Grove Developments – Will Smash and Grab now Crash and Burn

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Grove Developments Ltd v S&T (UK) Ltd [2018] EWHC 123 (TCC)

The Decision

1. In his final substantive judgment in the TCC before moving up to the Court of Appeal, Coulson J expressly departed from ISG v Seevic, opening the door for Payers to adjudicate the 'true value' of an interim application, even where they have failed to respond with either payment or payless notices.

2. In essence Coulson J rejected the notion, central to ISG, that by failing to respond to an interim payment notice a Payer under a construction contract is "deemed to agree" the sum applied for [115-117]. Instead, by operation of the contract and/or terms implied by the Scheme, the Payer must immediately pay the sums applied for, but may, at any time after payment, commence an adjudication to determine the true value of the works as at the relevant due date [67-104].

3PB Analysis

3. Coulson J gave a number of detailed reasons for his decision. In short:

    a. S.108 of the Construction Act and paragraph 20 of the Scheme allow parties to refer disputes to adjudication without limitation and at any time. Prima facie, therefore, a Payer should, at any time, be able to refer a dispute as to the true value of the works.

b. A dispute as to the true value of an application is different to a dispute as to whether that application was responded to (adequately or at all). An adjudication as to the latter ought not to bar an adjudication on the former.

c. Payees are entitled to refer disputes as to the value of the works subject of an interim valuation where underpaid. In fairness, Payers must have the same right if they have overpaid.

d. There is no justification in the wording of the Act, Scheme or standard form contracts for treating final applications differently from interim applications, yet the decision in ISG has forced a different approach to dealing with final and interim applications. Coulson J's decision therefore renders the law more consistent.

e. Interim payment provisions will not be undermined. Payers who do not respond will still be required to pay the full sum applied for, only then can they dispute the true value.

f. The interim payment process is, instead, enhanced. The 'smash and grab' adjudication has brought the system into disrepute. The Act and Scheme were not intended to allow Payees to hold on to large sums of money, for prolonged periods, without Payers having a means of recovery until the final account. Coulson J's decision prevents that and restores fairness as between Payees and Payers.

4. Also of significance were Coulson J's findings that:

a. The courts will construe both Payers' and Payees' notices to the same standard, namely: would a reasonable person, in the circumstances, understand the document to have (or be intended to have) the effect of a payment or payless notice.

b. If a payless notice is sufficiently clear in the circumstances, it need not itself include a calculation of the sums due if it clearly refers to another document which does include a calculation.

c. An adjudicator may award repayment of any sum overpaid by a Payer, even if there is no term in the contract allowing for negative interim valuations. Parties

are bound by Adjudicators' decisions and Adjudicators have broad powers to make such awards.

Implications

5. This is undoubtedly the most significant payment decision to come out of the TCC in recent years. Opinion has been divided about whether or not the decision will bring an end 'smash and grab' adjudications, whereby Payees make large payment applications after the works are completed but before the final account and then, if the Payer fails to adequately respond, adjudicate for the full sum, even if it is not owed on a true valuation.

6. That 'smash and grab' approach was buttressed by the decision in ISG, which prevented Payers recovering sums overpaid in a 'smash and grab' by counter-adjudicating over the true value of the works. This meant Payers had to wait until the final account before reclaiming any overpayment made at the final interim application. Since Grove opens the door for Payers to counter-adjudicate over the true value of the works as soon as they have paid, many have taken the view that the 'smash and grab' is now dead in the water.

7. Others, however, note that Coulson J was at pains to make clear that the principle 'pay now argue later' should still apply (see [90], [119] and [102-103]), stating e.g. that an *"employer has to pay the sum stated as due, and could thereafter, if they wished, raise the question of the 'true' valuation in a subsequent adjudication."*

8. Such passages give Payees some incentive to adjudicate where applications have not been (adequately) responded to. Indeed, some have noted that Adjudicators may now have greater confidence awarding the sums applied for, since Payers will no longer be left out of pocket without remedy for prolonged periods; a concern which is likely to have made some adjudicators hesitate before awarding what may have appeared to be substantially over-valued applications on the basis of a mere technicality.

9. What is less clear is how this 'pay now, argue later' approach is to work in practice. For example, it is not clear whether, in suggesting that a Payer can only raise the question of the 'true value' after it has paid, Coulson J was intending to suggest there would be some restriction on an Adjudicator's jurisdiction to assess the 'true value' before payment had been made. It is difficult to see how any such jurisdictional restriction could be

reconciled with Coulson J's own reasoning that parties can bring adjudications 'without limitation' and 'at any time.'

10. Accordingly, there would seem to be little incentive for Payers to make payment where they have failed properly to respond to a payment application. Where a 'smash and grab' is threatened, there would seem to be nothing to prevent a Payer commencing a concurrent counter-adjudication over the true value. As such there would be every reason to resist payment in the meantime.

11. On its surface that may appear to undermine the interim payment regime; the concern that led to the decision in ISG in the first place. However it is important to note that, even if a Payer can bring a counter-adjudication at the same time and without having ever made payment, the operation of the 'pay now, argue later' principle will mean that the burden of proof will shift. If a Payer has failed to respond to a payment application, then it will be for them to prove – on a true valuation – that the sums applied for are not due. Absent such a failing, it would be for the Payee to prove an entitlement to any more than was paid.

12. As such, it is our view that the decision in Grove fairly balances the rights and obligations of the parties, while maintaining the interim payment regime and cash-flow. Importantly, it will now be more likely that only proper sums (representing the 'true value' of the work) rather than overstated amounts will flow to Payees. This being the case, both parties and adjudicators themselves can have greater confidence in the payment and adjudication system as a whole.

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