

# True Value

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The recent Court of Appeal decision in *Grove Developments Limited -v- S&T (UK) Limited* has sent ripples across the legal and construction industry. So, what does this mean to smash and grab adjudications going forward?

In the original Part 8 claim brought by Grove (the employer) against the contractor S&T, the Judge granted the declarations that Grove was entitled to pursue an adjudication as to the true value on the interim payment application. He also found that Grove's "pay less" notice was valid.

However, the key issue in this matter was whether an Employer can still be entitled to commence a separate adjudication to determine the true value of a contractor's payment application, in circumstances where its pay less notice is deemed to be invalid. Coulson J found that it was, for a number of reasons:

1. Determining the value of the work done was prima facie within the powers of an adjudicator (section 108 and paragraph 20 of the scheme); no express provision is required in the HGCR.
2. By virtue of section 111(8), where a contractor can challenge an employer's payment or pay less notice in adjudication, the same should be true for adjudicating the true value of a payment application.
3. The operation of section 111 HGCR by issue of either an interim application notice, payment notice or pay less notice was not evidence of the "true value" of the work done. Its purpose is only to provide cash flow, not a valuation. Therefore, either party can challenge the accuracy of the notified sums by adjudication.
4. The Judge distinguished between the obligation to pay the "sums stated as due" and the "sums actually due" following their review and adjustment.
5. The Judge also considered that the short period of time required under the construction scheme (10 days) between the date that a pay less notice should be issued in response to a payment application supported his view that this did not allow enough time to undertake a valuation process. Therefore, the sums stated for immediate payment were a provisional figure only.
6. Most significantly, that the obligations under the HGCR provided that payment was required immediately. Adjudication could then follow to establish the true value. The principle obligation is to pay the sums stated as being due - the right to adjudicate on the true value cannot be exercised until after that payment has been made. The Judge was keen to stress that the adjudication to determine the true value should not trump the prompt payment regime that the HGCR was principally designed to do.

## What does this mean to "smash and grab" adjudications going forward?

Whilst this decision reduces the benefits of launching a smash and grab adjudication, because any payment made can be subsequently overturned and any overpayment will have to be repaid, they still continue to be launched.

## Is this the last we will hear of this?

Almost certainly not. Practical questions are already arising on whether the adjudicator for the "true value" adjudication lacks jurisdiction until the adjudicator for the first adjudication has made its decision, meaning that launching the second "true value" adjudication could end up being a waste of money.

## Conclusion

The most important aspect of this decision is that either an employer or a contractor can commence a "true value" adjudication subsequent to a "smash and grab" adjudication, even when a pay less notice has been incorrectly served. The effect of this may see less "smash and grab" adjudications being commenced by contractors, knowing that any sums paid to them in the first adjudication may have to be repaid by way of the second, "true value" adjudication.

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