

Grove Developments v S&T (UK) Ltd - The impact on 'smash and grab' adjudications

CORRECTION

1. Slide number 11 says this (emphasis added)
 - *“But decision in Grove means victory may be short lived*
 - *may face repayment claim either in next payment cycle (even if no express right to negative certificate)*
 - *Or via a true value Adjudication”*
2. I would like to clarify and correct the words in bold, as discussed in the question session at the end of the talk. The effect of the TCC decision in Grove is:
 - An overvaluation in one interim payment cycle can be corrected in the following payment cycle. It will usually be absorbed by the value of the ongoing works. However where the Employer seeks recovery of an overpayment, it may be claimed via a negative certificate if the contract contains such a power.
 - However where the contract does not contain a power to issue negative certificates, the Employer's remedy is to adjudicate the true value (as per Grove) and ask the adjudicator for an order for repayment based on the implied term / right of restitution (as per Grove paragraphs 132-135).
3. I have revised slides 11 and 15 which are attached to this Note.

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Potential impact

- Assuming upheld on appeal
- Tactical value of ‘smash and grab’ ADJ - reduced not eliminated
 - Contractor can still make claim based on absence of PN & PLN
- But decision in Grove means victory may be short lived
 - may face repayment claim either in next payment cycle (even if no if there is express right to negative certificate)
 - Or via a true value Adjudication
- Fewer ‘smash & grab’ - but more value adjudications ?
 - In reality, only where no further interim payment cycle to utilise

Potential impact

- Employer's options in absence of PN and/or PLN ?
 - Resolve in next payment cycle and seek order to repay if appropriate
 - Bring an adjudication on 'true value'
- Can still try to stop enforcement of Adj decision that no valid PLN
 - By Part 8 challenges for final decision on application /notice validity
 - Timing is crucial – probably need to start protective Part 8 early
 - Court may be less sympathetic to these challenges now
- Scenarios only arise when the Employer fails to serve valid notices
 - Best option for Employer is to ensure valid notices served