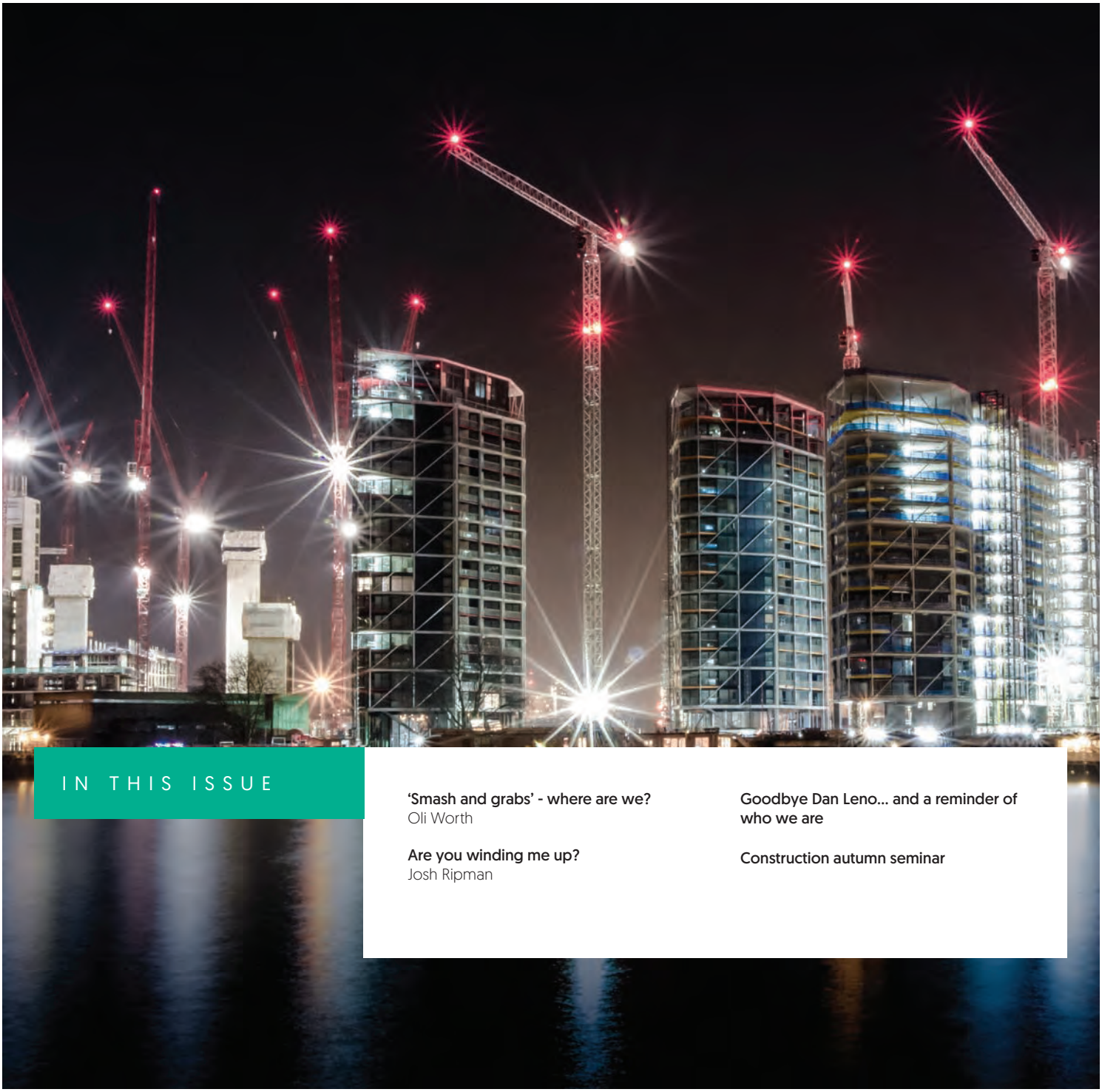
Birketts

WELCOME TO THE NOVEMBER 2019 EDITION OF

Cornerstone



IN THIS ISSUE

Welcome to the November 2019 edition of Cornerstone, our newsletter for those working in the construction industry.

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Welcome to our latest edition of *Cornerstone*.

In light of the news that the Court of Appeal's decision in *S&T v. Grove* won't be proceeding to the Supreme Court, we take the opportunity to take a look at the status of smash and grab adjudications. With so many 'sometimes' cases over the last few years, you can be forgiven for having lost the thread – something Oli Worth's article hopes to address.

A more drastic option for securing payment instead of adjudication, is winding-up proceedings. Issuing a winding-up petition can get a debt settled quickly and sometimes get costs paid too, leading it to be used with increasing frequency. However, on the other hand, it presents real risk for the party; Josh Ripman takes a look at the process and its dangers in more detail.

In more personal news, we also have a brief homage to the retiring construction law legend Dan Leno as he leaves us after more than 30 years. We also use his farewell as an opportunity to provide readers with a quick update of team news, including a who's who within the department. Finally, we have a report on our recent autumn seminar. This took place at the Institution of Civil Engineers' HQ at the end of October and proved an interesting occasion, especially with the input of guest speakers Simon Hargreaves QC of Keating Chambers and Gary Kitt of Arcadis.

We hope you enjoy reading this edition of *Cornerstone*, in which we aim to be both informative and thought-provoking. As ever, if you have any queries or comments on the articles, we would be delighted to hear from you.

IN THIS ISSUE

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‘Smash and grabs’ - where are we?

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The term is often used disapprovingly, but ‘smash and grab’ adjudications are really just a means of enforcing a party’s legal right. Yes, they can be an easy way to avoid a party having to prove their underlying entitlement. But it’s equally true that if the paying party wants to avoid this, they only have to get their notices in properly; and if they haven’t done so, why shouldn’t the payee exercise their rights?

> *For the uninitiated... ‘smash and grabs’ are simply adjudications where the payee looks for payment on a procedural basis ... because the payer has failed to serve the right notices at the right time, entitling them to payment of an applied-for sum in default.*

The law on payment and pay less notices, and their effect on adjudications, has been the subject of countless column inches over the last five years or so. This article takes a swift look back.

Background

For the uninitiated, (if any), ‘smash and grabs’ are simply adjudications where the payee looks for payment on a procedural basis (‘technicality’, pejoratively) because the payer has failed to serve the right notices at the right time, entitling them to payment of an applied-for sum in default.

Up until around five years ago, most parties would deal with payment notices and pay less notices (introduced by the changes to the Construction Act which came into effect in October 2011) in the same way as they had withholding notices under the old Act. Simply, if notices weren’t served by the right time, although a procedural adjudication could proceed, the party in default would start their own adjudication at, or around the same time, to determine the true value of the works (a ‘counter-adjudication’). The results of the two would be offset against each other and, other than the cost of having to deal with the adjudications, the payer would be in no worse position than if it had served the right notices.

The game changer - ISG v. Seevic College

All that changed at the end of 2014 when the Technology and Construction Court (TCC) stated in *ISG v. Seevic College* that an employer’s failure to serve a valid payment or pay less notice didn’t just mean that a sum became due to be paid by default, but that the payer was taken to agree with the value of the application. As such, there could be no dispute referable to adjudication about the true value, and so there was no scope for a counter-adjudication. In that case, Seevic College was stuck having overpaid ISG by £768,525.36 (the sum determined as a result of the second, unenforceable decision) until the balance could be redressed at final account stage.

With most forms of contract only allowing payments to flow one way (to the party doing the work) on an interim basis, paying parties risked having to find significant sums of money for potentially significant periods of time.

Suddenly, the failure to issue the right notices threatened real consequences. With most forms of contract only allowing payments to flow one way (to the party doing the work) on an interim basis, paying parties risked having to find significant sums of money for potentially significant periods of time. The potential unfairness was illustrated a few months later in *Galliford Try v. Estura*. There, the employer had failed to serve a valid notice in response to Galliford Try's application for a net payment of £4.075m, which the TCC said following *ISG v. Seevic* meant it had to pay and had no chance to recoup until the final account stage. The Court there did acknowledge the unfairness – in particular noting that Galliford Try's application claimed £2.7m in respect of loss and expense, a type of claim it said was "frequently significantly overvalued, and that quite often the true value is about a third of the figure claimed" – and as a result it found a way around enforcing the entirety of the payment by Estura. But it warned the so-called 'manifest injustice' exception would be narrowly construed, and it has not to our knowledge been implemented since.

The industry proceeded for a few years with this uneasy situation. It generally gave a party who had a procedural adjudication open to them, particularly at the right time (say, around practical completion where the value of works - and dispute - is typically high, but the final payment could be years away) a cash flow windfall and huge commercial leverage to use that to reach a commercial settlement. But that was what the courts said, at least implicitly, Parliament had intended.

Commentators cast doubt on whether *ISG v. Seevic* was correct, noting that the idea of a failure to serve a notice could deem agreement seemed a stretch. There was also a parallel case, *Paice v. Harding*, that was decided a week prior to *ISG v. Seevic* which ruled that a counter adjudication could be commenced, stating that the situation was different because it related to a payment on termination. In the Court of Appeal case, the Court said that *Paice v. Harding* was right, casting further doubt on *ISG v. Seevic*, without directly deciding the point.

ISG v. Seevic was wrong after all

Ultimately, in February 2018, the Court explicitly said for the first time that *ISG v. Seevic* was wrong. The Court was asked to make declarations arising out of an adjudication award in S&T (the contractor's) favour. Of *ISG v. Seevic*, the Court said that "it seems to me to be clear that an employer in the position of Grove must pay the sum stated as due, and is then entitled to commence a separate adjudication addressing the 'true' value of the interim application," and therefore concluded that "the analysis in *ISG v Seevic* and *Galliford Try v Estura* is erroneous and/or incomplete". It was a rare example of the TCC overturning itself – without recourse to the Court of Appeal. But Coulson J concluded that "the conflict in the cases is all too apparent and, for the reasons which I have given, I find myself unable to follow the 'different line' that [the judge] took in *ISG v Seevic* and *Galliford Try v Estura*".

In November 2018, in a highly anticipated judgment, the Court of Appeal upheld the first instance decision. It confirmed that it is open to a party that has failed to serve a payment

notice and pay less notice to commence an adjudication to have the true value of the payment assessed. The logic in *ISG v. Seevic* that the paying party was 'taken to agree' the valuation and therefore there could be no dispute was therefore wrong. However, crucially the Court of Appeal confirmed that before a 'counter adjudication' could be commenced, the paying party must actually pay the sum that had become due as a result of the failure to serve a valid payment notice and pay less notice. The Court said this was because the mandatory payment provisions of the Construction Act trump the statutory right to adjudicate.

"The requirement to pay the fruits of a 'smash and grab' before counter adjudicating is a change from the pre-ISG v. Seevic position. Again, commentators have questioned the Court's logic on why this should be the case...

The requirement to pay the fruits of a 'smash and grab' before counter adjudicating is a change from the pre- *ISG v. Seevic* position. Again, commentators have questioned the Court's logic on why this should be the case – in particular, how it affects a party's statutory right to adjudicate at any time. But the position has been confirmed in subsequent cases, such as *Davenport v. Greer* where the Court said that "it should now be taken as established that an employer who is subject to an immediate obligation to discharge the order of an adjudicator based upon the failure of the employer to serve either a Payment Notice or a Pay Less Notice must discharge that immediate obligation before he will be entitled to rely upon a subsequent decision in a true value adjudication. Both policy and authority support this conclusion and that it should apply equally to interim and final applications for payment".

This does raise practical problems. For example, what is the position if a counter adjudication is commenced before a decision on a 'smash and grab'? In such cases there will be no "immediate obligation to discharge" for the paying party. Would a court intervene to prevent a valuation dispute - and what if a 'smash and grab' is only suggested but not actually commenced?

These are interesting questions – perhaps more so to lawyers than parties to disputes, who won't welcome any continuing uncertainty – but they will surely come before the court before long. Unfortunately that won't be in the Supreme Court considering this particular case, because it was confirmed in September that the parties had reached a settlement and therefore an appeal to the highest court in the land would not be proceeding.

"... the number of 'smash and grabs' succeeding seems to have increased recently, perhaps because the consequences are not quite so extreme as they were...

Conclusion

Despite many parties suggesting that the decision in *Grove v. S&T* would spell the end of 'smash and grabs', that has not proved correct. If anything, the number of 'smash and grabs' succeeding seems to have increased recently, perhaps because the consequences are not quite so extreme as they were, which may offer comfort to adjudicators wavering over whether to grant relief.

There are a host of unanswered questions on construction payment rules which continue to cause uncertainty, and which will before long come before the courts (or perhaps, may even be clarified by legislation – when the Government has time). But for the time being at least, it seems that the position on 'smash and grabs', and counter adjudications, is a little more certain.

Are you winding me up?

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Winding-up petitions are being used increasingly in the construction industry as a means of recovering unpaid debts. It is the 'nuclear' recovery option because the consequences for the recipient company can be catastrophic (both for its reputation and financially). So when responding to a winding-up petition, time is very much of the essence.

An unchallenged winding-up petition will result in the recipient company being placed into compulsory liquidation and eventually dissolved. Game over. As such, given the potential consequences, all companies should have a set procedure in place for recognising winding-up petitions and getting them dealt with by an appropriate individual as an absolute priority. In terms of avoiding the possibility of bank accounts being frozen and supply lines being withdrawn, we are talking hours from receipt, not days.

Once a winding-up petition has been served on a company, the petitioning creditor must wait at least seven business days before it can be advertised in the *London Gazette*. That seven business day period used to provide the recipient company with a window of opportunity to deal with the petition before it could be advertised and inevitably picked up by credit agencies, creditors, and suppliers. However, that is no longer always the case. Now, it is not uncommon for news of a winding-up petition to be picked up by credit agencies (and their subscribers) soon after it has been issued and well before it can be advertised. This can result in other creditors supporting the winding-up petition, which makes the position instantly more complicated to resolve.

With the above in mind, here are some steps you should be taking if your company is served with a winding-up petition.

1. If the sum claimed in the petition is due, pay it immediately. You will usually be required to pay the petitioning creditor's costs too. Ensure that as soon as cleared funds are received by the petitioning creditor, the creditor immediately files an application at court for the withdrawal of the petition

2. If you cannot afford to pay the sum claimed in the petition immediately, take steps to try and agree a repayment plan with the petitioning creditor. If possible, negotiate the withdrawal of the winding-up petition to prevent other creditors from supporting it. If you are unable to convince the petitioning creditor to withdraw the petition, seek an undertaking from the petitioning creditor not to advertise it provided you comply with the agreed repayment plan. The sooner you can pay the debt, the less likely it is that the petition will get into the public domain

> *...if you genuinely dispute the sum claimed in the winding-up petition, you need to provide the petitioning creditor with details of the dispute as a matter of urgency.*

3. If you genuinely dispute the sum claimed in the winding-up petition, you need to provide the petitioning creditor with details of the dispute as a matter of urgency. At the same time, you must request an undertaking that the petition will not be advertised. Having set out the details of the dispute, you should invite the petitioning creditor to voluntarily withdraw the petition on the basis that the sum claimed is genuinely disputed. If you do not get a satisfactory response, you will need to file an urgent application (before the date the petition can be advertised) for an injunction to restrain the advertisement of the petition. At the same time, you should also seek an order for the dismissal of the petition on the grounds that it has been issued in respect of a genuinely disputed debt (and is therefore an abuse of process). You should seek your costs on the indemnity basis.

"Above all, never hide from a winding-up petition and hope that it will go away.

Above all, never hide from a winding-up petition and hope that it will go away. It won't. The sooner you take action, the more likely it is that you will be able to protect your business from serious reputational and financial harm. Similarly, if a winding-up petition is threatened, crossing your fingers that the threat won't be followed through on is rarely good practice - as soon as insolvency proceedings are mentioned, our experience is that dealing with the issue head on is the sensible, not to mention most cost-efficient, response.

Goodbye Dan Leno... and a reminder of who we are

It has been a while since we wrote about 'us' – so we hope you will forgive us this indulgence.

First, news of a retiree. Almost everyone who has worked with the team will have come across Dan Leno (the construction litigator, not the Victorian music hall comedian). Dan retires at the end of the month after 31 years' esteemed service at Birketts. Much has changed in Dan's time but the biggest change for us will be the absence of his legendary personality around the office. Having said this, Dan will continue to assist clients as a Consultant, so we are not rid of him just yet!

Even with Dan's departure, there will still be close to thirty of us to help with your construction enquiries - one of the largest construction teams in the country. The team has grown considerably since we last updated you, so here is a brief run-down of who's who and where they're normally based.

The team in Ipswich is led by Ruth Sunaway and Josh Ripman, who have both been with us an age. Ruth leads big ticket dispute work and is assisted by Lawrence Pearce and Adam Brown. Josh's focus is predominantly insolvency-related work (see previous article) and disputes concerning the supply chain and housebuilders. Josh is assisted by Chris Utton.

In Cambridge, Stefan Harris-Wright leads a non-contentious focussed team along with colleagues Tim Hall, Katrina Bretten, and Sophie Thornley. Their practice includes both major development work and contract reviews, and is assisted by Rory Abel who is based in Norwich. Also in Cambridge, Oli Worth is focussed on disputes work along with Ben Burt and Tyler Fitzpatrick.

Finally, our head of construction Andrew Rush is based in Chelmsford along with senior lawyers Carolyn Porter and Hanna McNab. Assisting them, again mostly in a disputes-focussed practice alongside some non-contentious work, are Emma Chiaramello, Roger Watson, and Alex Hyams.

As well as those named above, the team is supported by a host of paralegals (Hannah Morris, Kira Sharp, and Lily Orr), trainee solicitors, administrators, and secretaries. Everyone in the team is dedicated full time to construction, which means we have the knowledge, experience and capacity to help in all-manner of construction work. If it's been a while since we spoke with you or your firm (which may be good news for you – no one ever really likes talking to lawyers!), please do let us know as we'd love to come and talk about how we can help your business.

Pictured: Hanna McNab and Dan Leno

Construction autumn seminar

Thanks to all of those who came to our first autumn seminar. On the 31 October 2019, delegates and special guests joined us at the Institution of Civil Engineers' head quarters in central London, to discuss some current issues (and of course, to enjoy the excellent breakfast rolls).

> *A room full of delegates along with some special guests, joined us at the Institution of Civil Engineers' HQ in central London on the morning of 31 October 2019 to discuss some current issues...*

Ruth Sunaway and Oli Worth started off the morning by running through the regulatory regime on fire safety. They provided an update on the latest on ACM cladding removal, and used a case study to illustrate how to prove causation when a fire is worsened through inadequate fire stopping. Ruth and Oli noted that in their experience, even where the building regulations have been complied with at design stage, workmanship issues are still commonly present. Indeed, even where there is contractor default in installing fire stopping, it can be difficult for employers to prove loss as a result where a fire breaks out; the contractor is not on the hook for all damage, only the additional damage suffered as a result of the inadequate fire stopping. That can be a difficult measure to undertake.

Stefan Harris-Wright and Rory Abel then talked Brexit (untroubled by presenting on what was once 'Exit Day'). Stefan and Rory mentioned that in their experience, for some considerable time after the referendum vote, few projects gave any thought to the implications of Brexit. However, as 'Exit Day' has become a more real prospect, there has been a considerable uptake in enquiries, particularly during 2019. The main implications of

Brexit on contracts (potential increased costs, delays and such like) were discussed, with a view cast on which party was most likely to be exposed. The default position was not good news for contractors, but Stefan and Rory's advice was that mitigating this by agreeing bespoke amendments was key.

After the break, we enjoyed a talk from Simon Hargreaves QC from Keating Chambers. Simon encouraged audience participation as he ran through various examples of clauses from cases that were said to be conditions precedent, with delegates voting on whether they thought they had been found to be such, or not. It quickly became apparent that the case law was unclear, and often directly contradictory, although Simon helpfully noted this meant that parties could argue whichever way they liked with apparent judicial support.

Finally – before an interesting panel discussion which rounded the morning off – Gary Kitt from Arcadis spoke on delay analysis. Gary has extensive experience acting on a tribunal, in particular as adjudicator and arbitrator, so has seen countless delay claims put to him. His practical explanation of what he prefers and (probably even more importantly, what he disapproves of) with regards to claim style was particularly appreciated by the audience.

We are now planning our next seminars, which are likely to be in the spring. Please look out for further details via email, on our website or at www.linkedin.com/in/birketts-construction-team. Our team also regularly speak for external organisations (recent presentations have been given to the RICS, the CIOB, CIArb and CICEs) and deliver bespoke training to clients. If you would like further details, please contact Oli Worth directly.