

Insights

S&T V GROVE [2018]: SMASH AND GRAB LIVES ON

Jan 25, 2019

SUMMARY

Legal commentators forecast the demise of ‘smash and grab’ adjudications following the first instance decision in *Grove v S&T*. Upholding that decision, the Court of Appeal decided that an unsuccessful party to a ‘smash and grab adjudication’ can commence a separate adjudication seeking a decision as to the true value of its interim payment application. An employer can now adjudicate to recoup an overpayment without waiting for the next payment cycle (which was the position before the decision in *S&T v Grove*).

Does the decision herald an end to ‘smash and grab’ adjudications? Will contractors be deterred because the employer can more quickly reclaim the overpaid amount? Not likely. The benefit to contractors of the ‘smash and grab’ adjudication is more than a temporary windfall. It offers the contractor cash flow, negotiating power in final account negotiations and puts the burden on the employer to demonstrate why the contractor is not entitled to those sums in an adjudication as to the ‘true value’ of the interim payment. So what, if anything, will anything change after *S&T v Grove*?

Timing of a second referral

Jackson LJ addressed the issue of when an employer can exercise the right to adjudicate the valuation contained in the interim application. In short, the employer must pay the ‘notified sum’ before commencing the second, ‘true value’ adjudication:

“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.” [para 107]

This suggests that payment of the notified sum is effectively a condition to commencing a ‘true value’ adjudication. If that reading is correct, it follows that adjudications to address the ‘notified sum’ and the ‘true value’ should be addressed sequentially.

S&T v Grove in practice

How will the principle of '*pay first, adjudicate later*' be applied in practice by the parties at the frontline of the adjudication process? If the employer refers the 'true value' to adjudication before a decision is reached in the 'notified sum' adjudication, the burden is on the contractor to raise a jurisdictional objection, inviting the second adjudicator to resign. The adjudicator could resign immediately based on the principles established in *S&T v Grove*. However, there is no specific guidance from the court on this point and a resignation could be premature in some circumstances.

Assume that the 'true value' adjudication is referred whilst the 'notified sum' adjudication is ongoing. Let's also assume that the employer is successful in the 'notified sum' adjudication. In those circumstances, it's not clear that the second adjudicator ever lacked jurisdiction. A situation of 'notified sum' and 'true value' adjudications running simultaneously was perhaps not envisioned by the court in *S&T v Grove* and the court did not directly address what should happen in those circumstances.

Alternatively, a contractor could apply for injunctive relief to prevent the employer from commencing a second adjudication. This process is not without its hurdles. The timeframes involved may not allow for injunctive relief before the second adjudication is decided. Furthermore, such applications typically face a high threshold of it being "*unreasonable and oppressive*" to allow the adjudication to continue (*Twintec Ltd v Volkerfitzpatrick Limited*). It's unclear how the courts would deal with a *Grove*-type situation in an injunction application.

Tactical consequences

Jackson LJ acknowledges that his conclusions on the timing issue operate harshly in situations where the contractor is veering towards insolvency and acknowledges that an employer may pay out a large sum which is then swallowed up by secured creditors before there is any re-evaluation of the works.

In practice, employers are unlikely to accept this harsh scenario without a fight. It's more likely we will see employers trying to circumvent paying what they perceive is an overstated notified sum. Tactics may involve instigating a true value adjudication either pre-emptively or whilst the notified sum adjudication is ongoing. As discussed above, query whether early referral of a 'true value' adjudication gives the adjudicator greater scope to proceed to determine that second adjudication.

Alternatively, employers might commence Part 8 proceedings for a declaration shortly after receiving a referral of a 'notified sum' adjudication. The TCC clarified the circumstances in which a party that had lost an adjudication could resist enforcement on substantive grounds raised in Part 8 proceedings (*Hutton Construction v Wilson Properties*). However, Part 8 proceedings started as soon as possible after a 'notified sum' adjudication is anticipated or commenced may prove to be a useful tool for employers, where there is a suitable declaration that can be obtained.

Enforcement by the courts

It remains to be seen how the TCC will deal with two simultaneous decisions on 'notified sum' and 'true value'.

The current position is that two adjudication decisions between the same parties may be set off against one another where both decisions are valid and enforceable (*HS Works v Enterprise Managed Services*). The simple set-off approach does not sit comfortably with the obligation to make payment before commencing the 'true value' adjudication. At first instance, Coulson J (as he then was) gave some indication as to the TCC's perspective on this point:

"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."

The court might refuse set-off on the basis that the second adjudicator lacked jurisdiction. Alternatively, it might decline to grant an order until the sum due under the first adjudication decision is paid – in essence a stay of enforcement of the second decision. It will also be interesting to see how the court will award costs in cases of simultaneous adjudications.

Conclusion

The decision in *S&T v Grove* offers much needed clarity in some aspects but there remains uncertainty as to how the decision will be applied in practice. The implications of the decision for employers faced with a contractor struggling financially are severe. We can expect to see a range of different approaches adopted in an attempt to avoid these consequences, at least until practical guidance and further judicial interpretation is given by the courts to resolve any remaining uncertainties.

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