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# A brave new world for interim payments?

In *S&T (UK) Limited v Grove Developments Limited* [2018] EWCA Civ 2448, the Court of Appeal has confirmed the TCC's decision on the right of an Employer who fails to provide a Payment Notice or Pay Less Notice to subsequently dispute the amount of that interim payment through adjudication.

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The first instance decision was seen as the Employer's counter to a smash and grab adjudication.

## Background

Grove Developments Ltd ("Grove") engaged S&T (UK) Ltd ("S&T") to design and build a new Premier Inn Hotel at Heathrow Terminal 4, using an amended version of the JCT Design and Build Contract 2011. The contract provided that any Pay Less Notice was required to specify the sum that the Employer (Grove) considered to be due to the Contractor (S&T) and the basis on which that sum was calculated. The contract also required Grove to pay the sum stated in either a Payment Notice or S&T's application (where a Pay Less Notice was not given in the stated period).

On 31 March 2017, S&T sent Grove an interim application seeking payment of £14m. Practical completion had been achieved (although not yet certified) by this time, meaning this was S&T's final interim application before the final account process. The basis for S&T's claim was set out in a spreadsheet attached to its interim application.

Grove's view was that the net amount due to S&T was £1.4m, which was set out in a spreadsheet attached to an email it sent S&T on 13 April 2017. Accordingly, Grove issued a Payment Notice and interim certificate confirming its assessment that the net amount due was £1.4m. The Payment Notice was not issued in time in accordance with the contract.

On 18 April 2017, Grove emailed its Pay Less Notice to S&T. This Pay Less Notice (which was itself in time) referred back to its detailed calculation of £1.4m in the purported Payment Notice of 13 April 2017.

Accordingly, S&T argued that Grove's Pay Less Notice was also invalid.

S&T did not seek payment for approximately six months. However, when Grove declined to pay, S&T served a notice of adjudication, arguing that a reference in the Pay Less Notice back to the detailed assessment (ie. the spreadsheet attached to Grove's email of 13 April 2017) was insufficient for a Pay Less Notice to comply with the contract – ie. the Pay Less Notice did not "specify" the basis on which the sum in that notice was calculated. The adjudicator determined that Grove's Pay Less Notice was invalid, and that S&T was entitled to be paid £14m. This was an expected result for a smash and grab-type adjudication.

Grove subsequently brought proceedings seeking various declarations from the Court, including that its Pay Less Notice was, in fact, valid. However, Grove also asked the Court to determine whether, if the Pay Less Notice was invalid, it could commence a separate adjudication seeking a decision as to the 'true' value of an interim application.

Coulson J's decision at first instance (as discussed in our article here) was that Grove's Pay Less Notice was valid. However, even if the notice was invalid, Grove would be entitled to start an adjudication to dispute the true value of S&T's interim application. It did not matter whether the Employer (in this case, Grove) had served a payment or Pay Less Notice.

S&T appealed to the Court of Appeal.

## Court of Appeal

The Court of Appeal was faced with three issues, of which the first two were the most significant, and are summarised below.

### What did the statutory and contractual obligation to "specify" the basis of calculation in a Pay Less Notice require?

Section 111(4) of the Housing Grants, Construction and Regeneration Act 1996 (as amended) ("HGCR") states that a Pay Less Notice given by an Employer (in this case, Grove) must specify both the sum it considers to be due and "the basis on which that sum is calculated". The contract between the parties was consistent with this requirement.

S&T accepted that the first limb of this requirement was satisfied – Grove's Pay Less Notice clearly stated the amount it considered to be due. The question was whether Grove's cross-reference back to its Payment Notice/spreadsheet (ie. those documents emailed to S&T on 13 April 2017, 5 days before the Pay Less Notice was issued) amounted to specifying the basis on which that sum was calculated.

Upholding Coulson J's first instance judgment, the Court of Appeal found that it did not matter that Grove's Pay Less Notice failed to set out the basis of its calculation but instead cross-referenced the earlier Payment Notice (and the spreadsheet attached to that). The Court found that Grove's Pay Less Notice of 18 April 2017 was sent to the individuals within S&T who were dealing with the interim payment application, and who had received Grove's Payment Notice on 13 April 2017. Those individuals were "bound to be familiar with the package of documents which Grove had sent to them" 5 days earlier, and would have understood the cross-reference. Accordingly, the cross-reference was valid.

This finding was fact-dependent, as it involved individuals within S&T who were familiar with the earlier Payment Notice, and therefore would have understood Grove's cross-reference in the subsequent Pay Less Notice. As such, care needs to be taken: a cross-reference or back-reference may be acceptable in one case, but not in another. The best approach remains strictly complying with the Payment Notice and Pay Less Notice requirements individually – i.e. ensure they each contain all of the required information in their own right, without cross-referencing earlier documents.

### Can an Employer commence an adjudication seeking a decision as to the 'true value' of an interim application if its Payment Notice or Pay Less Notice is invalid?

Although this question was academic here given the finding that Grove's Pay Less Notice was valid, the Court nonetheless determined whether an Employer, whose Payment Notice or Pay Less Notice is invalid, has the right to commence an adjudication to determine the true value of an interim application.

This area of the law was riddled with what appeared to be inconsistent authorities. Having reviewed these at length, the Court of Appeal found that a building contract is an entire contract – unless specified in the contractual terms or in statute (such as HGCR), a Contractor has no entitlement to interim payments. Assuming a Contractor has an entitlement to interim payments, an Employer who does not provide a valid Payment Notice or Pay Less Notice in response is required to immediately pay the 'notified sum' (ie. the amount claimed by the Contractor in its interim application) and, if it does not, then the Contractor can enforce this through means such as adjudication.

However, any sums paid as per the above are provisional only and not conclusive – they may not correctly value the work done. The courts, and adjudicators, have wide powers to consider and revise these sums if appropriate – accordingly, they have the power to determine the true value of the interim application at a later stage.

To illustrate the above, a Contractor may claim £10m in an interim application, but has only performed £5m worth of work. If the Employer fails to provide a valid Payment Notice or Pay Less Notice in response, it is required to immediately pay the £10m to the Contractor (ie. the notified sum). If the Employer fails to pay that £10m, then the Contractor can launch an adjudication for the full £10m, and would almost certainly succeed – i.e. the

smash and grab. However, provided it first pays the £10m, the Employer can then commence its own adjudication to determine the true value of the Contractor's interim application – i.e. the Employer can seek to argue that it should have only paid £5m.

This is important as, prior to *Grove Developments*, it was considered that the Employer's only avenue to reassess the sum due, and recover any overpayment, was in a later interim payment cycle or at the final account stage.

## Comment

Before the TCC decision in *Grove Developments*, there was a line of cases which established that an Employer who failed to serve the correct notices was not entitled to subsequently adjudicate the true value of an interim payment claim.

*Grove Developments* reverses that principle, and makes clear that an Employer does have the right to adjudicate the true value of an interim claim. However, as the Court of Appeal clearly stated, the Employer must pay the notified sum before commencing such an adjudication. It cannot withhold payment pending that process.

Confirming this right may reduce the number of smash and grab adjudications by Contractors, on the basis they know they are unlikely to hold on to overpayments for long, but is unlikely to end the practice entirely. In fact, it is possible that the number of adjudications overall will increase: first an adjudication by a Contractor seeking payment of the notified sum on the basis that the Employer has not complied with its notice requirements; followed by a second adjudication commenced by the Employer to establish the true value of the interim application.

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