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Case No: HT-2023-MAN-000046
Case No: HT-2023-MAN-000050

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS IN MANCHESTER
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Manchester Civil Justice Centre,
1 Bridge Street West, Manchester M60 9DJ

Date handed down: 29 November 2023

Before:

HIS HONOUR JUDGE STEPHEN DAVIES
SITTING AS A JUDGE OF THE HIGH COURT

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Between:

LIDL GREAT BRITAIN LIMITED	**Part 7 Claimant / Part 8 Defendant**
- and -	
CLOSED CIRCUIT COOLING LIMITED t/a 3CL	**Part 7 Defendant / Part 8 Claimant**

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Jonathan Acton Davis KC (instructed by **Clarke Willmott LLP, Manchester)** for **Lidl**
Charlie Thompson (instructed by **Hill Dickinson LLP, Manchester**) for **3CL**

Hearing date: 20 November 2023
Draft judgment circulated: 23 November 2023

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APPROVED JUDGMENT

Remote hand-down: This judgment was handed down remotely at 10:30am on 29 November 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

I direct that pursuant to CPR PD 39A paragraph 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

His Honour Judge Stephen Davies

His Honour Judge Stephen Davies:

Introduction and summary of decision

1. This is my judgment following the hearing on 20 November 2023 of:

   i) Lidl's Part 7 claim for summary judgment of the adjudication decision of Mr Christopher Hough made 25 September 2023 (**adjudication no 2** and **decision no 2**)

   ii) Two of the three grounds raised in 3CL's Part 8 claim. These grounds relate to decision no 2 and to the further adjudication decision of Dr Franco Mastrandrea made 3 October 2023 (**adjudication no 3** and **decision no 3**).

2. In short, as to the two Part 8 claim grounds 3CL contends that decision no 2 is unenforceable, as would be decision 3 if it was sought to be enforced, because they were each made without jurisdiction and/or in breach of public policy, on the ground that Lidl commenced these adjudications before it had complied with its immediate payment obligation under s.111 of the Housing Grants, Construction and Regeneration Act 1996 (as amended) in respect of a previous notified sum obligation (as it was held to be in a previous adjudication). I shall refer to this as the Grove principle, because it is a principle which was stated by Coulson J and upheld and explained in the judgment of Sir Rupert Jackson in S&T(UK) Ltd v Grove [2018] EWCA Civ 2448. This case raises issues as to the scope of the Grove principle and whether decisions 2 and 3 are within the scope of the Grove principle, properly determined.

3. In summary, my decision is that on a proper application of the Grove principle:

   i) Lidl is entitled to summary judgment in relation to decision no 2 to the extent that there is unarguably no defence based on lack of jurisdiction, namely as to £496,946.02 of the £757,845.63 awarded, together with proportionate interest and together with the adjudicator's costs.

ii) 3CL is entitled to a declaration that Dr Mastrandrea had no jurisdiction to determine 3CL's right (or lack of such right) to any extension of time over part of the period in respect of which he was asked to do so, namely 18 June 2022 to 29 September 2022.

The facts, summarised

4. The first part of this section is lifted directly from my previous judgment in the previous Part 7 and Part 8 proceedings between the parties, in which the positions were reversed, which was delivered on 11 September 2023 and reported under neutral citation number [2023] EWHC 2243 (TCC).

5. Lidl is a well-known national retailer. 3CL carries on business as an industrial refrigeration and air-conditioning contractor. Lidl and 3CL entered into a framework agreement which enabled the parties to enter into individual works orders, each of which was to constitute a separate contract incorporating both the terms of the framework agreement and the order. The first order issued under the framework agreement for refrigeration works at Lidl's Belvedere 2 Regional Distribution Centre is the subject of this and the previous case and all of the adjudications in issue.

6. The framework agreement and the order contain provisions entitling 3CL to make applications for interim payment (**a payment application**) following the achievement of defined milestones. The relevant payment application was the 19th such application (**AFP19**), dated 29 September 2022, in which 3CL sought payment of £781,986.22. That became a notified sum on 12 October 2022, with the final date for payment being 2 November 2022, but nothing was paid by Lidl, based on what it contended was a valid payment notice (**PAY-7**) served on 6 October 2022 stating that nothing was payable. PAY-7 included a number of items where it was said that 3CL's work was incomplete and/or defective and also a deduction of £765,000 for liquidated damages for the period from 18 June 2022 (being the date up to which Lidl had previously granted an "ex gratia" extension of time from the contractual completion date of 25 May 2022) to 29 September 2022 (the date of AFP19).

7. On 26 April 2023, 3CL referred the dispute over its entitlement to payment under AFP19 to adjudication (**adjudication no 1**). In a detailed reasoned decision dated 1 June 2023 (**decision no 1**) the adjudicator (Mr. Robert J. Davis) rejected all of Lidl's submissions as to the invalidity of AFP19 and as to the validity of PAY-7 and, thus, rejected Lidl's defences that no sum was payable because the final date for payment had not arrived and/or because no sum was payable under PAY-7 as a valid payment notice. He ordered Lidl to pay the sum applied for in AFP19 together with interest by 8 June 2023.

8. Lidl did not pay and instead issued a Part 8 claim challenging the decision on various grounds. In response 3CL issued its Part 7 claim and summary judgment application. In summary, my decision was that the Part 7 claim succeeded and that Lidl was not entitled to the Part 8 declarations sought, so that there should be summary judgment for 3CL on the claim.

9. Lidl complied with the order made as a result of that judgment and duly paid the sum due under decision no 1 to 3CL on 18 September 2023.

10. However, in the meantime, Lidl had commenced two further adjudications.

11. Adjudication no 2 was referred by Lidl on 28 July 2023, and concerned its entitlement to recover as a debt and/or deduct from any monies due to 3CL or which might become due, alleged costs and/or losses incurred by Lidl in appointing a third party to rectify alleged defects in relation to the works undertaken. I shall refer to the detail of adjudication 2 in more detail when I deal with the Grove point.

12. By decision no 2 dated 25 September 2023, Mr Hough decided that Lidl could deduct the sum of £757,845.63 from any monies due or which may become due to 3CL and payment of the sum within 7 days.

13. It will be noted that at the time of the referral Lidl had not paid the sum payable under decision no 1 but, by the time of decision no 2, it had done so.

14. 3CL did not pay the sum payable under adjudication no 2 and, thus, by the current Part 7 claim issued on 6 October 2023 Lidl seeks to enforce decision no 2.

15. By the current Part 8 claim dated 19 October 2023 3CL seeks a declaration that decision 2 is unenforceable because it was made without jurisdiction and/or in breach of public policy, in that Lidl commenced adjudication 2 before it had complied with its immediate payment obligation under s. 111 of the Act in respect of AFP19. This is the Grove point. Lidl has accepted, rightly, that this Grove point, if made out, would operate as a defence to its Part 7 adjudication enforcement claim and, thus, that it must be determined by the court at the same time.

16. Adjudication no 3 was referred by Lidl on 1 August 2023 in relation to 3CL's entitlement to an extension of time. By decision no 3 dated 3 October 2023, Dr Mastrandrea decided that 3CL had no entitlement to an extension of time. Again, at the time of the referral Lidl had not paid the sum payable under adjudication no 1 but, again, by the time of decision no 3 it had done so. Again, I shall refer to the detail of adjudication 3 when I come to determine the Grove point.

17. Although adjudication no 3 did not require 3CL to make any immediate payment it did enable Lidl to say that by virtue of that decision it is entitled to levy liquidated damages against 3CL for the period of time in respect of which it was decided that 3CL had no entitlement to an extension of time. This included the period from 25 May 2022 to 18 June 2022 (the date up to which the previous ex gratia extension of time had been granted) and the period from 29 September 2022 to 26 October 2022 (the date of practical completion as decided by Mr Hough in a further previous adjudication, to which it is not necessary to refer further). By letters dated 5 October 2023 Lidl contended that in consequence of decision no 2 it was entitled to recover liquidated damages amounting to £1,155,000 as a debt and threatened winding-up proceedings if payment was not made by 9 October 2023. The current position is that Lidl has referred a further claim to adjudication seeking a decision that 3CL is liable to pay liquidated damages in such amount.

18. By the current Part 8 claim 3CL seeks a declaration that decision 3 is unenforceable: (a) on the same Grove point as regards decision 2 and; (b) because there was no crystallised dispute as at the time of referral.

19. Lidl has objected to these further points being determined at the same time as its Part 7 adjudication enforcement claim on various grounds, including that there is no claim by Lidl for enforcement of decision no 3 and that the issue as to whether or not there was a crystallised dispute as at the time of referral was not suitable for summary determination and would delay the speedy resolution of its Part 7 claim.

20. I had made some observations about the problems which could be caused in parallel Part 7 and Part 8 claims in my previous decision at paragraph 16. In short, the view which I took in this case at the beginning of the hearing was that it was appropriate for me to deal with the Grove point in relation to decision 3 as well, since it involved little further factual enquiry and since it would be positively wasteful to have two separate judicial determinations of the same point between the same parties at separate times. In contrast, however, my view was that the crystallised dispute point was unconnected with the current Part 7 enforcement claim and, even if it was suitable for summary determination on the documents as 3CL contended, it would still take some time to argue and to decide which would delay the speedy resolution of this Part 7 claim and the Part 8 Grove point. Further, if I found in full for 3CL on the Grove point there would be no need to determine the crystallised dispute point anyway. Accordingly, I declined to determine this point at this hearing on the basis that it could be listed for a hearing on the next available date so as to avoid any prejudice to either party from any delay.

The respective arguments, summarised

21. In their impressive written and oral submissions Mr Acton Davis KC and Mr Thompson for Lidl and 3CL argued respectively as follows.

22. Mr Acton Davis KC submitted that:

    i) There is no basis for any contention that a party may not commence any adjudication, regardless of its subject matter, until a notified sum is paid. Such a contention would be contrary to the right to allow any dispute arising under a construction contract to be referred to adjudication under s.108.

    ii) On a proper analysis of Grove and subsequent authorities, the only prohibition on commencing an adjudication is where the dispute referred is a "true value" adjudication in respect of the same payment cycle as the notified sum adjudication, where a 'true value' adjudication is one concerned with the re-valuation of work for which payment has become due on a previous payment application. (I shall refer to this as the **same payment cycle true value adjudication prohibition**.)

    iii) Neither adjudication no 2 nor adjudication no 3 was a true value adjudication.

    iv) Adjudication no 2 was a breach of contract claim against 3CL to recover the costs of employing a third party to rectify 3CL's snagging items or defective works. Lidl sought monetary relief calculated by reference to the cost of employing a third party to carry out that work, pursuant to specific clauses in the contract which permitted it to do so. No part of Lidl's relief sought the valuation of 3CL's own works, whether pursuant to the contract payment mechanism procedures or otherwise.

v) Adjudication no 3 was an extension of time claim where no monetary relief at all was sought and where there was no connection between the claim referred and the circumstances relevant to the AFP19 payment cycle.

23. Mr Thompson submitted that:

i) The Grove principle, properly determined, does prevent a party from commencing any adjudication until it has complied with its s.111 obligation, because it would be fatal to the adjudication system – and, by extension, the prompt payment regime – if a party was free to commence adjudication prior to complying with its s.111 obligation or to exhaust the other party by forcing them to defend an adjudication whilst they were deprived of the benefit of a payment due to them pursuant to s. 111. Such delay in compliance with the s.111 immediate payment obligation offends against the core purpose of the Act: to promote prompt payment. (I shall refer to this as the **any adjudication prohibition**.)

ii) Even if the Grove principle is limited to true value adjudications, that category is not limited as suggested by Mr Acton Davis but extends to all adjudications where the relief sought is designed to permit the party liable to pay the notified sum to avoid compliance with and/or to undermine its s.111 immediate payment obligation or in which it seeks to re-value the account between the parties. (I shall refer to this as the **any true value adjudication prohibition**.)

iii) Both adjudication no 2 and adjudication no 3 obviously offended against the any adjudication prohibition but also offended against the any true value adjudication prohibition because:

a) In adjudication no 2 Lidl was seeking payment of, or the right to make deductions in respect of, the true value of its claim for defective works where that was plainly designed to provide Lidl with the platform to set-off or deduct such sums against what was due under s.111 as a notified sum under adjudication no 1.

b) In adjudication no 2 there was also an overlap between a number of the items in respect of which Lidl had also sought, unsuccessfully, to withhold payment from AFP19 through PAY-7.

c) In adjudication no 3 Lidl was seeking relief designed to enable it to recover the true value of its entitlement to liquidated damages based on a re-assessment of the extension of time previously allowed to 3CL where that was also plainly designed to provide Lidl with the platform to set-off or deduct such sums against what was due under s.111 as a notified sum under adjudication no 1.

The relevant authorities

24. The starting point is of course the decision in Grove, which contains a full summary of the earlier relevant authorities. I need not attempt a summary of the judgment of Sir Rupert. It is sufficient to say that the discussion on the second issue, which is found at part 7 of the judgment at paragraphs 60 through to 113, does not specifically address whether the

principle which is established, which is to be found at paragraph 107, is only applicable to true value adjudications where the dispute referred is limited to a valuation of the same payment cycle as the subject of the notified sum, or extends to any adjudication arising under the contract, or is subject to some intermediate limitation. That, no doubt, is because in that case and, indeed, in all of the previous cases before Grove, the dispute referred or sought to be referred was limited to a true valuation in relation to the same payment cycle as the subject of the notified sum. It may also be because, so far as I can tell, it was only in the Grove case itself that this point became the subject of consideration. Even then it was addressed by Coulson J and by Sir Rupert only as an obiter issue and in the Court of Appeal only with the benefit of submission from one party.

25. In paragraph 107 what Sir Rupert said was this:

"107…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."

26. Mr Acton Davis noted the distinction drawn in this paragraph between "all disputes" and disputes about the true value of work done" which he submitted, and I agree, indicates that true-value adjudications are a limited sub-set of all disputes which may be referred to adjudication under a construction contract. He also noted that in the final sentence reference is made to adjudications to "obtain a re-valuation of the work before he has complied with his immediate payment obligation" which, he submits, also tends to support the payment cycle true value adjudication prohibition.

27. Mr Thompson noted however that there was nothing in Grove which expressly limited the principle to the same payment cycle.

28. I was also referred to the subsequent decision of Stuart-Smith J in M Davenport Builders Ltd v Greer [2019] EWHC 318 TCC. In that case the judge said at paragraph 21 that in his view the policy which justified the Grove principle meant that a person who has not discharged his immediate obligation should not be entitled to rely upon a later true value decision by way of set-off or counterclaim in order to resist the enforcement of his immediate obligation because that "would enable a defendant who has failed to implement the Payment or Payless Notice provisions to string the claimant along while he goes about getting the true value adjudication decision rather than discharging his immediate obligation and then returning if and when he has obtained his true value decision". Mr Acton Davis

submitted that this policy is directed to the payment cycle true value adjudication prohibition interpretation rather than a wider interpretation, and I agree. Again, however, the difference between the two was not an issue in that case.

29. That case is also significant because Stuart-Smith J expressly addressed the question as to whether or not the Grove principle prevented an employer who had not paid a notified sum from commencing a true value adjudication or only from relying upon it and decided, based on what both Coulson J had said at first instance and Sir Rupert had said on appeal, that it was the former: see paragraphs 25, 31(iii) and 37. It seems to me that it is this point which supports the conclusion, which Mr Acton Davis did not vigorously contest, that an adjudicator asked to decide a true value adjudication falling within the Grove principle on a referral made before such payment was made would lack jurisdiction to do so, even if the notified sum was paid before the decision was made. Whilst Stuart-Smith J did note at paragraph 37 that it would not always be the case that the court would restrain the commencement or progress of a true value adjudication commenced before the employer has discharged his immediate obligation, that observation appears to have been based on his careful analysis of the facts in the prior decision in Harding v Paice [2016] 1 WLR 4068, [2015] EWCA Civ 1231 rather than upon any reservation as to the correctness of this consequence of the "pay now adjudicate later" principle. It may also be the case that there is, as in this case, a real dispute as to whether a particular case is within the scope of the Grove principle, so that it would be wrong to restrain the adjudication by injunction from proceeding to a decision if that point could not finally be determined at the injunction hearing.

30. Both counsel also referred me to the decision of O'Farrell J in Bexheat v Essex Services Group [2022] EWHC 936 where, having embarked upon a review of the authorities in this area, she summarised the law at paragraph 76 as follows:

"[76] Thus, it is now clear that:

(i) where a valid application for payment has been made, an employer who fails to issue a valid Payment Notice or Pay Less Notice must pay the 'notified sum' in accordance with s 111 of the 1996 Act;

(ii) s 111 of the 1996 Act creates an immediate obligation to pay the 'notified sum';

(iii) an employer is entitled to exercise its right to adjudicate pursuant to s 108 of the 1996 Act to establish the 'true valuation' of the work, potentially requiring repayment of the 'notified sum' by the contractor;

(iv) the entitlement to commence a 'true value' adjudication under s 108 is subjugated to the immediate payment obligation in s 111;

(v) unless and until an employer has complied with its immediate payment obligation under s 111, it is not entitled to commence, or rely on, a 'true value' adjudication under s 108."

31. Again, there was no express consideration, because there was no need for her to do so, of the width of the Grove principle.

32. In an earlier decision, Mr Roger Ter Haar QC (sitting as a deputy High Court Judge) had needed to address this question. In Broseley London Limited v Prime Asset Management Limited (Trustee of the Mashel Family Trust) [2020] EWHC 944 (TCC) he held that the Grove principle applied with equal force where a party sought to adjudicate upon the final account without first having discharged its immediate payment obligation pursuant to a prior payment round:

> "44. This raises the question whether PAML can now raise a "true value" final account adjudication without first paying the sum awarded in Adjudication No. 1 [a notified sum adjudication in relation to an interim payment application]. Mr. Townend's answer to that question is "yes" because of Adjudication No. 3 and because the "true value" adjudication is of the final account post-termination.
>
> 45. 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 … 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.
>
> 47. Accordingly, in my judgment it is not open to PAML to seek to challenge the conclusion of the Adjudicator in Decision No. 1 in another adjudication without first paying the amount held due in Decision No. 1."

33. Mr Thompson is entitled to and does submit that this decision marks a rejection of any suggestion that the Grove principle only applies to true value adjudications relating to the same immediate payment cycle as the notified sum. The judge's reasoning is that as a matter of substance to allow such an adjudication would "permit the adjudication system to trump the prompt payment regime". That, it seems to me, is a clear statement of the reasoning behind the Grove principle, focussing on the purpose and effect of the prompt payment regime established by the Act, and by s.111 in particular, and adopting a purposive approach to that principle.

34. Finally, there is a recent decision of the Liverpool TCC District Judge, Judge Baldwin, in Henry Construction Projects Limited v Alu-Fix (UK) Limited [2023] EWHC 2010 (TCC) where the judge expressly held, consistently in my view with the approach of Stuart-Smith J in Davenport, that an adjudicator who had embarked on an adjudication before payment had been made lacked jurisdiction as a result.

35. That concludes my review of the authorities, from which it may be seen that none are conclusive on the particular point which I have to decide and, with the exception of Broseley, none focussed on the particular point which I have to decide.

Discussion and conclusions

36. In my judgment there is no possible basis in principle or in case-law for the wide no adjudication prohibition contended for by Mr Thompson. The obligation to pay the notified sum only applies to what is due in relation to the notified sum under the payment regime in question. There is no rationale for a construction of the Act which has the effect of prohibiting any adjudication whilst that notified sum remains unpaid, even where the subject matter of the adjudication has no relation to the notified sum. The only rationale identified by Mr Thompson is the financial prejudice of having to defend an adjudication whilst not receiving payment for the notified sum. However: (a) there is of course a speedy enforcement procedure for adjudication and adjudication enforcement claims, which substantially ameliorates any such prejudice; (b) the right to adjudicate construction disputes is a valuable right which should not be cut down or restricted save for clear reasons; (c) no such clear reasons in my view appear from the Act (or, for that matter, the Latham report or, to the extent relevant, the extracts from Hansard to which I was referred) and nor as Mr Acton Davis submits, from the wording used by Sir Rupert in Grove or in other cases.

37. Thus in my view the real contest lies between the any true value adjudication prohibition and the same payment cycle true value adjudication prohibition.

38. In my view, a sensible starting point is to consider what the payment obligation in s.111 involves. The obligation is to pay the notified sum on or before the final date for payment: s.111(1). The notified sum is the sum considered to be due at the payment due date as stated in a payer's or specified person's notice under s.110A(2) or a payee's notice under s.110A(3). That is usually focussed on the valuation of the work at that time. That obligation is however also subject to s.111(3), under which the payer or specified person may give notice of an intention to pay less than the notified sum. That is usually focussed on deductions for defective work or for delay or the like. The point, however, is that it is open to a payer to pay what it considers due by reference to the valuation of the works at the payment date and by reference to any deductions or set offs in relation to defective work or delay claims or similar. If or to the extent that the payer does not do so, then it may not rely upon such matters in a defence to a notified sum adjudication and, by virtue of the Grove principle, may not do so in a true value adjudication until it has paid the notified sum.

39. It follows, in my judgment that, whilst a payer may well wish to bring a true value adjudication in relation to all such matters (i.e. valuation, defects and delay claims), it may also wish to bring a true value adjudication in relation to matters only of valuation, or only of defects claims, or only of delay claims. Often it will wish to do so in relation to defects claims or delay claims because it has omitted to serve an effective payless notice and, thus, will want to bring a true value adjudication in relation to such matters. In my judgment it must follow that such claims are covered by the Grove principle insofar as they are matters which could have been the subject of a payless notice served in respect of the particular notified sum in question. If, however, they are claims which could not have been the subject of such a payless notice, then it is difficult to see the justification for applying the Grove principle to them.

40. To take examples similar to the facts of this case, if a payer has, at the time of the relevant payment cycle, a claim for defect related losses in respect of defects already in existence or a claim for delay related losses in respect of delay already suffered, but fails to serve a valid

payless notice in respect of them, it cannot commence a true value adjudication in respect of such claims until it has paid the relevant notified sum. If, however, it subsequently has a claim in respect of defects or delay occurring after the pay less notice date in respect of the notified sum, then there can be no principled reason for prohibiting the payer from commencing an adjudication in respect of such matters. Of course, that does not mean that if it did so it could raise them as a defence to the payee's adjudication enforcement claim. However, there is a fundamental difference between a prohibition against commencing an adjudication, where the penalty is that any decision would be made without jurisdiction and, hence, be unenforceable, and a prohibition against using any such claim as a defence to an adjudication enforcement claim.

41. In my judgment this dividing line also accords with the purpose of the Act because it focusses on substance rather than form. If to fall within the Grove principle the payer had to commence an all-embracing attack on the notified sum claim, raising issues of valuation as well as any other matters such as defects or delay claims, it would be very easy for a cynical payer to sidestep this by choosing only to refer a claim based on, for example, one or more items of specific works. Furthermore, if the payer chose to refer an adjudication based on a subsequent payment cycle, such as in the Broseley case, that would be caught by the Grove principle unless the payer could show that there was nothing in the reference which sought to raise matters which could have been raised in the previous payment cycle, trivial matters excluded.

42. In my judgment setting the dividing line at this point would not operate unduly harshly upon a payer. All it has to do in order to avoid this result is to pay the notified sum first. If it cannot do so then there is nothing to stop it from commencing court proceedings. If there was a dispute over whether there was a notified sum which it ought to have paid but had not (because the Grove principle is not limited to notified sum claims which have already been the subject of an adjudicator's decision) then it could either adjudicate that dispute or raise that dispute as a defence to any adjudication enforcement claim or, alternatively, exercise the remedy of Part 8 proceedings to obtain a declaration that there was no notified sum which it was obliged to but had not paid.

43. Finally, in my view the suggestion by Mr Thompson that the Grove principle is engaged when the relief sought is designed to permit the party liable to pay the notified sum to avoid compliance with and/or to undermine its s.111 immediate payment obligation is, whilst attractive, ultimately wrong. That is because to focus on the payer's intent, rather than to focus on the position judged objectively, seems to me to be inappropriate in the light of the policy behind s.111 and the Grove principle. If the subsequent adjudication sought to be commenced does in fact seek to achieve a true valuation of matters which could have been the subject of a payment notice or a payless notice then that is the objectionable feature. If it does not, the fact that the referring party is seeking to achieve a position where it can contend for a deduction or set off against its liability to pay a notified sum is neither here nor there. If the paying party is entitled to do so then he should not be prohibited from doing so, whereas if, in the circumstances, it is held that there is no entitlement to do so, then that sufficiently protects the payee's s.111 payment rights.

Application to the facts of adjudication no 2 and adjudication no 3

Adjudication no 2

44. The notice of adjudication in adjudication no 2 is a convenient place to begin. It records that: (a) practical completion was achieved on 26 October 2022 (and thus after 29 September 2022, when 3CL submitted AFP19, and after it became a notified sum on 12 October 2022); (b) following issue of the practical completion statement on 27 October 2022 a snagging list was issued under the contract; (c) 3CL failed to complete the items of the snagging list within 7 days, as it was required under the contract; (d) by letter dated 11 April 2023 Lidl provided notice to 3CL that it would employ others to complete the items in the snagging list which 3CL failed to complete; (e) following practical completion a number of defects became apparent, which were notified and not made good, and by letter dated 11 April 2023 Lidl provided notice that in accordance with the contract it would employ others to complete the notified defects which had not been made good; (f) of such defects Lidl has identified two scopes of works which it has employed a third-party contractor to complete which are referred to as the "Priority Red List Items" and the "Additional Items"; (g) there is a dispute between the parties in relation to Lidl's entitlement to recover as a debt, or to deduct from any sums due to 3CL, the costs incurred in employing third parties to complete the Priority Red List Items and the Additional Items; (h) the dispute relates to the recovery or deduction of the cost of employing third parties to complete the Priority Red List Items and the Additional Items only; (i) on 5 May 2023 and 12 July 2023 Lidl's solicitors wrote detailing Lidl's claim with no substantive response having been received; (j) Lidl claimed that it was entitled to recover as a debt or deduct from any sum due to 3CL the sum of £1,605,156 plus VAT, or any other such sum that the Adjudicator may decide, in relation to the cost incurred of employing others to complete the Priority Red List Items and Additional Items.

45. 3CL raised a jurisdictional challenge based on the any adjudication prohibition principle and Lidl responded arguing the same payment cycle true value adjudication prohibition alternatively the true value adjudication prohibition principle. In its email of 8 August 2023 3CL raised the alternative argument that the true value adjudication prohibition principle applied and that there was a duplication of defects claims between PAY-7 (i.e. Lidl's purported payless notice in response to AFP19) and its claim in adjudication no 2, giving one example as regards condensers. Lidl's reply did not engage with this point. Mr Hough decided to continue with the adjudication.

46. It is worth noting that in his reasons at paragraph 12 he picked up the point from the chronology as stated above that the claims made by Lidl related to a post-completion obligation not notified until April 2023 and, thus, could not have been included in a payless notice in response to AFP19. He did not, however, address the point made by 3CL about the duplication of claims.

47. It is also worth noting that he decided to proceed subject to the caveat that he would value Lidl's entitlement as a declaration and order any payment separately, so that if any decision in relation to deduction did offend the Grove principle that could be severed.

48. Subject to the duplication argument, therefore, it can be seen that the dispute said to be referred in adjudication no 2 was a dispute in relation to snagging items and defects arising

after practical completion and, hence, did not involve seeking to raise matters which could have been raised in relation to payment cycle AFP19, where the notified sum fell due before the date of practical completion.

49. 3CL has, however, maintained its case as to duplication. In his witness statement in support of the Part 8 claim made on 20 October 2023 Mr Wicks, a director of 3CL, attached a spreadsheet produced by 3CL's quantity surveyors which identified the alleged duplication between the sums Lidl had been withholding and the sums it was seeking in the adjudication and where Lidl's claims were ultimately successful in that adjudication. This showed an overlap of £455,094 as claimed and £265,920.41 as upheld.

50. In its evidence in response Lidl relied upon a witness statement from Mr Bowater made on 6 November 2023, a managing partner of a refrigeration consultancy which acted as such for Lidl as employer's agent on the Belvedere project on which he was involved. This included the following points:

    i) The GEA costs claim for snagging works post-dated practical completion and, hence, could not have been the subject of the AFP19 payment cycle.

    ii) He accepted that any costs relating to the rectification of incomplete or defective refrigeration elements of the project would, by virtue of the fact that they involve the refrigeration plant the subject of the works, inevitably involve some "cross-over" of items that are included within AFP19 but contended that nonetheless the claims made in adjudication no 2 were not true valuation claims associated with AFP19. He explained, correctly in my view, that the process of valuing interim payments under the contract was a different process to that of claiming for the cost of rectifying defective works the majority of which, he said, were notified between 1 October 2022 and 16 June 2023. (It is to be noted, however, that he did not, in this section of his witness statement - or indeed anywhere in his witness statement – refer to the contractual entitlement given to Lidl of giving a payless notice to the contractor not less than 1 day before the final date for payment.)

    iii) He asserted that the spreadsheet produced by 3CL "is misleading and I challenge its content". He gave as one example, whilst asserting that there are "certainly more examples which I could refer to", that of milestone 212, being the Glycol Distribution Pipework – Pipework Header Installation. In short, he said that 3CL was wrong to equate the deduction in PAY-7 with the claim in adjudication no 2 because they refer to sections of pipework within different areas and because one of the items claimed in adjudication no 2 was claimed in error and withdrawn during the course of the adjudication.

51. There was no response to Mr Bowater's witness statement (no provision for such had been included in the previously agreed directions order) but in his oral submissions Mr Thompson:

    i) Submitted that Mr Bowater's evidence was unsatisfactory in only giving one example (there were only 6 items from PAY-7 and only 9 items from adjudication no 2 in the spreadsheet).

ii) Stated that 3CL's case was that the schedule was not intended to comprise an exhaustive list, only those where the linkage was unarguable.

iii) Stated that, whilst not accepting the lack of linkage in the example given by Mr Bowater, the amount awarded by the adjudicator for these items was only £5,020.80 and, hence, for present purposes 3CL did not contest it.

iv) Submitted that for the purposes of summary judgment the balance of £260,899.61 ought on any view to be regarded as the subject of an overlap and that decision no 2 could and should be severed and the decision only enforced as to the remainder of £496,946.02 (viz. £757,845.63 less £260,899.61).

52. I accept Mr Thompson's submissions on this point. In my judgment for the purposes of the summary judgment application on the Part 7 claim 3CL has demonstrated that £260,899.61 of decision no 2 was at least arguably awarded in circumstances where Mr Hough had no jurisdiction to award anything in relation to such sums so that Lidl is only entitled to summary judgment for the balance of £496,946.02 together with applicable interest and costs.

Adjudication no 3

53. This is factually more straightforward because, as I have explained above, the factual position is that in PAY-7 Lidl claimed to be entitled to withhold liquidated damages from 18 June 2022 to 29 September 2022 whereas in adjudication no 3 Lidl was claiming to be entitled to a determination that 3CL was not entitled to any extension of time over the period from the contractual completion date of 25 May 2022 to the date of practical completion on 26 October 2022.

54. It is true that in adjudication no 3 Lidl did not seek any decision that it was entitled to deduct or be paid liquidated damages reflecting the determination of Dr Mastrandrea as to what, if any, extension of time 3CL was entitled to. It appears that this is the subject of a current further adjudication founded on Dr Mastrandrea's decision no 3. It is, thus, argued by Lidl that there is no overlap between PAY-7 and adjudication no 3.

55. However, in my judgment that submission elevates form over substance. It is clear that the basis of the deduction in PAY-7 was that 3CL was not entitled to any extension of time from 18 June 2022 to 29 September 2022 which, hence, entitled Lidl to deduct liquidated damages over that period. It follows, in my view, that insofar as adjudication no 3 sought a declaration that 3CL was not entitled to any extension of time over the same period it was in substance seeking to undertake a true valuation of that issue which would inevitably lead to a claim for liquidated damages in respect of the same period to the extent that it succeeded and, hence, to that extent was prohibited under the Grove principle until Lidl paid the notified sum due under AFP19 and decision no 1.

56. It follows in my judgment that 3CL is entitled to a declaration that Dr Mastrandrea had no jurisdiction to determine that it was not entitled to any extension of time over the period from 18 June 2022 to 29 September 2022, whereas he did have jurisdiction to do so over the period from 25 May 2022 to 18 June 2022 and from 29 September 2022 to 26 October 2022.

End