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An Unusual Defence to a Smash and Grab Adjudication

Key Takeaways from Road Development LLP v Laxmanbhai Construction (UK) Ltd

The construction industry is often faced with ambitious time schedules and limited budgets, making steady cash flow an important element of any project.

The UK Construction Act's payment provisions[1] aim to improve cash flow within the industry with a particular focus on increased visibility and certainty in relation to payments under a construction contract. The Act also introduced a statutory right for a party to refer a dispute, including those relating to payment, to adjudication. This article considers 'smash and grab' adjudications which arise after a payer[2] fails to issue payment notices or pay less notices,[3] specifically where the payee[4] adjudicates for payment of the full amount claimed within their interim application under a default payment notice.

The payment dispute

During the latter half of 2021, I read with interest the decision from HHJ Eyre QC in the case of Downs Road Development LLP v Laxmanbhai Construction (UK) Ltd.[5] The decision considered (1) an adjudicator's jurisdiction to consider a responding party's cross claim, (2) the payer's intentions when issuing interim payment notices and (3) the severance of an adjudicator's decision.

Laxmanbhai was appointed as a Contractor by Downs Road who was the Employer under the Contract. Laxmanbhai was engaged to undertake the demolition of the existing buildings and the construction of four new buildings containing a total of seventy-nine new residential units, in connection with a development at 1A Downs Road in London. The Contract was an amended JCT Design and Build Contract (2011 edition).

A dispute arose in relation to the payment regime and its operation under the Contract, with a dispute centred on payment cycle no. 34 referred to adjudication. The adjudicator reached a decision that determined the sum due in respect of Laxmanbhai's interim application for payment no. 34.

Downs Road commenced Part 8 proceedings[6] challenging the enforceability of the adjudicator's decision. This was on the basis that the adjudicator had failed to address a line of defence put forward by the Employer in relation to the defects associated with a capping beam. In addition, Laxmanbhai sought a declaration as to the validity of the Downs End payment notices.

HHJ Eyre QC held that the Employer's payment notice was invalid because it did not accurately state the sum the Employer considered to be due, that there was a breach of natural justice because the adjudicator had failed to extinguish his jurisdiction in relation to the capping beam counterclaim, and that it was not possible

in relation to the facts under this dispute to sever the adjudicator's decision.

How valid was the Employer's payment notice?

The Employer's payment notice no. 34 set out a gross valuation of £20,451,110.85 which was £1 more than the previously certified sum; after retention the net amount for payment was £0.97. The Employer issued an accompanying email to payment notice no. 34 stating that a further payment notice would be issued in due course. This was in the form of payment notice no. 34a which included a gross valuation of £21,128,654.70, with a net amount for payment of £657,218.50, and importantly was accompanied by detailed calculations. However, it was the validity of payment notice no. 34 that was considered by the court under the Part 8 proceedings.

As part of the decision, HHJ Eyre QC referred to Section 110A (2)(a) of the HGCRA,[7] which provides that a payment notice complies with the S110A (2)(a) if it specifies:

> "(i) the sum that the payer considers to be or to have been due at the payment due date in respect of the payment; and
>
> "(ii) the basis on which that sum is calculated."

It was the reference to the phrase "…that the payer **considers** to be or to have been due… [my emphasis]" that was addressed as part of the decision. With HHJ Eyre QC, noting that it:

> "…**cannot realistically be contended that Payment Notice 34 accurately stated the sum which the Employer considered to be due at the payment due date**. That is evident from the fact that the covering email said that a further notice would be issued. **The Employer clearly envisaged that the further notice would set out a different figure which would be the figure which the Employer in fact considered to be due.** It follows that Payment Notice 34 did not set out the figure which the Employer actually considered to be due. It may well be that at the date of Payment Notice 34 the Employer had not formed a view as to the precise amount which it believed was due, but it clearly did not believe that the figure was just £0.97 and it is not credible to suggest that the Employer did not realise that a substantially greater sum was due…".[8]

It was therefore held that payment notice no. 34 did not satisfy the requirements of Section 110A (2)(a) of the HGCRA.

Can decisions from this case be applied to other disputes?

Having held that the Employer could not 'believe' that the sum due for payment under the payment notice was £0.97, and as such the payment notice was invalid. I immediately thought of the other circumstances where a party to a dispute may attempt to apply the facts under this case to their own dispute. Two possibilities emerged:

1. **An increase in 'smash and grab' adjudications** on the basis that the payer payment notice or pay less notice does not reflect the genuine belief of the payer as to the sum 'considered' due, resulting in a non-valid payment notice.
2. **In the situation that a payer was seeking to defend a smash and grab adjudication, where the payee interim payment application has become the default payment notice.** Put simply, does the payee genuinely believe that the sum applied for is the sum properly due? It has previously been held that a default payment notice is to be of a similar standard to that of a payment notice.[9]

Both possibilities would be heavily dependent on the factual matrix around the issuing of notices, but more importantly, would require a subjective consideration of the state of mind of the party issuing the notice. However, with regards to the second possibility my primary thought was: how would it be practicable to demonstrate to a decision-maker that a payment notice, pay less or default payment notice submitted did not reflect the genuine sum the person issuing the notice thought was due?

With that fleeting thought, I duly forgot about the decision in Downs Road. That was until Spring 2022 when I have now seen the facts under the Downs Road decision being applied as a defence by the payer in smash and grab adjudications in the manner set out above.

As noted, Section 110A (2)(a) of the HGCRA needs to be complied with as part of the payment regime, where a notice is given for the sum that the payer 'considers' due. As part of the decision under Downs Road, HHJ Eyre QC gave deliberation to the meaning of 'considers' under Section 110A (2)(a) insofar as the sum considered due must be a true reflection of the sum the payer considers due for payment. But would this apply to a default payment notice as issued by the payee?

A true belief of the sum considered due?

Thinking back to my previous role as a quantity surveyor working for a main contractor, where I was responsible for the production and submission of the monthly interim payment applications, I asked myself retrospectively, did I ever truly believe that the sum applied for was not due for payment? The simple answer is no.

I acknowledge that on certain projects there was a requirement to include a forecasted value for elements of the works as part of the interim application for payment. For example, if the interim application was to be submitted on the 25th of the month, there could be a requirement to include a valuation of the works up to the 30th of the month. Therefore, there was a projected or forecasted valuation of the works to be undertaken during those five days.

For valuation of the works undertaken during this five-day period, there was always a risk that the forecasted works would not be carried out. For example, a breakdown at the concrete batching plant could prevent a concrete pour on-site from occurring, which was included as part of the forecasted valuation.

But this is where a good relationship between the contractors and employers' quantity surveyors is invaluable. Discussions occur and the valuation is adjusted within the employers' payment notice, and ultimately the correct payment is made.

However, consider a hypothetical scenario based upon the above forecasted valuation and a subsequent breakdown at the concrete batching plant, where a payment or pay less notice was not issued by the employer. Could it be claimed that my interim application for payment inclusive of the costs of the forecasted concrete pour is not truly my genuine belief of the sum due?

Again, in my opinion, the simple answer is no. When I submitted the interim application for payment, it was my true belief that the concrete pour would occur and that the works would be complete. I think that it would be very difficult in the situation of the defence of a smash and grab adjudication to demonstrate that the interim application for payment was not my true belief of the sum due when it was submitted.

Key learnings from recent adjudications

The defence raised by the payer in relation to the default notice relates to assertions that the payee interim application for payment does not contain the sum that is genuinely believed to be considered due. This is followed by a list of items within the interim application that were not carried out or have been carried out to a lesser extent than claimed. Thus, it is asserted that the payee has invalidated their interim application for payment by not claiming sums that they 'genuinely' believed were due.

It is interesting to note that where the above defence has been raised, the adjudicator in each dispute has given the assertions short shrift. Key observations from the adjudicators have included:

1. The facts under Down Road apply to a payer payment notice and not an interim payment application.
2. The facts under Downs Road should be considered 'extreme'. Specifically, the payment notice was for an interim valuation of £0.97 and it was known that this was not the sum considered due.
3. While a payee's interim application for payment may contain claims at a higher value than is assessed by the payer, this does not make the application for payment inherently invalid; a difference in valuation is commonplace within the industry.

From my perspective, of note under the Down Roads decision is that the Employer's payment certificate of £0.97 was accompanied by an email which made it clear that the Employer did not believe that sum of £0.97 was a true interim value of the works. The commercial reality of construction means that it is extremely unlikely that a payee would issue an accompanying email or communication stating that their valuation does not include a sum that they consider to be a genuine assessment (but if they did then it could prove potentially problematic).

Will a payer's defence to a smash and grab adjudication succeed?

If my recent experience of decisions from adjudicators is replicated, a payer's defence to a smash and grab adjudication (based upon applying the facts associated with the Downs Road decision) is unlikely to succeed. This is due to the very particular background facts under Downs Road, therefore, I would be surprised if reported court decisions arise that address whether a payee genuinely considers that the sum applied for is a true reflection of the value of the works undertaken within their interim application for payment.

Consequently, the advice to payers under a construction contract remains the same: remain vigilant with respect to the timely issuance of both payment and pay less notices, whilst ensuring that the content of such notices sets out the sum considered due and the basis upon which it has been calculated.

The views expressed in this article are those of the author(s) and not necessarily the views of FTI Consulting, its management, its subsidiaries, its affiliates, or its other professionals.

1. The UK statutory payment regime under the Housing Grants, Construction and Regeneration Act 1996, as amended by the Local Democracy, Economic Development and Construction Act 2009
2. Payer – the party who certifies and processes payments under a construction contract, ordinarily either an Employer or a Main Contractor.
3. Payment notice and or pay less notice – to be issued by the payer and must define the sum due and the basis on which it has been calculated. A payment and or pay less notice is required even if the sum due is zero.
4. Payee – the applicant who has submitted an interim application for payment, ordinarily the main contractor or and sub-contractors.
5. [2021] EWHC 2441 (TCC)
6. Part 8 forms part of the English Civil Procedure Rules ("CPR") and is aimed at raising a court action for a legal claim, where the claimant is seeking a decision form the court which does not contain a substantial dispute of fact. In relation to construction adjudication, a party can raise Part 8 proceedings to enforce an adjudicators decision, and or can raise proceedings to challenge the enforcement of the decision.
7. Housing Grants, Construction and Regeneration Act 1996, as amended by the Local Democracy, Economic Development and Construction Act 2009
8. [2021] EWHC 2441 (TCC), paragraph 47
9. Caledonian Modular Ltd v Mar City Developments Ltd [2015] EWHC 1855 (TCC) and Henia Investments Inc v Beck Interiors Ltd [2015] EWHC 2433 (TCC)

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