

*Grove Developments Ltd v
S&T(UK) Ltd*

The impact on “smash &
grab” adjudications

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Grove Developments Ltd v S&T(UK) Ltd

Agenda

- The pre-*Grove* position
- The decision in *Grove Developments Ltd v S&T(UK) Ltd* [2018] EWHC 123 (TCC)
- The potential impact on “smash & grab” adjudications

“Smash & grab” adjudications

Pre-2014

Assumed facts

- Interim application: £10m
- Proper value: £2m
- No interim certificate
- Pay less notice issued 5 minutes late

Result

- Adjudication by contractor
- Adjudication by employer
- Compromise

“Smash & grab” adjudications

ISG and Estura

The “wrong turn”

- *ISG Construction Ltd v Seevic College* [2014] EWHC 4007 (TCC)
- *Galliford Try Building Ltd v Estura Ltd* [2015] EWHC 412 (TCC)

Principle

If no valid payment or pay less notice is issued, the employer will be taken to have agreed the valuation in the contractor’s application.

“Smash & grab” adjudications

ISG and Estura

ISG v Seevic

[28] “...if the employer fails to serve any notices in time it must be taken to be agreeing the value stated in the application, right or wrong”

Galliford Try v Estura

[20] “This means that **the employer cannot bring a second adjudication to determine the value of the work at the valuation date of the interim application in question...**”

“Smash & grab” adjudications

Example

Assumed facts

- Interim application: £10m
- Proper value: £2m
- No interim certificate or pay less notice

Position under *ISG* and *Estura*

- The sum due is the sum set out in the last properly served notice (£10m)
- No defence or cross adjudication based on sum properly due
- Impact

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Background

Construction of Premier Inn hotel at T4, Heathrow

- JCT Design & Build 2011
- Contract Sum: £26m
- Original Completion Date: 10 October 2016
- Practical completion achieved: 24 March 2017

S&T's application no 22

- Valuation: £39m
- Payment sought: £14m

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The pay less notice

The Employer considers that the sum that is due on the date this notice is given is £0.00.

The basis on which the sum is calculated is as follows:

- 1. the sum which, absent point 2 below, would have been due from the Employer at 31 March 2017 is £1,407,748.00 plus VAT (the “Sum”). **The basis on which the Sum is calculated is set out in the Payment Certificate 22 dated 13 April 2017;** and*
- 2. subject to paragraph 2, the Employer is entitled to withhold from the sum which would otherwise be due on that date liquidated damages of £2,506,857.00 (the “Liquidated Damages”). The Liquidated Damages have been calculated on the following basis:*
 - 2.1 Liquidated damages 11th October 2016 – 24th March 2017 @ £107,000.00 per week or proportion for any part thereof (total: £2,506,857.00).*

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The adjudication and the court proceedings

S&T adjudication

- Pay less notice invalid as it did not specify the basis of calculation
- Order for payment of application in full (£14m)

Grove Part 8 claim

The *Grove v S&T* decision

Contents of pay less notices

Requirements - Clause 4.10.2.1

*“A Pay Less Notice... shall specify both the sum that [the Employer] considers to be due to the Contractor at the date the notice is given and **the basis on which that sum has been calculated**”*

Grove's pay less notice

“The basis on which the Sum is calculated is set out in the Payment Certificate 22 dated 13 April 2017”

The *Grove v S&T* decision

Contents of pay less notices

Decision

Information can be incorporated by reference

The court's approach

*“A pay less notice will be construed by reference to its background, in order to see how a reasonable recipient would have understood it. The court will be **unimpressed by nice points of textual analysis**, or arguments which seek to condemn the notice on an **artificial or contrived basis**. One way of testing to see whether the contents of the notice are adequate is to see if the notice provides an **adequate agenda for a dispute about valuation and/or any cross-claims available to the employer.**”*

The *Grove v S&T* decision

New position on “smash & grab”

Decision

- Employer is entitled to bring its own adjudication to decide the ‘true’ value of the interim application, even if it has not issued a valid payment or pay less notice
- Recovery of overpayment by way of implied term or restitution

Reasons

- First principles [67-90]
- Court of Appeal authorities point in that direction [91-104]
- TCC cases that ‘took a different line’ wrongly decided [114-122]
- Will not create “doomsday scenario” – will not undermine notice regime and will strengthen adjudication system [136-143]

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Potential impact - contractors

Assuming upheld on appeal

Result for contractors

- Still tactical value in “smash & grab” adjudication
- But *Grove* means that the victory may be short lived
- Fewer “smash & grab” adjudications?

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Potential impact - employers

Best route – serve the correct notices

Options

- Resolve via next payment cycle
 - problematic towards end of project
 - often no provision for repayment of negative certification
- Part 8 claim
 - need the right issue
 - timing is crucial
- ‘True value’ adjudication

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Timing for 'true value' adjudication

Grove v S&T

[90] “...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”

[141] “Even if we assume that the relationship between the employer and the contractor is poor, so that there is a second adjudication in any event, **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. I have made that crystal clear...”

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Final thoughts

- Still likely to be advantages for contractors in “smash & grab”, although reduced
- Are we really back to the pre-/SG position?

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