



On 7 November 2018 the Court of Appeal handed down its judgment in this landmark case on the proper operation of the payment provisions under the amended provisions of the HGCRA. In summary, Coulson J’s first-instance judgment was upheld in respect of each of the three issues which had been raised by way of S&T’s appeal.

Pay Less Notices

The Court entirely endorsed Coulson J’s reasoning. The test to be applied to the proper construction of payment notices under the Act was that set out in *Mannai v Eagle Star*. The question is how a reasonable recipient would have understood the notice. Viewed in that way, if a reasonable recipient of a Pay Less Notice which expressly referred back to documents sent previously, but which were not re-attached, would have understood what was meant by the reference, the notice would be valid.

“True value” adjudications

The Court confirmed that an employer who has failed to serve both a Payment Notice and a Pay Less Notice is entitled to commence an adjudication to have the true value of the application assessed and to reclaim any sum which has been overpaid. In short, the Court upheld Coulson J’s decision for each of the six reasons that he gave:

- (i) Courts and adjudicators have the power to open up, review and revise sums shown as due in interim applications in any case where the interim application determines what is payable. Prior to Grove, this point had not featured as a line of argument in the earlier cases;
- (ii) Section 108 and, where it applies, paragraph 20 of the Scheme are broad enough to enable any adjudicator to carry out that review and revision and order payment accordingly;
- (iii) There is a distinction between a dispute about the sum which has to be paid (“the notified sum”) and the true valuation of the work done. The former does not transmute into the latter. In adjudication parlance, they raise different disputes;
- (iv) The contract distinguishes between “the sum due”, which represents the product of the valuation bargain and “the sum stated as due” which represents the product of the payment bargain. The valuation bargain sets out the terms for reviewing and adjusting the payments which have been made;

(v) The conclusion that an employer has the right to adjudicate over the true value of an interim payment is a fair one because the contractor also has the right to do so when seeking payment of a higher sum than that notified. The payment regime gives an employer very little time to carry out a complex valuation. The purpose of the notice regime is to generate a provisional figure for immediate payment. Adjudication would facilitate a more detailed valuation if required;

(vi) There is no basis for distinguishing the position at the final account stage (when a true value adjudication is always permissible: see *Harding v Paice*) from the position at interim stage, in circumstances where s.111 applies equally to both forms of payment.

Having determined that the right to a true value assessment exists, the Court took a different approach to that of Coulson J in respect of the mechanism for repayment of any sum which, by then, will be regarded as having been overpaid. Whereas the Judge concluded that this could be achieved by means of an implied term or restitution, the Court of Appeal accepted the proposition that this was unnecessary. The order for repayment should be seen simply as part of the dispositive remedy which flows from the adjudicator's revaluation: see *Beaufort Developments v Gilbert Ash and Henry Boot Construction v Alstom*. No self-standing cause of action for repayment was required.

The final and all-important issue concerned the question of timing. Coulson J had emphasised that a true value adjudication could not be commenced until payment by the employer had first been made but, because the issue had not been debated, gave no express juridical basis for so concluding. The Court of Appeal grappled with this head-on. In an interesting analysis, the Court construed the Act so that the mandatory payment provisions in s.111 should be seen as having priority over the statutory right to adjudicate in s.108. This right was to be regarded as subordinate to the payment right. On that basis, an employer must pay first and adjudicate after.

Liquidated damages

Finally, the Court considered the giving of notices in respect of liquidated damages. The Court of Appeal agreed with Coulson J that whilst the first notice warning about the deduction and the second notice imposing that deduction had to be received in the given sequence, no particular period of time must elapse between receipt of the two.

Concluding remarks

The judgment, in nine parts, with threads duly drawn together, will be of great importance to the construction industry. And not one mention of “smash and grab”.

Alexander Nissen QC (Keating Chambers) was counsel for the successful respondent, Grove Developments Ltd

