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“SMASH AND GRAB” UPDATE: CAN AN EMPLOYER START A “TRUE VALUE” ADJUDICATION WITHOUT FIRST PAYING THE NOTIFIED SUM?

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SUMMARY

Insofar as “smash and grab” disputes go, **Broseley London Ltd v Prime Asset Management Ltd** is simple and straightforward. However, the judgment touches upon an issue which is anything but straightforward: can an employer start a “true value” adjudication without first paying the notified sum?

For those who are new to “smash and grab” practice, Jonathan Cope’s blog, Implications of the Court of Appeal’s decision in S&T v Grove Developments and Gideon Scott Holland’s blog, Adjudication matures as it gets the key to the door are a good starting point.

Broseley – a textbook application

The contractor applied for payment of around £485,000 (notified sum). As the employer did not serve a timely payment notice or pay less notice, it was required to pay the notified sum. The employer didn’t pay and the contractor obtained an adjudicator’s decision requiring the employer to pay the notified sum.

The employer still did not pay. The contractor applied to the TCC for summary judgment to enforce the adjudicator’s decision. The employer did not oppose the contractor’s application, but sought a stay of execution so as to allow it to commence Part 7 proceedings to determine the true value of the account.

The court (Mr Roger ter Haar QC sitting as a deputy High Court judge) ordered the employer to pay the notified sum, and refused to grant a stay of execution. This was a textbook application of “smash and grab” and adjudication “pay now argue later” principles.

Can an employer start a “true value” adjudication without first paying the notified sum?

This vexed question was alluded to in Broseley.

In Harding v Paice, the contractor started a “smash and grab” adjudication and received an adjudicator’s decision in its favour. Without paying the awarded sum, the employer started a “true value” adjudication. The awarded sum was later paid but, when a related dispute ended up before the courts, neither the TCC at first instance nor the Court of Appeal appeared to take issue with the employer commencing the “true value” adjudication without first paying the awarded sum.

In Grove Developments Ltd v S&T (UK) Ltd, Coulson J (as he was then) took a different view. He said:

In my 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.” (Paragraph 103).

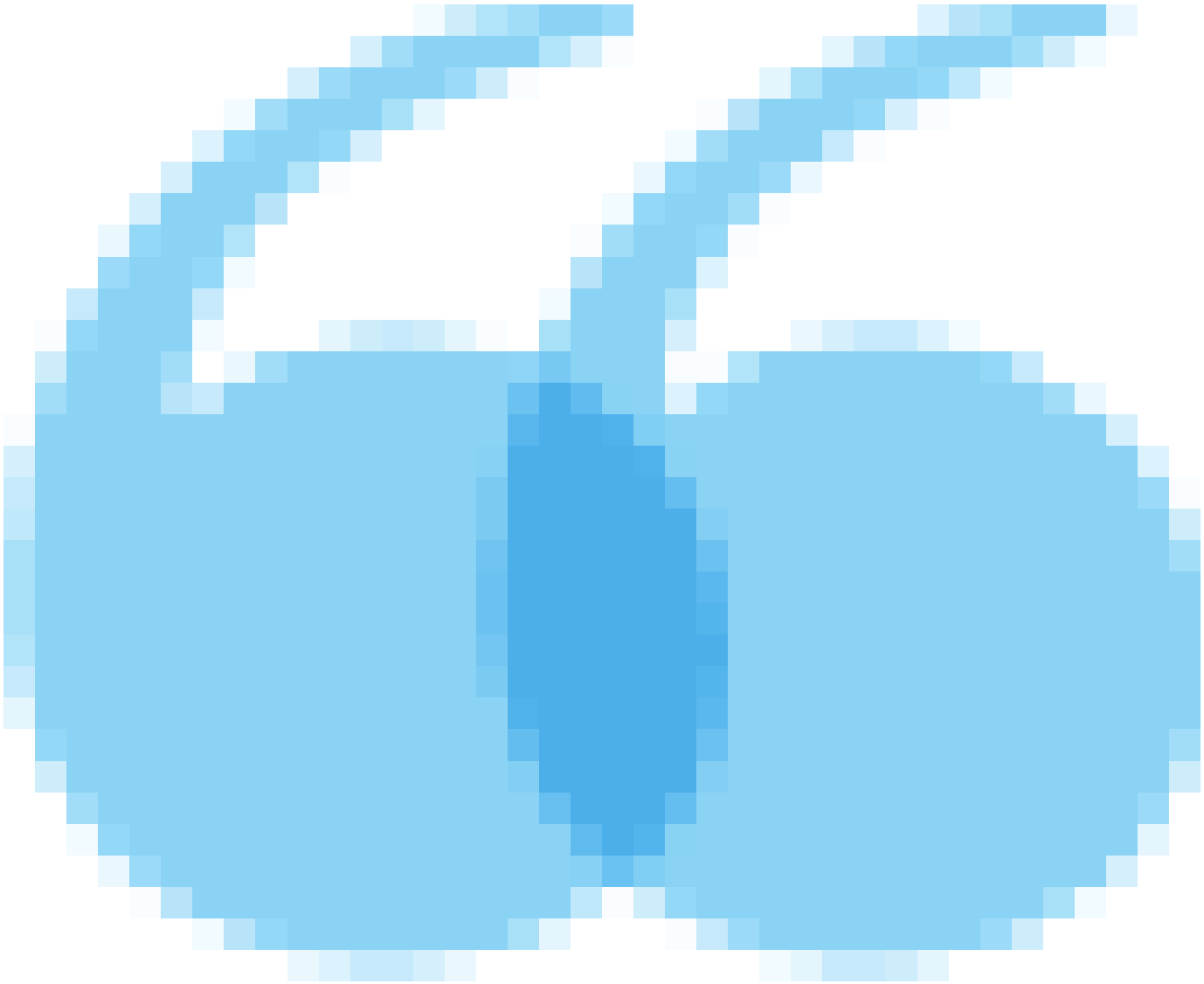
On appeal to the Court of Appeal, this judgment was upheld and Jackson LJ in particular endorsed the comment above. Therefore, a brake on section 108(2) of the Construction Act 1996 (which envisages that parties may refer a dispute to adjudication at any time) was introduced. In both Coulson J's and Jackson LJ's judgments it was suggested that the brake applied so long as the notified sum was not paid. On the face of it, this prevents a party from starting a "true value" adjudication while a "smash and grab" adjudication is on foot. One wonders whether it might also apply where a "smash and grab" is threatened, or even, possibly, where the parties are oblivious (at the relevant time) that such an entitlement may exist.

That said, Coulson J's and Jackson LJ's comments were, strictly, obiter. In M Davenport Builders Ltd v Greer, Stuart-Smith J found that an employer who had not paid a sum awarded pursuant to a "smash and grab" adjudication was not permitted to enforce a decision pursuant to a "true value" adjudication. However, obiter, Stuart-Smith J suggested – consistent with Harding v Paice but

contrary to Grove v S&T – that an employer might be able to start a “true value” adjudication without first having paid the notified sum.

The discussion in Broseley

The contractor had obtained an adjudicator’s decision affirming its “smash and grab” entitlement (Decision No.1). The court considered whether the employer would be permitted, without having first paid the awarded sum, to start a “true value” adjudication. He said that to do so:



...would be a remarkable intrusion into the principle established in [S&T v Grove]: it would permit the adjudication system to trump the prompt payment regime, which is exactly what the Court of Appeal said in paragraph [107] of that case would not be permitted to happen.

Accordingly, in my judgment it is not open to [the employer] to seek to challenge the conclusion of the Adjudicator in Decision No.1 in another adjudication without first paying the amount held due in Decision No.1.” (Paragraphs 46 and 47).

It is somewhat surprising there was no mention of Davenport v Greer, which featured detailed and careful discussion of this very issue and suggested the opposite result. To be fair, the Broseley judgment records the parties as having agreed the principles above, so the court may not have had the benefit of full argument on this point.

Starting adjudication “at any time”

There are a number of positive aspects to the current regime, including that parties are very careful about operating contract provisions correctly, with the benefit that contractors are paid promptly and disputes about value are identified contemporaneously.

However, section 108(2) of the Construction Act 1996 envisages that parties may refer a dispute to adjudication at any time. I set out four reasons below as to why, in terms of the future development

of this area of law, and a direction that would be open to the courts to take, an employer might be allowed to start a "true value" adjudication before paying the notified sum:

- As above, it is not the same dispute as the contractor's "smash and grab". The two disputes can be dealt with separately. As demonstrated in *Broseley*, on a contractor's application for summary judgment following a "smash and grab" adjudication, it is no defence for the employer to say that, according to the "true value" of the account, the contractor is owed less than the (awarded) notified sum.
- Where the employer seeks enforcement of an adjudicator's decision in its favour, it is within the court's power to decline to enforce until such time as the employer pays the notified sum (without this invalidating any adjudication the employer had started). This is what happened in *Davenport v Greer*.
- In practice, "true value" disputes can be detailed and complex, requiring time to prepare the substantive documents and, often, requiring longer than the default 28 days for adjudication. There is considerable interest in having the resolution of an important dispute such as this progressed without having to wait for the outcome of a "smash and grab" adjudication.
- "Smash and grab" disputes are often not straightforward. An employer might not agree that the contractor has such an entitlement, or might not know for sure. On the present state of the law, it is arguable that, if the employer purports to start a "true value" adjudication without having first paid the notified sum, the adjudicator may lack jurisdiction. As Coulson J remarked in **The Dorchester Hotel Ltd v Vivid Interiors Ltd**, a flawed adjudication may involve a good deal of time and money being spent and ultimately wasted. This problem is overcome if "true value" adjudications can be brought in parallel.

In conclusion, **Broseley** provokes much thought in an unsettled area of practice, but we will have to wait for a future occasion to have these difficult and important questions resolved.

This article first appeared on the Practical Law Construction blog dated 20 May 2020.

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