

Green light for “true value” adjudications: Court of Appeal upholds Grove decision

S&T (UK) Limited v Grove Developments Limited [2018] EWCA Civ 2448

In late 2018, the Court of Appeal upheld the decision in *Grove Developments Limited v S&T (UK) Limited* that a paying party can seek an assessment of the true value of an interim application, even if a procedural (‘smash and grab’) adjudication has previously been brought in relation to that same interim application.

The 2015 case of *ISG v Seevic* had held that, in the absence of a valid payment notice or pay less notice, a paying party must pay the ‘notified sum’ (i.e. the sum applied for, or notified, by the payee) and was unable to seek reassessment of that particular interim valuation.

Preferring the approach of the first instance judge in *Grove* to that in *Seevic*, the Court of Appeal has now confirmed that:

1. A party who has failed to serve a payment notice/ pay less notice can refer to adjudication a dispute concerning the true value of that same interim valuation.
2. Prior to commencing an adjudication as to ‘true value’, the payer must nevertheless pay the sum to which the payee is entitled on the ‘smash and grab’ basis.
3. The adjudicator has the power to order the return of any overpayment disclosed by the subsequent Decision as to ‘true value’.

The requirement to pay up before launching a ‘true value’ adjudication means that some parties will continue to bring ‘smash and grab’ adjudications in an effort to gain commercial advantage and short-term cash-flow benefits.

This potentially exposes the paying party to the risk of payee insolvency until such time as a true value adjudication can be concluded, and the appropriate financial adjustments made. Service of valid payment or pay less notices therefore remains fundamental to mitigating project risk.

The decision in *Grove* should also encourage paying parties to ensure valuations are actively managed so that, should a true value adjudication nevertheless prove necessary, this can be done promptly to minimise potential risks.

In addition, the decision provided further useful guidance that:

- Payment notices can be valid where they refer expressly to documents previously served on the payee, notwithstanding that copies of those documents are not enclosed with the Notice. This is provided a ‘reasonable recipient’ would have understood the notice’s meaning.
- When claiming liquidated and ascertained damages under the JCT Design and Build Contract 2011, ‘non-completion’, ‘intention’ and ‘deduction’ notices must be served separately and in the correct order, but there only needs to be the briefest of periods of time between them (in this case a seven-second gap between the second and third notices did not invalidate the deduction). Parties, particularly payees, should therefore consider amending the JCT contract to allow a ‘cooling off’ period for discussion and negotiation before an actual ‘deduction’ notice is served.

If you have any questions please contact:



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