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# Construction Law Update

## "Smash and Grab" Adjudications: The End is Nigh

*ISG Construction Ltd v Seevic College* (2015) and a line of authorities that followed gave rise to what has become known as the "smash and grab" claim; whereby the full amount applied for in a payment application becomes due based on a failure by a paying party to issue an effective Payment Notice or Pay Less Notice. However, some recent decisions (including Court of Appeal decisions) have sought to try and 'reign in' and generally cast doubt over the scope of a "smash and grab" claim. In the recent case of *Grove Developments Limited v S&T (UK) Limited,* Coulson J (in his last judgment before becoming a Court of Appeal Judge) seems to have provided the last word on the scope of the "smash and grab".

### Background

In March 2015 Grove engaged S&T to design and build a new hotel at Heathrow airport. The contractual completion date was 10 October 2016 but practical completion was not achieved until 24 March 2017.

There were three adjudications between the parties; the first decided that a Schedule of Amendments was part of the contract; the second decided that S&T were entitled to an extension of time until 9 January 2017; and the third decided that Grove's Pay Less Notice of 18 April 2017 was invalid, meaning that S&T were entitled to be paid the full sum of their interim application (No. 22), which was in excess of £14 million (i.e. a "smash and grab").

Anticipating a negative outcome in the third adjudication, Grove commenced proceedings seeking declarations from the Technology & Construction Court on a number of discrete points, the key points being summarised below:

### Was the Pay Less Notice valid?

S&T argued that Grove's Pay Less Notice was invalid because the basis of Grove's lower valuation had been set out in a separate document that had been issued a number of days earlier than the Pay Less Notice. However, that document had not been attached to the Pay Less Notice. Therefore S&T's position was that the Pay Less Notice failed to properly specify the basis on which the sum stated had been calculated.

The court confirmed that notices are to be construed objectively, but whether a Pay Less Notice is valid is a matter of fact and degree. In this instance the court found that a reasonable recipient would have known precisely what sum was being deducted and the basis of its calculation. Therefore, the Pay Less Notice was valid regardless of the fact that the basis of the calculation was set out in a separate document and not attached to the Pay Less Notice itself.

### Was Grove entitled to commence an adjudication to determine the 'true value' of interim application No. 22?

The court had to consider whether a paying party, whose Payment Notice or Pay Less Notice was deficient or non-existent, could seek (in a second adjudication) to determine the 'true value' of the work undertaken by reference to the same interim application for payment that formed the basis of a "smash and grab" claim.

Coulson J stated *"… can an employer, whose payment notice or pay less notice is deficient or non-existent, pay the contractor the sum stated as due in the contractor's interim application and then seek, in a second adjudication, to dispute that the sum paid was the 'true' value of the works for which the contractor has claimed? In my view… the answer to that question is Yes".*

*"…. I consider that that conclusion is confirmed by a consideration of the relevant Court of Appeal authorities, which are binding on me. For the reason set out above, I consider that the analysis in ISG v Seevic and Galliford Try v Estura is erroneous and/or incomplete".*

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Accordingly, the court found that Grove was entitled to refer the 'true' valuation of the interim application No.22 to adjudication.

## Analysis

Coulson J concluded that the analysis in *ISG v Seevic* and *Galliford Try v Estura was "erroneous and/or incomplete"* and that a paying party does have the right to adjudicate on the 'true value' of an interim application where there is no Payment Notice or Pay Less Notice or the Notice is not effective.

Whilst this does not prevent a party from running a "smash and grab" claim, which can still be a useful negotiating tool, it does mean that it is the 'true value' that is key, and a paying party will no longer have to wait for a subsequent valuation or (potentially) the final account to determine the value of the works. Therefore the potential threat posed by a "smash and grab" claim has certainly been diminished.