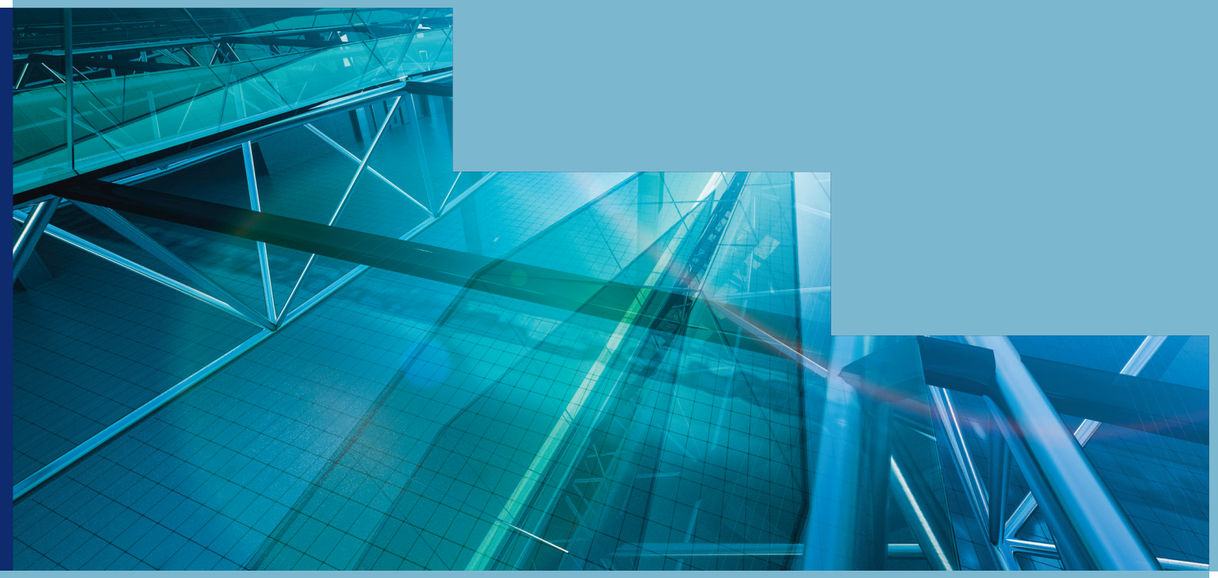
A CRITICAL LOOK AT *BROSELEY LONDON v PRIME ASSET*:

WOULD PERMITTING A FINAL ACCOUNT ADJUDICATION HAVE BEEN A "REMARKABLE INTRUSION"



By Harry Smith

Harry Smith examines the recent judgment in *Broseley London Ltd v Prime Asset Management Ltd (Trustee of the Mashel Family Trust)*[1], in which the TCC declined to stay the execution of a judgment enforcing an adjudicator's decision in order to allow a "true value" adjudication to take place in respect of the final account.

How did the question of a "true value" adjudication arise?

On 11 July 2019, Broseley issued a payment application ("Valuation 19") for £485,216.17 plus VAT. Prime Asset failed to give a payment notice or pay less notice, and refused to pay the sum due. Broseley therefore sought, and on 12 September 2019 obtained, an adjudicator's decision to the effect that it was entitled to be paid the sum set out in Valuation 19. Two further adjudications took place thereafter in September and November 2019 respectively, the latter of which resulted in a declaration that Broseley had lawfully terminated the contract on 29 September 2019.

In early 2020 Broseley applied to enforce the decision in the first adjudication. Prime Asset accepted that Broseley was entitled to summary judgment but argued that it was entitled to a stay on the basis of the well-known principles set out in *Wimbledon v Vago*[2]. Prime Asset's case was not that the stay should continue indefinitely, but that it should be limited to about two months to allow a further adjudication to take place to determine the true value of the final account post-termination.

What did the court decide?

It was common ground that the effect of the decision of the Court of Appeal in *S&T v Grove*[3] was to preclude Prime Asset from commencing a "true value" adjudication as to Valuation 19 prior to paying the sum found to be due in the first adjudication. The parties disagreed, however, as to whether Prime Asset was, by extension, precluded from adjudicating the true value of the post-termination final account.

Mr Roger ter Haar QC, sitting as a Deputy High Court Judge, decided that Prime Asset was so precluded. He said:

> *"Whilst the S & T decision does not expressly concern the present situation, where what is suggested as the possible subject of an as yet unstarted adjudication is the determination of a notional final account where the amount of that final account would be dependant on the validity of Decision No. 1, the ability to mount such an adjudication following upon Decision No. 3 attacking the validity of that Decision without prior payment of the amount awarded in Decision No. 1 would be a remarkable intrusion into the principle established in S & T: it would permit the adjudication system to trump the prompt payment regime, which is exactly what the Court of Appeal said in paragraph [107] of that case would not be permitted to happen."*

He went on to find that no stay should be granted on the grounds that (a) Prime Asset had failed to take any steps to challenge the first adjudicator's decision in the period since 12 September 2019; (b) it could not be said to be probable that Broseley would be unable to repay the judgment sum if ordered to do so; and (c) neither could there be said to be a real risk of Broseley dissipating or disposing of the judgment sum.

Was the court right to say that permitting a final account adjudication would have been a "remarkable intrusion" into the principle established in *S&T v Grove*?

In *S&T v Grove*, the Court of Appeal upheld the decision of Coulson J at first instance that S&T was not entitled to adjudicate the true value of an interim payment due to Grove until it had paid the notified sum. The principal justification for that conclusion was expressed by Sir Rupert Jackson as follows:

> *"Both the HGCRA and the Amended Act create a hierarchy of obligations, as discussed earlier. The immediate statutory obligation is to pay the notified sum as set out in section 111. As required by section 108 of the Amended Act, the contract also contains an adjudication regime for the resolution of all disputes, including any disputes about the true value of work done under clause 4.7. As a matter of statutory construction and under the terms of this contract, the adjudication provisions are subordinate to the payment provisions in section 111. Section 111 (unlike the adjudication provisions of the Act) is of direct effect. It requires payment of a specific sum within a short period of time. The Act has created both the prompt payment regime and the adjudication regime. The Act cannot sensibly be construed as permitting the adjudication regime to trump the prompt payment regime. Therefore, both the Act and the contract must be construed as prohibiting the employer from embarking upon an adjudication to obtain a re-valuation of the work before he has complied with his immediate payment obligation."*

This passage, which was technically *obiter*, has proved controversial. The kernel of the controversy is the judge's use of the phrase "embarking upon" in the final sentence. A rule that an employer cannot refer a "true value" dispute to adjudication without first paying the notified sum is difficult to reconcile with the wording of s. 108(2)(a) of the Housing Grants, Construction and Regeneration Act 1996:

> *"The contract shall include provision in writing so as to – (a) enable a party to give notice at any time of his intention to refer a dispute to adjudication". (Emphasis supplied)*

The meaning of the words "at any time" might be thought to need no elucidation, but for the avoidance of any doubt the Court of Appeal confirmed in 2005 that the phrase "means exactly what it says"[4]. The court also noted that it was apparent from Hansard that Parliament had considered the time for referring a dispute to adjudication and had "decided not to provide any time limit".

1 [2020] EWHC 1057 (TCC)
2 [2005] EWHC 1086 (TCC)
3 [2018] EWCA Civ 2448
4 *Connex SE v Building Services Group* [2005] 1 WLR 3323 at [38]

In *Davenport v Greer*[5], both a "smash and grab" adjudication and a "true value" adjudication had already taken place by the time of the enforcement hearing. The defendant argued that it was entitled to rely on the "true value" decision to resist enforcement of the "smash and grab" decision. In a carefully reasoned judgment, Stuart-Smith J considered *S&T v Grove*, and concluded:

> *"it should now be taken as established that an employer who is subject to an immediate obligation to discharge the order of an adjudicator based upon the failure of the employer to serve either a Payment Notice or a Pay Less Notice must discharge that immediate obligation before he will be entitled to rely upon a subsequent decision in a true value adjudication. Both policy and authority support this conclusion and that it should apply equally to interim and final applications for payment."*

He went on to say this:

> *"The decisions of Coulson J and the Court of Appeal in Grove are clear and unequivocal in stating that the employer must make payment in accordance with the contract or in accordance with section 111 of the Amended Act before it can commence a 'true value' adjudication. That does not mean that the Court will always restrain the commencement or progress of a true value adjudication commenced before the employer has discharged his immediate obligation: see the decision of the Court of Appeal in Harding. It is not necessary for me to decide whether or in what circumstances the Court may restrain the subsequent true value adjudication and, in these circumstances, it would be positively unhelpful for me to suggest examples or criteria and I do not do so." (Emphasis supplied)*

These passages are important because they make clear that, notwithstanding *S&T v Grove*, the court has a discretion to permit employers to commence and progress "true value" adjudications without paying the notified sum in particular circumstances. The "prohibition" on such adjudications laid down, obiter, by S&T v Grove is not, therefore, absolute; and so cannot be a matter of jurisdiction. It can convincingly be argued that this analysis must be right in view of the clear wording of s. 108(2)(a) and Connex SE v Building Services Group, quoted above.

With this background in mind, the view of the judge in *Broseley v Prime Asset* that permitting the commencement of a post-termination final account adjudication would represent a "remarkable intrusion" into the principle laid down by *S&T v Grove* was, arguably, an overstatement, for several reasons:

(1) As the judge acknowledged, the facts of *S&T v Grove* were different to the facts of Broseley v Prime Asset. In *S&T v Grove*, the proposed adjudication concerned the true value of an interim payment for which no valid payment notice or pay less notice had been given. In *Broseley v Prime Asset*, the proposed adjudication concerned the true value of the final account following the termination of the contract.

(2) Further, as *Davenport v Greer* made clear, the court has a discretion to permit "true value" adjudications without payment of the notified sum to proceed.

(3) In principle, it is not obvious why merely allowing a "true value" adjudication to proceed should in itself, as the judge put it in *Broseley v Prime Asset*, "permit the adjudication system to trump the prompt payment regime", given that it is clear from both *S&T v Grove* and *Davenport v Greer* that an employer will not, in any event, be permitted to "rely upon" the result of a "true value" adjudication to avoid payment of the notified sum.

What is the impact of this judgment likely to be in practice?

On the face of it, the judgment in *Broseley v Prime* Asset supports the proposition that *S&T v Grove* lays down an absolute prohibition on the commencement of a "true value" adjudication by an employer absent payment of the notified sum; and suggests that that prohibition extends not only to attempts to adjudicate the true value of the particular payment concerned, but to adjudications which might cut across the employer's liability to pay the notified sum more generally. It is likely to be cited by parties seeking an injunction to restrain the progress or continuation of an adjudication on analogous facts.

"Insofar as there is a tension between Broseley v Prime Asset and Davenport v Greer, the latter is surely to be preferred for the depth and quality of its reasoning"

The weight which future courts place upon this aspect of the judgment may, however, prove to be limited, for a number of reasons:

(1) It is not clear whether the judge was referred to *Davenport v Greer*. At all events, the judgment does not acknowledge, or grapple with, the extent of the court's discretion to permit a "true value" adjudication to proceed prior to payment of the notified sum.

(2) The judge's reasoning has to be understood in the context of the slightly unusual way in which the issue arose, namely as part of an application for a stay of execution. The theoretical availability or non-availability of a "true value" adjudication as a route by which to contest the decision in the first adjudication could only ever have been a factor of incidental relevance to the merits of this application[6]. Moreover, the judge may well, in suggesting that permitting the proposed adjudication to proceed would "permit the adjudication system to trump the prompt payment regime", have had in mind the practical reality that, on the facts, granting a stay would have deprived Broseley of its right to prompt payment of the notified sum; rather than any broader point about the relationship between adjudication and payment.

(3) Insofar as there is a tension between *Broseley v Prime Asset* and *Davenport v Greer*, the latter is surely to be preferred for the depth and quality of its reasoning, and in particular for its recognition of the availability of a discretion on the part of the court to permit a "true value" adjudication to proceed before payment of the notified sum in certain circumstances. Unless and until *S&T v Grove* is revisited by an appellate court, the existence of such a discretion is, it is submitted, necessary in order to enable the courts to recognise and give effect to employers' statutory right to adjudicate "at any time".

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5 [2019] EWHC 318 (TCC)

6 The principally relevant factors being those set out in Wimbledon v Vago [2005] EWHC 1088 (TCC).