

For how long can the cracks be papered over?

M Davenport Builders Limited v Greer [2019] EWHC 318 is the first TCC case to apply *S&T(UK) Ltd v Grove Developments* [2018] EWCA Civ 2448. The difficulties arising from that earlier decision have been laid bare and remain unresolved.

The claimant contractor sought to enforce an adjudication decision for payment in the absence of a pay less notice. The employer's attempt to set off against the decision a second "true value" decision failed. Robert Scrivener acted on behalf of the successful contractor.

In Grove it was held that a "true value" adjudication cannot be commenced until any adjudication based on a lack of a payment or pay less notice (often referred to as a "smash and grab" adjudication) has been paid. The reasoning for that, however, is unclear. Jackson LJ suggested in Grove that the Construction Act created a "hierarchy of obligations" and that 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*". This is difficult to understand, particularly in light of section 108(2)(a) of the Act, which allows a party to adjudicate "at any time".

Davenport is the first TCC case grappling with the application of this new principle. The claimant sought to enforce a "smash and grab" adjudication. The defendants' only defence was to rely on a true value adjudication (which was commenced after the "smash and grab" but before payment) as a set-off. Its attempt failed. At paragraph 10, Stuart Smith J posed the following question:

"The question in the present case is whether [the employer] is entitled to commence and/or rely upon a true value adjudication...without having first made the immediate payment required by the first adjudication."

He considered first the facts of Harding v Paice [2016] 1 WLR 4068, which he concluded suggest that "*it is not an essential prerequisite to relying upon a later true value adjudication decision that the earlier immediate obligation should be discharged before launching the later true value adjudication...*" This, he said at paragraph 20, illustrates a misunderstanding by the Court in Grove, which incorrectly took Harding as being a situation where payment had been made prior to commencement of the "true value" adjudication, when in fact it took place only after.



Stuart-Smith J pulled the threads together in paragraph 35, noting that *“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.”* This, he said, was sufficient to dispose of the application.

Nevertheless, he noted at paragraph 37 that Grove was clear and 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”*.

Somewhat confusingly, however, Stuart-Smith J felt compelled then to go on to say:

“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 [to pay the smash and grab adjudication]: 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”.

As a result, although the Court of Appeal in Grove suggested that an employer must always pay the sum stated as due before *commencing* a true value adjudication, Stuart Smith J has indicated this may have been based on a misreading of Harding. Whilst he reiterated the decision in Grove, Stuart Smith J then, without explanation, holds the door open to the possibility that the Court may not in fact restrain a true value adjudication even in the absence of prior payment. .

It seems that, for the moment, judges at first instance will be left to feel their way in the dark as to whether, on the particular case before them, they will restrain a true value adjudication or not. This is unhelpful. It seems that the only way to remedy the position would be for the matter to be grappled with again by the Court of Appeal, or maybe even the Supreme Court.

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