individuals in S&T who were dealing with interim application 22. They were therefore bound to be familiar with the package of documents which Grove had sent to them five days earlier. Those individuals "knew perfectly well" what the detailed calculations were to which Grove was referring in the Pay Less Notice. Accordingly, LJ Jackson concluded that the notice, did "specify" the basis on which Grove's valuation figure of £0.00 had been calculated.

Was Grove Entitled to Pursue a Claim in Adjudication to Determine the Correct Value of Interim Application 22?
The CA judgment contains a useful summary of the earlier court decisions leading to the "smash and grab" cases where employers who had failed to serve a timely Pay Less Notice, were then denied the chance to start a further adjudication to determine the true value of the interim application in question. The summary ends with the present case where Mr Justice Coulson had set out six reasons why Grove was entitled to bring a separate adjudication to determine the correct value of interim application 22, even if there was no valid Pay Less Notice:

(i) An adjudicator has the same powers as the court to determine the true value of any certificate, notice or application, including the power to open up and revise a sum notified in an interim application.
(ii) The wide powers of an adjudicator meant that there was no limit on the nature of disputes which either party could refer to adjudication.
(iii) Given that the adjudicator had ordered payment of £14,009,906 on the ground that there was no timeous Pay Less Notice, there had not yet been any adjudication about the true value of interim application 22.
(iv) The "sum due" under clause 4.7 of the amended HGCRA is different from "the sum stated as due" in clause 4.9. The mechanism of section 4 of the contract was designed, in the end, to achieve payment of the true sum which is due under clause 4.7.
(v) If a contractor objects to the employer's Pay Less Notice, it can start an adjudication to ascertain the correct figure. As a matter of fairness, the employer should have a similar right to adjudication if he considers that the sum notified by the contractor is too high.
(vi) There is no justification for treating interim and final applications differently.

LJ Jackson agreed that the six reasons supported his view that the employer, having failed to serve a Payment Notice or Pay Less Notice, was nevertheless entitled to adjudicate to determine the true value of an interim application. The Judge was of the view that if an adjudicator found that the employer had overpaid at an interim stage, he could order re-payment of the excess. The parties had agreed that the adjudicator should have jurisdiction to deal with disputes, including concerning the correct valuation of work under clause 4.7. Having determined the true value of the works at an interim stage, the adjudicator should be able to give effect to the financial consequences of his decision.

The next question that arose was when could this right be exercised? Mr Justice Coulson had held that the employer could only exercise that right after he has paid the notified sum, as required by section 111. Lord Justice Jackson agreed, saying that the HGCRA:

"has created both the prompt payment regime and the adjudication regime. The Act cannot sensibly be construed

as permitting the adjudication regime to trump the prompt payment regime. Therefore, both the Act and the contract must be construed as prohibiting the employer from embarking upon an adjudication to obtain a re-valuation of the work before he has complied with his immediate payment obligation."

LJ Jackson further noted that:

"It may be argued that my conclusion on the timing issue operates harshly in situations where the contractor is veering towards insolvency. The employer may pay out a large sum (in a scenario like the present some £14 million), which is then swallowed up by secured creditors before there is any re-valuation of the works. I emphasise that there is no suggestion of insolvency here. I am merely exploring the potential issues. My answer to that hypothetical argument is that in any case where there is a perceived risk of insolvency the employer would (or at least should) be scrupulous to protect itself by serving timeous Payment Notices or Pay Less Notices."

Were the Notices Served by Grove Sufficient to Entitle Grove to Deduct Liquidated Damages?
Clauses 2.28 and 2.29 of the contract required the employer to give separate notices in a specified sequence, before it could recover liquidated damages for delay. Here, the key notices were the second and third. Grove sent the second notice at 49 seconds after 5 pm and the third 8 seconds later. S&T said that this process did not comply with the contract. Grove had sent the third notice before S&T could reasonably have received and considered the second. The second notice was essentially a warning that the employer may exercise his right to recover liquidated damages. The warning notice was of no possible use, unless the contractor had a brief period of time to do something about it. Whilst LJ Jackson could see that there was some "force" in this argument, he found it "impossible" to identify in the contract any specific period of time which should elapse between serving the second and third notices. All that was required was that the notices were given in the correct order.

Liquidated damages & force majeure

GPP Big Field LLP & Anor v Solar EPC Solutions SL

[2018] EWHC 2866

The disputes here related to five solar power generation plants made between one of the claimants ("GPP") as employer, and Prosolia UK Ltd as contractor. Prosolia was now insolvent. Solar was the parent company of Prosolia and was sued as guarantor and/or indemnifier of Prosolia's obligations. This summary concentrates on the "Hamptworth contract" only. GPP's primary claim was for £631k, which it said was due by way of liquidated damages (LADs) under clause 21.5 arising from the failure to achieve the specified commissioning date. Solar said that the LAD clause was a penalty clause, and so was unenforceable, and that Prosolia was relieved of its obligation to achieve "commissioning" by the contractual date because a substantial part of any relevant delay was caused by force majeure.

Solar said that clause 21.5 expressly described the sum payable as "the penalty". This was a "powerful indicator" of the parties' intentions. Further, the extent of the loss likely to be suffered would be dependent upon the output of the plant and the prevailing electricity price. Yet the five EPC contracts provided for the same penalty of £500 per day per MWp, even though each of the five plants had a different output, and there was a difference of over 30% in the expected electricity prices recorded in the various contracts. Therefore the sum chosen was not based on any genuine pre-estimate of the likely losses.

Mr Richard Slater QC accepted the witness evidence to the effect that there were no negotiations about the £500 figure. However, this was not sufficient to say that clause 21.5 was an unenforceable penalty. What mattered therefore was the substance of the clause in question. Delay damages provisions are common in construction contracts, and the parties were experienced and commercially sophisticated, and of equal bargaining power, who were well able to assess the commercial implications of the clause.

Further, the sum specified was not "extravagant or unconscionable" in comparison with the legitimate interest of GPP in ensuring timely performance. Based on the proposed construction period, the relevant period would have been expected to begin in mid-July, at the height of the peak generation period. There was no difficulty in the £500 figure being a "round sum." It was the nature of LADs that they are often used (as here) in cases where precise prediction of the likely loss is difficult, and are therefore often expressed in round. Further, the clause in question referred to both a "penalty" and "delay damages".

Solar's second defence was that protests by local residents, amounted to "disturbance, commotion or civil disorder" or "acts of...sabotage" which prevented Prosolia from progressing with the works along the chosen route, compelling them to abandon the already partially built route for the cabling in favour of a longer and more costly one. According to the witness evidence, as the: "sub-contractors were trenching the roads, there were public demonstrations and human barriers, which were jumping into and occupying the trenches creating serious and present risk to the health and safety of the public and the contractor's staff and visitors."

However, in the opinion of the Judge, the evidence did not establish that the cause of that delay was "disturbance, commotion or civil disorder." Instead, it showed that the delay was caused by Prosolia's assessment that, given the strength of the local opposition, it was unlikely to get the necessary planning permissions and consents needed for its original substation location and cable route. Under the terms of the Hamptworth contract this was Prosolia's responsibility. The risk that they could not be obtained was therefore theirs. In addition, there had not been a formal notice as required by the contract. Mr Richard Salter QC noted that the invocation of force majeure was a formal step, and it made "perfect commercial sense" for the parties to require the formality of written notification. The provision of "some information about the alleged objections of the local community to the cable route" did not amount to compliance with formal force majeure notification requirements.

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