GROVING PAINS

Matthew Finn and Harry Smith consider some of the issues arising out of the Court of Appeal's decision in *S&T v Grove Developments.*

Introduction

It is probably an overstatement to describe the Court of Appeal's judgment in *S&T v Grove ("Grove")*[1] as exciting. It does, however, address a number of problems concerning the operation of Part II of the Housing Grants, Construction and Regeneration Act 1996, with which practitioners and the construction industry have had to grapple for many years. As Jackson LJ said himself:

> *"We are all trying to hack out a pathway through a dense thicket of amended legislation, burgeoning case law and ever-changing standard form contracts."*

Grove concerned a contract to design and build a new Premier Inn Hotel at Heathrow Terminal 4. There had been three adjudications, the last of which decided that a pay less notice issued by Grove dated 18 April 2017 had been invalid, with the result that S&T was, on the face of it, entitled to be paid some £14 million, being the sum stated as due in its interim application no. 22.

Grove issued Part 8 proceedings seeking declarations that: (1) its pay less notice dated 18 April 2017 had been valid; and (2) in any event, it was entitled to commence a fourth adjudication as to the true value of interim application 22. It succeeded both at first instance before Coulson J (as he then was) and on S&T's appeal to the Court of Appeal, which was dismissed.

This article is concerned with the second declaration sought by Grove, and the consequential legal issues arising from the Court of Appeal's decision in respect of that request for declaratory relief.

The Right to Challenge the Notified Sum

In arguing that it was entitled to refer a dispute as to the true value of interim application 22 to adjudication, Grove expressly invited the court to depart from the decision in *ISG v Seevic*,[2] in which Edwards-Stuart J had held that:

> *"... if the employer fails to serve any notices in time it must be taken to be agreeing the value stated in the application, right or wrong. In my judgment, therefore, in that situation the first adjudicator must be in principle taken to have decided the value of the work carried out by the contractor for the purposes of the interim application in question."*

At first instance,[3] Coulson J accepted Grove's invitation, embarking on a comprehensive rejection of the reasoning in *ISG v Seevic*, both by reference to first principles and by reference to authority. He summarised his conclusions as to principle in the following way:

> *"...in my view, there is no contractual basis for treating interim and final applications/payments in different ways. The contract treats them in the same way. So too should the parties, the adjudicators and the courts. On that basis, therefore, whether what is in dispute is an interim payment or a final payment, the employer has the right in principle to refer to adjudication the dispute about the 'true' valuation.*
>
> *Accordingly, ... it seems to me to be clear that an employer in the position of Grove must pay the sum stated as due, and is then entitled to commence a separate adjudication addressing the 'true' value of the interim application."*

"The second adjudication cannot act as some sort of Trojan Horse to avoid paying the sum stated as due."

The Court of Appeal adopted this reasoning at paragraph 99.

As the above passage makes clear, Coulson J's analysis was predicated on the notion that the employer would have to pay the notified sum before commencing a second 'true value' adjudication. He developed this point later in his judgment in the following way:

1 [2018] EWCA Civ 2448
2 [2014] EWHC 4007 (TCC)
3 [2018] EWHC 123 (TCC)

"There is also the suggestion that, if this analysis is right, the notice regime under the 1996 Act and/or this form of contract will be undermined, because every employer who misses the relevant deadline for the pay less notice will simply start a second adjudication as to the true value. But why would they? In most cases, such a course would be inefficient and costly: ***the employer will still have to pay the sum stated as due in the interim application****. If the employer can then resolve the alleged over-valuation point in the next interim payment round, no second adjudication would be necessary.*

Even if we assume that the relationship between the employer and the contractor is poor, so that there is a second adjudication in any event, ***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."* (emphasis added)

Coulson J's analysis of this point was upheld and developed in the Court of Appeal. Jackson LJ said:

"As a matter of statutory construction… 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. … 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 on an adjudication to obtain a re-valuation of the work before he has complied with his immediate payment obligation.****"* (emphasis added)

"The Court of Appeal judgment in Grove amounts to a radical departure from the words used in the statute."

There is much to be commended in that analysis:

i) The problem thrown into focus by *Grove* is one which might be said to be inherent in the drafting of the 1996 Act: s.108(1) provides for a right to adjudicate 'at any time'; s.111(1) provides that the employer 'shall pay the notified sum…on or before the final date for payment'. The former is a right of an absolute character; the latter is an absolute obligation. If they conflict, the answer must be that one or the other has to give way.

ii) It is trite that the principal purpose of Part II of the Act is to maintain contractors' cash-flow. That being the case, on the working hypothesis that s.108(1) and s.111(1) conflict, it can convincingly be argued that it is the right to adjudicate 'at any time', and not the right to payment under s.111, that ought properly to be 'read down'.

iii) This was, in effect, the solution which Edwards-Stuart J adopted in *ISG v Seevic*: the employer was deemed, in the absence of a valid pay less notice, to have agreed to the amount set out in the contractor's application, such that no 'true value' dispute could arise or be referred to adjudication. The problem with this analysis was that it was thoroughly artificial, as Coulson J convincingly demonstrated in his first instance judgment (see paragraphs 114-121).

iv) The judgments in *Grove* resolve the conflict by giving the contractor's right to payment under s.111 precedence in time over the employer's right to enforce the parties' underlying contractual rights. This recognises the fundamental point that, if s.111 is to be complied with at all, the employer must, logically, discharge its s.111 liability before any adjustment to account for the parties' underlying contractual rights can be made. It can therefore be said to be inherent in the statutory scheme that the contractor's right to payment under s.111 ought to be given temporal precedence over the employer's right to adjudicate.

However, as is instantly clear, the Court of Appeal's decision that an employer is prevented from *"embarking on"* a 'true value' adjudication until it has paid the notified sum is flatly inconsistent with s.108(2)(a), which permits a party to a construction contract to give notice *"at any time of his intention to refer a dispute to adjudication"* (emphasis added). In that regard, the Court of Appeal judgment in *Grove* amounts to a radical departure from the words used in the statute and, further, runs counter to prior Court of Appeal authority in which it has been held that the phrase *"at any time"* means exactly what it says: see e.g. *Connex South Eastern Ltd v MJ Building Services Group Plc*,[4] [38] per Dyson LJ (as he then was).

In our view, there was – strictly speaking - no need for the Court of Appeal to treat ss.108(1) and 111(1) as being in conflict with one another in order to hold an employer to its payment obligations. Instead of prohibiting an employer from commencing a 'true value' adjudication prior to payment of its s.111(1) liability, the court could simply have held that the courts would *enforce* 'notified sum' adjudications and 'true value' adjudications sequentially, in that order. Such an approach would have avoided doing violence to the language of s.108(1) of the Act, whilst ensuring that if an employer failed to pay the notified sum and immediately referred a 'true value' dispute to adjudication, the contractor would be free to commence a separate s.111 adjudication – or to seek a Part 8 declaration as to the employer's s.111 liability – safe in the knowledge that its right to payment under s.111 would be upheld and enforced before any question of enforcement of the parties' underlying contractual rights could arise.

The Employer's Right to Recover an Overpayment

The consequential issue which arose in *Grove* concerned the legal nature of the employer's right to recover any overpayment made by reference to a 'notified sum'. Coulson J held at first instance that the employer's right to repayment arose pursuant to an implied term or alternatively in restitution. This adopted the findings of the Supreme Court in *Aspect Contracts (Asbestos) Limited v Higgins Construction plc*,[5] which concerned the slightly different context of an overpayment found to have been made as a result of an adjudicator's decision subsequently shown to have been wrong.

Jackson LJ departed from this analysis, stating:

> *"If an adjudicator finds that the employer has overpaid at an interim stage, he can order re-payment of the excess as the dispositive remedy flowing from the adjudicator's re-evaluation... Having determined the true value of the works at an interim stage, the adjudicator (whose powers are co-extensive with the powers of the court in matters such as this) must be able to give effect to the financial consequences of his decision."*

"...there is now an unwelcome tension in the jurisprudence between the basis of the employer's right to recover overpayments flowing from an adjudicator's decision."

With respect, this reasoning is circular and unsatisfactory. It is circular because it does not follow from the fact that an employer has the right to refer a 'true value' dispute to adjudication that there *"must"* exist a legal basis for a claim to recover any overpayment found to have been made. It is unsatisfactory for that reason and also because there is now an unwelcome tension in the jurisprudence between the basis of the employer's right to recover overpayments flowing from an adjudicator's decision (i.e. an implied term or restitutionary right: *Aspect v Higgins*) and overpayments made pursuant to the interim payment mechanism, respectively. There is no good reason for similar rights of this kind to have different legal foundations.

Future disputes will have to grapple with this difficult passage in the Court of Appeal's decision in *Grove*. One possibility is that the courts will reject it as inconsistent with *Aspect v Higgins* and/or as being wrong in principle. Another possibility is that Jackson LJ's judgment represents the first step towards the recognition by the courts of some kind of alternative freestanding statutory right to repayment of sums overpaid flowing from or necessarily implied by the provisions of the 1996 Act itself. However, if such a freestanding right is to be recognised, a stronger forensic justification for it will be required than that articulated in *Grove*.

4 [2005] 1 WLR 3323

5 [2015] UKSC 38