

Further clarification of Grove and ‘true value’:

Lidl -v- 3CL

In the well-known Court of Appeal case of *S&T(UK) Ltd -v- Grove* [2018] EWCA Civ 2448 (‘Grove’), Sir Rupert Jackson concluded that following a ‘smash and grab adjudication’, it was permissible for a paying party to commence a further adjudication to determine the ‘true value’ of the works. However, the case also established a hierarchy of rights whereby the obligation to pay the notified sum under s.111 of the Housing Grants, Construction and Regeneration Act 1996 (as amended) (Construction Act) took precedence over the paying party’s entitlement to adjudicate under s.108 of the Act.

In several cases that followed Grove in recent years, it is now widely known and accepted that where a paying party commences a ‘true value’ adjudication prior to payment of a notified sum, the adjudicator is unlikely to have jurisdiction.

However, none of those cases required the court to consider whether the principles established by Grove were intended to be confined solely to the actual value of the works, or whether a broader interpretation ought to be applied to, for example, claims for damages brought by the employer.

In the recent case of [Lidl Great Britain Limited -v- Closed Circuit Cooling Limited t/a 3CL \[2023\] EWHC 3051](#) (TCC), the Technology & Construction Court (‘TCC’) have provided some clarification and guidance to parties on this issue.

[Chris Keating](#) and [Matthew Cookson](#) of Hill Dickinson and acted for 3CL. Some key aspects of the judgment are outlined below.

Background

3CL commenced an adjudication seeking payment of a notified sum following an interim payment application (referred to in the judgment as “AFP19”) (‘Notified Sum Adjudication’). The decision in that adjudication was enforced by the TCC in the previous matter of *Lidl Great Britain Ltd -v- Closed Circuit Cooling Ltd* (t/a 3CL) [2023] EWHC 2243 (TCC). For a detailed summary of this case please see [Adjudication Enforcement and Contract Considerations - 3CL -v- Lidl](#).

In the interim, and prior to the enforcement, Lidl commenced 3 adjudications in response:

- 1. Practical Completion** – Lidl sought confirmation of the date of practical completion of the project.
- 2. Defects** – Lidl sought costs of defects/snagging to be paid as a debt or offsetting against sums owed to 3CL (‘Defects Adjudication’).
- 3. Extension of Time** – Lidl sought a declaration that 3CL was not entitled to any extension of time (‘EOT Adjudication’).

3CL raised jurisdictional challenges in the Defects Adjudication and EOT Adjudication contending that, applying the principle in Grove, those adjudications were commenced without jurisdiction owing to Lidl having not paid the AFP19 notified sum before commencing.

Following the decisions 3CL maintained its position and as such Lidl commenced Part 7 proceedings to enforce payment of sums awarded in the Defects Adjudication.

By way of defence, 3CL commenced Part 8 proceedings and sought declarations that the EOT and Defects decisions were unenforceable.

The claims proceeded to a joint hearing before His Honour Judge Stephen Davies at the TCC in Manchester. [Charlie Thompson](#) was instructed by Hill Dickinson on behalf of 3CL.

Judgment

HHJ Davies did not consider that there was any basis for a blanket prohibition on all adjudications commenced in the absence of a payment of the notified sum.

As such, the key issue to be determined was whether the Grove principle should apply to true value disputes in the wider sense of the meaning as submitted by 3CL (ie without being limited to merely just the value of ‘the works’ but also employer cross claims such as LADs and defects).

In reaching his decision the judge considered it appropriate to look at the payment provisions of the Construction Act.

There is an obligation by way of S.111(1) of the Construction Act to pay the notified sum on or before the final date for payment. This is the sum considered to be due as stated in the payer’s payment notice or a payee’s notice, both of which normally focus on the valuation of the work at the time. However, this obligation is subject to s.111(3) of the Construction Act, which entitles the paying party to issue a “pay less notice”.

Unlike payment notices, pay less notices also tend to include deductions for other matters outside of the mere value of ‘the works’ such as defective work or LADs.

Given that the payment provisions enable a paying party to pay what it considers due by reference to deductions for alleged defective work or delay, it logically follows that a payer may wish to bring a true value adjudication to determine such issues in circumstances where an effective pay less notice was not served.

As such the meaning of a true value adjudication for the purposes of Grove is not just concerned with the valuation of the actual works but has a wider meaning to include potential cross claims for alleged defects and delay. The Court decided that:

“[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 (ie 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.”

The Court found that the Defects Adjudication was, in part, commenced without jurisdiction as it amounted to an effective ‘true value’ of certain items that in the Court’s view could have been the subject of a timely pay less notice.

The Court found that the EOT Adjudication was, in part, commenced without jurisdiction as it too amounted to an effective ‘true value’ of LADs that again in the Court’s view could have been the subject of a timely pay less notice.

Key takeaways

1. This case serves as a useful reminder that the approach in Grove, in line with the Construction Act, is very much pay the notified sum before seeking to re-adjudicate.
2. Cross claims are also covered by those principles insofar as they are matters which could have been the subject of a payless notice.
3. An employer is entitled to commence part of a ‘true value’ adjudication in relation to items that arise after the date of the pay less notice for the payment cycle in question. However, whilst such an adjudication can be commenced, any award cannot be used to set off against an unpaid notified sum at the enforcement stage.
4. This is an interesting distinction and is likely to lead to a more forensic analysis of true value disputes referred to adjudication (specifically whether there is jurisdiction by reference to what could have been subject to a pay less notice at the time).



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