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COMMON SENSE AND THE PHILOSOPHER'S STONE – THE NEXT ROUND OF GROVE V S&T

> *"Section 111 [of the Construction Act] is not the philosopher's stone. It does not transmute the sum notified ... into a true valuation of the work done"* [1]

Sir Rupert Jackson was thinking more Greek alchemy than JK Rowling. Nevertheless, the English Court of Appeal's very recent decision in S&T v Grove Developments has been as eagerly awaited among construction lawyers as a new Harry Potter book.

The central issue is payment notices, and in particular whether a failure to serve a timely Pay Less Notice crystallises the true valuation of the work at that interim stage. Mr Justice Edwards-Stuart's judgments including in ISG v Seevic and Estura v Galliford Try said that it did (but later decisions have moved away from this, allowing an adjudication on the true value of a final account).

Mr Justice Coulson (as he then was) at first instance in Grove took an opposing position. He set out six key reasons why a failure to serve a valid Pay Less Notice (note that a Payment Notice was not served in time) meant the payer had to pay the sum applied for, but could subsequently bring an adjudication on the true value of the work.

The Court of Appeal decision

The Court of Appeal agreed with Mr Justice Coulson, and endorsed all six of his reasons.

> "The statute requires the employer to pay the "notified sum" by the final date for payment, unless it has specified a lesser sum in a timeous Payment Notice or a timeous Pay Less Notice".

In short, the paying party should pay up but can then bring a subsequent adjudication on the true value. This was the distinction between the "payment bargain" and the "valuation bargain". [2]

Adjudicate at any time

At first instance, Mr Justice Coulson had made clear that he expected a payer to pay before commencing a value adjudication. Our article on that decision asked how that squared with the statutory right to adjudicate at any time. Was 'smash and grab' dead, if the defaulting party could simply cross-adjudicate on the true value, and then ask the enforcing court to set the second decision off against the first?

Sir Rupert felt he needed to tackle that question head on. He agreed with Mr Justice Coulson that payment must be made before an adjudication could be commenced. He found a basis in the interpretation of the Construction Act itself.

The reason, he said, was that the Construction Act as amended creates a "hierarchy of obligations". Section 111 created an "immediate statutory obligation" to "pay the notified sum". It could not be, he said, that the right to adjudicate at any time could "trump the prompt payment regime". On that basis:

> "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". [3]

So where are we with 'smash and grab'?

In short, at least for disputes subject to English law, the value of smash and grab has been re-established. Once again, there is benefit to a payee of bringing a quick 'no valid Pay Less Notice' adjudication, to ensure continued cash flow on a project. Until that payment is made, an adjudicator will not (presumably) have jurisdiction to look at the true valuation.

The practicalities of this remain to be seen. For example, what if the payer refuses to pay, and the next payment cycle comes along with a correct Payment Notice served before the payee gets round to adjudicating? A potential overpayment situation, under the previous application, may have been addressed through the next valuation.

[1] Paragraph 92 of Sir Rupert Jackson's decision.
[2] Paragraph 95 of Sir Rupert Jackson's decision.
[3] Paragraph 107 of Sir Rupert Jackson's decision.

Where sums are significant, rather than adjudicating, a payee, who has recourse to the English courts, may consider applying for summary judgment/ Part 8 proceedings, as the law is now settled and this may be a more speedy route.

The Court of Appeal has now re-set the dial in terms of "pay now, argue later". The right to have the proper debate as to the true value in adjudication is common sense.

It remains, however, in the light of main contractor insolvency, that valuations accompanied by the valid notices are vital to avoid employers being left with no redress to reclaim an overpayment. In an insolvency situation, the Employer may have only the comparatively cold comfort, delay and uncertainty of a potential negligence claim against a consultant for failure to give the notices or a claim under a performance bond which would only crystallise following the balancing account process, post making good defects. An essential part of an Employer's risk management strategy on any project must be to ensure the notices are properly issued.

A note on liquidated damages

A further point, that could easily be overlooked, is that the Court of Appeal clarified English law on the notification requirements surrounding liquidated damages.

Sir Rupert set out that, under clauses 2.28 and 2.29 of the JCT Design and Build, three separate notices must be served before an employer can deduct liquidated damages for delay: (a) a non-completion notice, (b) a notification that the employer may require payment of, or may withhold or deduct, liquidated damages (the "Warning Notice") and (c) a notice stating that he will withhold or deduct the relevant sums (the "Deduction Notice").

It was submitted that there must be some period of time left between the Warning Notice and the Deduction Notice, or else the requirement for two notices would be redundant, but, whilst Sir Rupert saw force in this argument, he disagreed. [4]

He said that to require a certain period of time to lapse would be unworkable, and would create "huge uncertainty in future cases". Where the contract requires a certain amount of time to pass, it says so. Here, it is silent. On that basis, as long as three separate notices are given, and as long as they are sent in the correct order, that will suffice.

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[4] Paragraph 121 of Sir Rupert Jackson's decision.