Construction Adjudication

Grove, Smash and Grab, Cluedo, Mark Twain and Helen of Troy

Construction law specialists Andrew Kearney and Rebecca Taylor pat themselves on the back for predicting the obvious last year … but they did predict the killer and the weapon too…

Mr Justice Coulson, in the Rolls Building, with a Part 8 dagger.

You may remember that last July – in our talks to the Adjudication Society – we foretold the demise of the Seevic decision, hinting that since the Court of Appeal was being unduly coy about it, a certain TCC Judge was going to kill it off when the chance arose …


Construction Adjudication – are cross adjudications possible despite ISG v Seevic ?

Published on 12 July 2017

Many of you attended our recent seminars for the Adjudication Society (Bristol on 4 July and Cardiff on 12 July). Those who did will have heard Andrew Kearney and Rebecca Taylor discussing whether the Seevic decision is correct, and suggesting that the TCC may be ready to depart from it. If so, this could make it possible for an adjudication for the notified sum in an interim application for payment (in the absence of a payment or pay less notice) – a so called 'smash and grab' – to be met by a cross adjudication to establish the true value of the work applied for – even as an interim application. (This is already possible on a final payment dispute – Harding v Paice, CA).

A Construction Act update

"In my judgment, the ratio of both those Court of Appeal authorities ..... cast some real doubt on whether that case would be decided in the same way now. That must lead to sensible doubts as to whether the reasoning in that case concerning rights to recover overpayments is correct....." (12 July 2017)

Very shortly afterwards, we asked the question **"Construction Adjudication – are cross adjudications possible despite ISG v Seevic ?"** and our short article on that is still available here

Spoiler alert: "Yes, they are now"

Many of you will know by now that last week said certain TCC Judge, now leaving the TCC for the Court of Appeal, plunged a long overdue judicial dagger into the heart of the Seevic decision….

Of course, we all knew this was coming sooner or later. In July last year we said this –

> "Following a payee's 'smash & grab' (yes we know its pejorative and shouldn't be used – but until someone comes up with a better shorthand label…..) will a second Adjudicator be willing to engage on a 'value' adjudication ? Probably not – faced with Seevic, Adjudicator 2 will probably resign ? But maybe, in a high enough value case worth running, on a Part 8 application the TCC will be willing to declare that a second adjudication on value is permissible, and essentially depart from ISG v Seevic ….. "

Those of you who attended our talks will also remember that we suggested (in the light of Hutton) issuing Part 8 proceedings as a defensive tactic - pre decision – where an adjudication was not going well. At the time that seemed a bit too avant-garde for some ….

Last week Coulson J gave judgment in the TCC in Grove Developments Ltd v S&T (UK) Ltd [2018] EWHC 123 (TCC). The details are in the judgment, but this was essentially a £14m adjudication enforcement case, heard together with a Part 8 claim (issued pre decision).

…the Seevic issue just fell away…but it was going to take more than that to prevent the wielding of the judicial dagger…

The interesting bit is that the adjudicator had decided that a pay less notice on an interim application was invalid. So the developer had to pay the contractor the 'notified sum' applied for. 'Smash and grab' territory. Unsurprisingly, the developer was keen to be allowed to adjudicate on the 'true value' of the interim payment.

(In the event, the developer didn't need to do this – the adjudicator's decision that the pay less notice was invalid was so obviously wrong that the Court just corrected it on the Part 8 claim. So in reality the whole Seevic issue just fell away. But it was going to take more than that to prevent the wielding of the judicial dagger …)

Whilst Harding v Paice said a 'true value' adjudication was possible on a final payment application, ISG v Seevic was pretty clear (though we all thought obviously wrong) that it was not possible on an interim application.

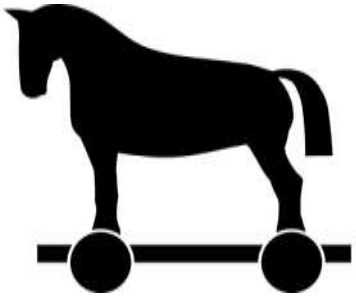
Coulson J decided in Grove – in very clear terms – that Seevic is wrong, and a payer who is caught out by the notices provisions is allowed to adjudicate to have the true value established, even on an interim application. All that "deemed to have agreed the application" stuff from Seevic was squarely rejected. So we now have two competing TCC decisions – but it is pretty clear that Grove is right and Seevic wrong, and a fairly safe bet that Grove will be followed.

…smash and grab is not dead … Mortally wounded maybe…

So it is being widely reported that "smash and grab is dead".

That however is probably wrong. Or at least, with thanks to Mark Twain, "reports of its death have been greatly exaggerated".

Smash and grab is alive and well. If you don't issue a pay less notice, you pay the notified sum without having to prove the value. Nothing – at all - has changed on that front.



But now the payer can try to get some or all of it back via an adjudication to establish the 'true value'. But – it seems - only once it has paid up the notified sum. On that front, after repeatedly using phrases such as "has to pay…but…is *then* free to commence its own adjudication" and "could *thereafter*, if they wished, raise the question of the 'true' valuation in a subsequent adjudication", the Judge said this –

> "the adjudications will still be dealt with, by the adjudicators and by the courts, in strict sequence. The second adjudication cannot act as some sort of Trojan Horse to avoid paying the sum stated as due…."

So smash and grab is not dead. Mortally wounded maybe. To be allowed to adjudicate on the true value in a case where no pay less notice was served, the sum stated as due must still be paid first and only then can a 'true value' adjudication follow.

No Trojan Horses … But hang on …

Under s108 of the Construction Act a party to a construction contract has a right to refer a dispute to adjudication "at any time"… So can it *really* be the case that a true value dispute only be adjudicated after payment ? Or after a first adjudication on notices ?

Why can't a payer, if it has missed a pay less notice deadline, immediately ("at any time" remember …) commence an adjudication to establish the true value ?

Watch this space …

And a final message for paying parties…

Just get your notices in on time. It really isn't that difficult and will save a lot of trouble. Even now.

And if you can't, or don't, or are on the wrong end of a bad adjudication decision (which after all is what Grove was *really* about), do get in touch with us for help !

Andrew Kearney
Rebecca Taylor
6 March 2018