Time to Take Notice: *Grove Developments Ltd v S&T (UK) Ltd*

***Alexander Nissen QC** discusses the key points and implications arising from Grove Developments Ltd v S&T (UK) Ltd,[1] in which he successfully acted for the claimant.*

The case of *Grove* raises three points of general interest to the construction industry, but this commentary focusses on two related points concerning payment notices and adjudication. It was the last substantive judgment from Coulson J before his well-deserved elevation to the Court of Appeal.

Grove Developments Ltd was engaged in the business of hotel developments. The building contractor was S&T UK Ltd. This was a project for the development of a Premier Inn hotel at Heathrow Airport. The contract was a JCT D&B 2011. Practical completion had been achieved. S&T issued an interim payment application for £14m. In response, Grove valued the work at £1.4m, providing full particularity as to the basis of that valuation. In doing so it used the spreadsheet which S&T had itself issued when making the application, dropping in its own lower values within the same document.

So far so good, but, regrettably, its Payment Notice came too late. The effect of missing the date was that it became liable to pay the sum stated as due in the application unless it had served a valid Pay Less Notice. Grove did rather better with the timing of the Pay Less Notice. But the sender did not re-attach the spreadsheet with that notice. Instead he referred back to its content as sent with the Payment Notice. S&T contended that this was not a valid Pay Less Notice because it failed to "specify" the basis on which the sum had been calculated, that word coming from the contract and the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA"). S&T's argument was that the word "specify", on its true construction, imported the requirement for attachment of the detail within the Pay Less Notice itself. It was not enough to refer to a breakdown contained in some other document which was not itself attached. It said the contractor should not be left struggling through the project files to work out the basis of the calculation.

By contrast, Grove said it was sufficient if the recipient of the Notice would know which document was being referred to. Applying that test, the reasonable recipient would have known that it was a reference to the detailed spreadsheet sent only a few days before with the Payment Notice.

The Payment Notice

Narrowly, the principle arising in this part of the case is that the word "specify" does not mean that the detail must be attached. It is a question of fact and degree whether a notice specifies the basis of the calculation in compliance with the contract and the HGCRA.

Of broader interest is the shift in the Court's approach to the way in which notices will now be considered. Judges have previously tended to address the question of validity differently depending on whether it is a payment application on the one hand or a pay less notice on the other: contrast *Caledonian Modular Ltd v Mar City Developments Ltd*[2] with *Windglass Windows Ltd v Skyline*.[3] As Coulson J himself says in *Grove*, there is a hint in some of the cases that a pay less notice may be construed "more generously" than would be the application for payment, because of the draconian consequences which would flow from non-compliance with the requirements of a pay less notice. But the words used in the contract are the same and so, it could be said, there is no real justification for any difference of approach. For that reason, Coulson J confirms the test should be the same.

It may be that how a pay less notice will be construed is not a question which can be wholly divorced from the legal consequences of an adverse conclusion as to its validity. As a matter of policy, a tribunal is more likely to find a pay less notice invalid if it knows that the only consequence of that conclusion is a temporary deprivation of cash flow until the matter can be corrected in a second adjudication. When the law was thought to be as suggested in *ISG v Seevic*, one can understand a more liberal approach being adopted to the construction of pay less notices.

One of the fascinating things about the law and lawyers is their endless appetite for testing the boundaries. No sooner has one principle become established than questions are raised about how that new principle is to be applied.

1 [2018] EWHC 123 (TCC)

2 [2015] BLR 694

3 [2009] EWHC 2022

Even though the Judge reached very firm conclusions on this issue, he gave permission to appeal in respect of it because, he said, it was of importance to the construction industry and he therefore thought that there was a compelling reason that it be dealt with definitively.

Adjudication Over the True Value

The headline grabbing point in the case concerns the question of whether *ISG v Seevic*[4] was correctly decided. One of the fascinating things about the law and lawyers is their endless appetite for testing the boundaries. No sooner has one principle become established than questions are raised about how that new principle is to be applied.

The significance of *Grove* obviously lies in its decision that, in principle, an employer (or in the case of a subcontract, a main contractor) can adjudicate over the true value of an application if he fails to issue his notices in time. But, in the legal profession, that is already yesterday's news.

Everyone tells me they always knew *Seevic* was wrong – even people with whom I remember debating that very question – and now the legal argument moves on: how quickly can I start the second adjudication? This was not a question which arose directly in *Grove* – it simply needed to establish the principle that it could re-adjudicate if it wanted to.

The principle established in *Seevic* (and *Galliford Try v Estura*[5] which followed it) was that an employer who failed to issue both a payment notice and a pay less notice was to be taken as having *agreed* that the true value of the work was that which was stated in the application.

The effect of this was that the penalty for not serving notices was not merely the liability to pay the sum claimed but also to deprive the employer of the right to reclaim any windfall element which exceeded the true value of the work.

It was said that this was in accordance with the statutory scheme and that affording a right to adjudicate the true value would drive a coach and horses through the purpose of the amendments introduced in 2009.

As the Judge held, there are real difficulties with this analysis. I will focus on four.

(1) The wording

The words of the contract, which mirror exactly the words in the Act, specifically draw a distinction between "the sum due" (the valuation bargain) and the "sum stated as due" (the payment bargain). The sum due is the sum which is actually due, calculated in accordance with the valuation bargain. That is the agreement reached in clause 4.7.2. By contrast, the bargain struck in the notice regime (or, more accurately, the deal imposed by statute) is that the sum which is stated as due becomes payable if no timely notices are served. The sum stated as due may, coincidentally, be the sum due but it is likely not to be.

On the common and ordinary meaning of the provisions, there is therefore no warrant for creating a deemed agreement that the sum stated as due is the same as the sum due. As Coulson J said, there is no basis in fact for the agreement and it flies in the face of reality, which is that there is usually a plethora of disagreements over the sum due.

To use the language of adjudication, a dispute about payment of the sum stated as due is not the same as a dispute about the true value of the sum due.

Coulson J said that the concept of a deemed agreement which lies at the root of *Seevic* and of *Galliford Try* was "not only unjustified, but it is also an unnecessary complication".

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(2) Inconsistency with the final payment

The second difficulty with *Seevic* relates to the situation at the final account stage, when the final payment comes to be made. The Courts quickly realised that the *Seevic* principle creates an anomaly at this point. If applied in that context it would mean an

4 [2015] 2 All ER Comm. 545

5 [2015] EWHC 412 (TCC)

"It was never the purpose of the Act to enable contractors to retain, on an indefinite basis, a sum greater than that which was actually due to them in accordance with the valuation bargain."

employer who did not get his notices in on time in relation to the final account payment could find himself forever deprived of the opportunity to prove the true value of the final account.

So, the Judges said: well of course this does not apply at the final account stage. Edwards-Stuart J decided that at first instance in *Harding v Paice* and the Court of Appeal agreed. That was the occasion on which it could also have chosen to overrule *Seevic* but it chose not to do so in terms, hinting only that it may be wrong. The Court simply decided that, whatever may be the position at the interim stage, the final account payment could always be the subject of investigation as to the true value of the sum due irrespective of the absence of notices. O'Farrell J followed that approach in *Kilker Projects Ltd v Purton*.[5]

But the difficulty with that approach, not addressed by any Court, is that the wording in relation to the final account provisions and the effect of not serving notices in respect thereof is materially exactly the same as it is at the interim stage. It is also exactly the same in the Act.

So, it is completely anomalous to say that the same contractual and statutory wording has one effect at the interim stage and another at the final stage. In *Grove*, Coulson J recognised this.

(3) Equal treatment

The approach which was successfully advanced in *Grove* applies equally to the contractor and the employer. The employer who does the right thing and gets his notices in on time is only liable to pay the sum "stated as due" in his own notices.

Everyone (rightly) acknowledges that a contractor who is aggrieved by the employer's approach to valuation in a valid payment notice could adjudicate over the true value so as to get an increased valuation from an adjudicator. Indeed, the Act plainly envisaged that a contractor can ask for more: see Section 111(8) and (9). If the contractor is entitled to claim payment of more money because the sum stated as due does not reflect the sum truly due in accordance with the valuation bargain why should the employer not be able to do make the mirror image claim?

Coulson J said that giving the right to adjudicate over the true value was simply a matter of equality and fairness and that there was nothing in the Act which suggested a one-sided arrangement.

(4) The policy point

Edwards-Stuart J was impressed by the submission that permitting an employer to adjudicate over the true value would render the Act ineffective. Not so, as the Act still serves the function of rendering the employer liable to pay the sum stated as due if he does not serve proper notices.

It was never the purpose of the Act to enable contractors to retain, on an indefinite basis, a sum greater than that which was actually due to them in accordance with the valuation bargain. In cashflow terms, they could (or should) never have needed to be funded by that element which constitutes the excess windfall.

The question which has most excited the industry is how soon the employer can start his adjudication.

There is another point too. The NEC form of contract expressly enables the monthly payments to go in either direction. At the end of each month, a sum may be due to the employer or to the contractor, depending on the balance of the account as it then stands. So, the failure by an employer to issue his notices in time can immediately be rectified the following month by claiming an overpayment. There is nothing wrong with that and those provisions are statutorily compliant. So, if there is nothing wrong with allowing parties by their contract to rectify the consequences of not serving timely notices, why is it contrary to the Act to allow them to achieve the same result by adjudication?

Future Implications

So, I turn to the future implications which arise as a result of *Grove*.[6] The question which has most excited the industry is how soon the employer can start his adjudication. I have no doubt that there is already a case waiting in the wings to test that question – it did not arise directly in *Grove*, which simply sought to establish the principle.

There must, of course, be a crystallised dispute. So, on any view, an employer who has not served any form of notice or statement containing a valuation cannot begin his adjudication because he will not even have crystallised a dispute as to the true value.

But let us assume the conventional case in which the issue over valuation has, one way or another, been expressed. In my view the Courts should require the employer to have made payment before he can even start his own adjudication.

I say that for three reasons:

- First, there are several references within *Grove*, in which Coulson J emphasises the need to make payment of the sum stated as due before adjudicating over the true value. For example, Coulson J said:

  > *"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."*

- Second, the underlying reasoning in the judgment depends on prior payment by the employer having been made. An employer cannot easily crystallise a dispute that he is entitled to repayment until he has made the payment in the first place. In legal terms, there can be no cause of action based on over-payment until a payment has, first, been made. This is not a fetter on his right to refer a dispute at any time: it is based on a conclusion that a premature reference of such a dispute should fail in law.

- Third, this produces a proportionate outcome, commensurate with the policy of the Act. The provision of timely notices provides certainty and clarity. The penalty for non-compliance should be the obligation to pay. Once and if you have paid, you can reclaim any over-payment. It is also a neat outcome because it avoids the parties getting involved in tactical races between the payment adjudication and the repayment adjudication. Parties will be reluctant to extend time in the first adjudication (in circumstances where it would otherwise have been sensible for them to do so) for fear of narrowing the gap before the conclusion of the second adjudication. It stops or, at the very least, minimises the Courts having to determine tactical skirmishes about listing of the enforcement hearings, stays of execution and all the rest. In respect of the current approach to sequential adjudications, see Jackson J in *Interserve Industrial Services Ltd v Cleveland Bridge UK Ltd*[7] and *HS Works v Enterprise Managed Services*.[8] In the latter, Akenhead J took a similar approach to Jackson J though he did suggest that "things might be different if there were effectively simultaneous adjudications and decisions."[9]

S&T was also granted permission to appeal in respect of this issue on the grounds that it was an important point with industry wide ramifications. Pending that appeal, it is submitted that High Court Judges (and adjudicators) should follow *Grove*: see the approach in *Willers v Joyce*[10] at [9], which requires Judges faced with conflicting first-instance decisions to follow the last of the decisions, absent cogent reasons to the contrary.

5 [2016] EWHC 2616

6 Of course, I reserve the right to argue or decide differently from the views expressed should the need arise.

7 [2006] EWHC 741 at [43]

8 [2009] BLR 378 at [39-40]

9 see [64]

10 [2016] 3 WLR 534, [2016] WLR(D) 402, [2016] UKSC 44