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Grove Developments v S&T (UK) Ltd

The impact on ‘smash and grab’ adjudications

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Outline of talk

- The pre - Grove position
- The decision in Grove Developments v S&T (UK) Ltd [2018] EWHC 123
- The potential impact on payment claims where no pay less notice has been served ('smash and grab' adjudications)

The statutory regime

Section 111(1) says Payer must pay Notified Sum *

(1) Subject as follows, where a payment is provided for by a construction contract, the payer must pay the notified sum (to the extent not already paid) on or before the final date for payment.

Payer may give notice of intent to pay less than Notified Sum (s.111(3))

If so, what must be paid is sum stated in Pay Less Notice (s.111(6))

* ie the amount in the s.110A Payment Notice (s.111(2))

Pre-Grove position

Harding v Paice [2014] EWHC 3824

- Re: post termination final application
- Adj 1 decided not what was “properly due” but what payable now
- Absence of PLN does not convert sum not properly due into one that is properly due [¶35 & 36]
- Still open to have determined sum that was properly due [¶36]

Pre-Grove position

ISG v Seevic [2014] EWHC 4007

- Re: interim application
- Absent PN or PLN, Employer taken to be agreeing the value stated in the application
- Adj 1 had to be taken to have decided the question of the value of the work carried out for the purposes of the interim application in question
- Adj 2 regarding ‘true value’ was invalid as question decided in Adj 1.

[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. In my judgment, therefore, in that situation the first adjudicator must be in principle taken to have decided the question of the value of the work carried out by the contractor for the purposes of the interim application in question.”

Pre-Grove position

Galliford Try v Estura [2015] EWHC 412

- Re last interim application
- No PN or PLN means value of application deemed to be agreed [18]
- But payer may correct the valuation in next payment cycle [19]
- Only lasts for the payment cycle in question:

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. But it does not mean any more. There is nothing to prevent the employer challenging the value of the work on the next application.... If this was not made clear by my judgment, then it should have been, and it is certainly made clear by the decision of the Court of Appeal in Rupert Morgan Building Services (LLC) Ltd v Jervis [2004] 1 WLR 1867...

Evasive action

- Potential injustice where no further payment cycle or far in future
- Led to myriad attacks on validity of payment application via Part 8
- See for instance (non exhaustive list)

Maxi Construction v Morton Rolls [2001] Scots CS 1999

Leeds v Waco [2015] EWHC 1400

Caledonian Modular v Mar City Developments [2015] EWHC 1855

Henia v Beck Interiors [2015] EWHC 2433

Grove Developments v Balfour Beatty [2016] EWHC 168

Jawaby v Interiors Group & Black [2016] EWHC 557

Bouygues v Febrey Structures [2016] EWHC 1333

Decision in Grove v S&T

- Grove employed S&T to design and build Hotel at Heathrow Terminal 4.
- Interim application No.22 claimed payment in net sum of over £14m.
- Employer's PN value £1.4m - accompanied by detailed assessment.
- But this was out of time and so invalid.
- Employer served PLN (in time) which cross referred to its detailed assessment (but did not attach a copy).
- Contractor said pay less notice was invalid – Adjudicator agreed- Grove liable to pay £14m.
- Anticipating an adverse outcome in adjudication, Employer started a Part 8 claim a short time after the adjudication started - asking for the central points of law to be decided on a final basis.
- As a result the Part 8 and adjudication enforcement application were heard together.

Decision in Grove v S&T

- Issue 1 - Pay Less Notice was valid
- No objection to referring to calculation in another document, if clear
- Relies on test in Mannai Investment v Eagle Star [1997] AC 749
- 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 contents of the notice are adequate is to see if the notice provides an adequate agenda for dispute about valuation and/or any cross-claims [26]

Decision in Grove v S&T

- Issue 3 – Absent valid PN or PLN, the Employer may still adjudicate to determine the true value that ought to have been certified.
- Reasons:
 - (1) First principles - issue of true value remains live [67-90]
 - (2) Court of Appeal authorities point in that direction [91-104]
 - (3) TCC cases that ‘took a different line’ wrongly decided [114-122]
 - (4) Didn’t need express terms about repayments [131-135]
 - (5) Would not destroy or undermine notice regime [136-142]
 - (6) Will strengthen adj system & reduce ‘smash and grab’ [143]

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 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

- Not pointless for Contractor to claim immediate payment
 - Adjudication on true value often take longer to prepare
- In meantime Contractor should get paid unchallenged Notified Sum
 - But Grove should mean the end of windfall results
- Try going direct to summary judgment on Notified Sum ?
 - Not suitable where factual dispute pertaining to validity of notices

Potential impact

- Notice regime remains effective to ensure cash flow for contractors
- Payer must pay EITHER the notified sum OR the true value
 - But cannot stop paying based on bare assertion about value (as happened in bad old days before the 1996 Act)
 - In those days payment dispute might take years to go through courts
- This scheme still operates to ensure that does not happen
 - It remains a ‘pay now & argue later’ scheme
 - Decision in Grove will bring forward the ‘argue later’ in some cases

Potential impact

- WHEN can 'true value' adjudication be started ?
- Must it be sequential?

[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. And as I have said, if the interim payment cycle is coming to an end, then the risk of injustice to the employer increases and an adjudication as to the 'true' value becomes an important remedy. In my judgment, none of that threatens the whole edifice of construction adjudication.

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



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Dominique specialises in high value disputes in the field of technology, construction and engineering projects, and in professional negligence claims, both in the UK and abroad. She has extensive experience of complex PFI contractual arrangements in the UK. She frequently deals with commercial issues arising out of bonds, guarantees & warranties, as well as acting in disputes about the jurisdiction of UK or foreign courts or conflicts of laws.

She has represented contractors, employers and their professional advisers, as well as government departments, in both arbitration and litigation (in both the High Court and the Appellate Courts). She has excellent experience of mediation, where she has represented many clients in multiparty actions leading to early stage settlements, and adjudication, having acted in over multiple adjudications. She also acts as adjudicator and is co-author of the *Construction Adjudication and Payments Handbook* published by Oxford University Press, and is also an editor of the Building Law Reports

Dominique is recommended in the most recent editions of the legal directories, Chambers & Partners UK Bar Guide and The Legal 500 as a leading silk in the field of Construction and Professional Negligence.



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