Judgments

M Davenport Builders Ltd v Greer and another

[2019] EWHC 318 (TCC)

Queen's Bench Division (Technology and Construction Court)

Stuart-Smith J

20 February 2019

Judgment

Robert Scrivener (instructed by **JMW Solicitors LLP**) for the **Claimant**

Jonathan Ward (instructed by **Turner Parkinson**) for the **First Defendant**

Jonathan Ward (instructed by **Turner Parkinson**) for the **Second Defendant**

Hearing dates: **24th January 2019**

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE STUART-SMITH

Mr Justice Stuart-Smith :

Introduction

1. This is an application to enforce an adjudication decision by Mr Sutcliffe dated 24 October 2018. The decision awarded the Claimant £106,160.84 plus interest on a claim based on the Claimant's final account. On non-payment by the Defendants, the Claimant issued these proceedings and seeks summary judgment. The sum claimed by the Claim Form is £106,160.84 plus interest.

2. The Defendants initially put up a raft of unmeritorious defences that have been abandoned. It is now accepted that Mr Sutcliffe's award was valid and enforceable subject only to the existence of a “true value” adjudication by another adjudicator, Mr Sliwinski. The Defendants wish to rely on that award by way of set off or counterclaim. The Claimant says that the Defendants are not entitled to do so because they did not pay Mr Sutcliffe's award before commencing the Sliwinski adjudication. The Defendants say that they were not obliged to pay the Sutcliffe award before obtaining and relying on the Sliwinski decision. That is the central issue today.

Background facts

3. The dispute arises out of a contract made between the Claimant and the Defendants for construction operations to be carried out at a building in Stockport1. The contract was made by the Defendants' acceptance of the Claimant's quotation to carry out the works. Neither the quotation nor the acceptance made provision for adjudication or for the amount or date of payments under the contract, with the result that the relevant provisions of the Scheme for Construction Contracts applied: see s. 108(5) and 109 of the Housing Grants, Construction and Regeneration Act 1996 (“the Act”). Because this case concerns an application for a payment of a final account, Clause 5 of the Scheme applied, so that the final payment became due on whichever was the later of (a) the expiry of 30 days following completion of the work or (b) the making of a claim by the Claimant.

4. The Claimant's payment application was made on 22 June 2018 in the sum of £106,160.84. The due date for payment was 25 June 2018 and the final date for payment calculated in accordance with Clause 8 of the Scheme was 12 July 2018. Pursuant to Clause 9(2) of the Scheme, if the Defendants wanted to submit a Payment Notice, they were obliged to do so not later than five days after the payment due date i.e. by 30 June 2018. They did not do so. Pursuant to s. 111(3) of the Act and Clause 10 of the Scheme, if they wished to give notice of intention to pay less than the notified sum there were obliged to give it not later than seven days before the final date for payment i.e. on 5 July 2018. They did not do so.

5. Accordingly, on 6 July 2018 the Claimant issued a payee's notice in default pursuant to Section 110B of the Act, which had the effect of adjusting the final date for payment to 18 July 2018. Once again the Defendants failed to issue a Pay Less Notice; nor did they pay the sum demanded either on 18 July 2018 or thereafter.

6. It is not necessary to go into the details of the Sutcliffe adjudication process as it is now common ground that his award was valid. Mr Sutcliffe awarded the Claimant the sum demanded on its final account plus interest. The Defendants have not paid the sums ordered

by Mr Sutcliffe or any part of them.

7. The Sliwinski adjudication was commenced by a notice of intention to refer dated 30 October 2018, six days after Mr Sutcliffe's decision. Mr Sliwinski expressed doubts about his jurisdiction but proceeded to make his award on 30 November 2018. He concluded that the gross value of the final account was £867,557.54 excluding VAT and that no sum was payable by the Claimant to the Defendants. He directed each side to pay 50% of his fees and directed that VAT should also be paid if appropriate.

Is the Sliwinski decision enforceable by way of defence, set-off or counterclaim?

8. It is commonplace for parties to a construction contract to which the Scheme or analogous contractual conditions applies to rely upon the absence of a Payment Notice or a Pay Less Notice as entitling them to recover the full amount of a disputed application for payment. That is what the Claimant did in the Sutcliffe adjudication in the present case. If successful, it provides a short route to a right to immediate payment of the sum claimed. It does not require the adjudicator to undertake a valuation exercise: see *Harding v Paice* [2016] 1 WLR 4068, [2015] EWCA Civ 1231 at [64].

9. It is now established by the Court of Appeal in *Harding* and, more recently, in *S&T(UK) Ltd v Grove Developments Ltd* [2018] EWCA Civ 2448 that where a party to an initial adjudication has successfully taken the short route to immediate payment, the fact of the initial decision does not necessarily preclude a further adjudication requiring the later adjudicator to undertake the valuation exercise that was not undertaken by the first adjudicator. The second adjudication (which I shall call a “true value” adjudication) is not necessarily precluded by the first adjudication because the dispute in the true value adjudication is not the same or substantially the same dispute as the contractual issue resolved by the first adjudication: see *Harding*; and *Grove* at [95].

10. It is common ground (and I would accept) that a party required to make immediate payment because of an adjudication decision based upon the contractual route will be entitled to commence and rely upon the results of a true value adjudication if and when he has made the immediate payment required by the first adjudication. The question in the present case is whether he is entitled to commence and/or rely upon a true value adjudication (such as the Sliwinski adjudication in the present case) without having first made the immediate payment required by the first adjudication. Resolution of that question requires consideration of the 1996 Act, the Scheme, questions of policy, and previous authority of which *Harding* and *Grove* are the most important.

11. The starting point is s. 111(1) of the 1996 Act, which provides:

“Subject as follows, where a payment is provided for by a construction contract, the payer must pay the notified sum (to the extent not already paid) on or before the final date for payment.”

At [87] of *Grove* Jackson LJ characterised this (together with the statutory provisions for payment notices and pay less notices) as creating an “immediate” payment obligation. It is a provision dealing with cashflow and immediate payments in accordance with the well-known policy of the 1996 Act to promote cashflow to the construction industry: see *Grove* at [88] and

[108]. It is now clearly established that s. 111 of the 1996 Act applies equally to interim and final payments: see *Adam Architecture v Halsbury Homes Ltd* [2017] EWCA Civ 1735, [2018] 1 WLR 3739.

12. I am unable to identify anything in the provisions of the 1996 Act or the Scheme that either states or implies that different policy considerations should apply to final applications rather than interim applications. Although there are specific provisions relating to possible insolvency in s. 111(10) of the 1996 Act and different time-scales for payment of instalments or other sums, neither of these differences seems to me to signify material differences in policy as between interim and final applications for payment.

13. *Harding* demands close attention as a case involving an application for payment of a final account. The chronology as set out by the Court of Appeal and at first instance lends some support to the Defendant's position that it was entitled to start the Sliwinski adjudication before paying the sum ordered by the Sutcliffe adjudication:

i) After termination of the contract between the parties, Harding commenced what was the third adjudication between the parties by notice dated 1 September 2014. Harding's claims in the third adjudication included a claim for immediate payment based upon Paice's failure to serve a Payment Notice or Pay Less Notice. The adjudicator found in favour of Harding on this "short route" claim on 6 October 2014, and directed Paice to pay the sum claimed, namely £397,912 plus VAT;

ii) Harding commenced proceedings in the TCC to enforce the third adjudication decision.

iii) On 14 October 2014, without having paid the sum ordered in the third adjudication and while the enforcement proceedings were in progress2, Paice launched the fourth adjudication, which was a true value adjudication requesting the adjudicator to value the contract works and valuations. In effect, the adjudicator was asked to value Harding's final account;

iv) Harding tried to stop the fourth adjudication by separate proceedings issued on 21 October 2014 (also before Paice had paid the sum ordered by the third adjudication). He did so initially on two grounds, namely (a) that Paice had launched the fourth adjudication without first complying with the decision in the third adjudication and (b) that all the issues raised by Paice in the fourth adjudication had been decided by the adjudicator in the third adjudication. His application came before Edwards-Stuart J on 29 October 2014 who gave judgment on 21 November 2014 ([2014] EWHC 3824 (TCC));

v) Paice paid the sum awarded by the third adjudicator on 11 November 2014, the day before the hearing to enforce the third adjudication decision. Accordingly, the hearing before Edwards-Stuart J was before and his judgment was delivered after Paice had paid the sum due pursuant to the third adjudication;

vi) The judgment of Edwards-Stuart J recorded that Paice's solicitors had written to Harding's two days before the hearing on 29 October 2014 notifying them that they would not be defending the application to enforce the decision in the third application but that they needed time to find the money and asked for an extension of time to pay. The Judge recorded at [4] that "this offer … has largely undermined the Claimant's first ground for making this application.

” However, against the possibility that Paice might not make the promised payment, the first ground of the application was stayed, with permission to apply. On the second issue, the Judge rejected the contention that the third adjudication had determined what sum was properly due on a valuation of Harding's account and held that it was open to Paice to have that determined by adjudication or litigation. He added: “… [T]hat right does not detract from its obligation to comply with the adjudicator's decision in the meantime by paying the sum ordered [by the third adjudication]”: see [36]. Although the Judge did not record that the sum ordered by the third adjudication had been paid, he refused to restrain the fourth adjudication. The reason for this could have been that the first issue had been stayed before him or because the Judge had been told that the sum ordered by the third adjudicator had been paid or some other reason that does not appear.

vii) On 15 December 2014 the adjudicator in the fourth adjudication handed down his valuation decision, by which he found in favour of Paice. However, on 10 March 2015 Coulson J set aside that decision because it was tainted by apparent bias;

viii) Harding appealed the decision of Edwards-Stuart J to the Court of Appeal. The appeal was heard on 18 November 2015 (well after payment of the sum directed by the third adjudication). At that hearing Paice stated that (on the basis of the decision below) they were entitled to bring a fifth (true value) adjudication and that was what they intended to do.

14. In briefest summary, when they launched the fourth adjudication Paice had indicated an intention to pay the sums ordered by the third adjudication but had not yet done so: they paid (a) before the hearing for the enforcement of the third adjudication, (b) after launching the fourth adjudication, but (c) before the fourth adjudicator gave his decision. By the time of the hearing before the Court of Appeal Paice had paid the sums ordered by the third adjudication, the fourth adjudication had been and gone (because of Coulson J's refusal to enforce it), and Paice intended (unless restrained by the Court of Appeal) to launch a fifth valuation adjudication to replace the fourth one.

15. The Court of Appeal did not refer to the observation at [36] of Edwards-Stuart J's judgment that I have set out above. It did, however, make a number of observations about payment of the sum required by the third adjudication.

16. At [37] Jackson LJ (with whom the other members of the Court agreed) summarised the decision of the Judge below as follows:

“(i) The adjudicator decided that PS were obliged to pay the sum shown on the face of the contractor's account because they had failed to serve a compliant pay less notice. (ii) As a result of the adjudicator's decision PS were obliged to pay that sum over to Harding, *which they had duly done*. (iii) The failure to serve a compliant pay less notice could not deprive PS forever of the right to challenge the contractor's account. (iv) PS were entitled to have determined either by adjudication or litigation the question of what sum was properly due in respect of Harding's account. (v) Accordingly PS were entitled to proceed with the fourth adjudication.” [Emphasis added]

17. Later, when considering the scope and effect of the third adjudicator's decision, Jackson LJ referred to the earlier decision of the Court of Appeal in *Rupert Morgan Building Services (LLC) Ltd v Jervis* [2003] EWCA Civ 1563, [2004] 1 WLR 1867 and said at [67]:

“Nevertheless the absence of a pay less notice under section 111 did not prevent the employer from subsequently challenging the valuation underlying that certificate. Jacob LJ (which whom Schiemann and Sedley LJJ agreed) stated that section 111of the 1996 Act was a provision about cash flow. At para 14, he said:

“Sheriff Taylor's analysis, once articulated, is obviously right. And it has a series of advantages. (a) It makes irrelevant the problem with the narrow construction-namely that Parliament was setting up a complex and fuzzy line between sums due on the one hand and counterclaims on the other – a line somewhere to be drawn between set-off, claims for breach of contract which do no more than reduce the sum due and claims which go further, abatement and so on. (b) It provides a fair solution, preserving the builder's cash flow but not preventing the client who has not issued a withholding notice from raising the disputed items in adjudication or even legal proceedings. (c) It requires the client who is going to withhold to be specific in his notice about how much he is withholding and why, thus limiting the amount of withholding to specific points. And these must be raised early. (d) It does not preclude the client *who has paid* from subsequently showing he has overpaid. If he has overpaid on an interim certificate the matter can be put right in subsequent certificates. Otherwise he can raise the matter by way of adjudication or if necessary arbitration or legal proceedings.” [Emphasis added]

In the same vein, at [73] Jackson LJ said:

“One may then ask, what did the third adjudication achieve? The answer is that third adjudication achieved an immediate payment to the contractor. Harding will be entitled to retain the moneys paid to him unless and until either the adjudicator in the fifth adjudication or a judge in litigation arrives at a different valuation of Harding's final account under clause 8.12. ”

And in his executive summary and conclusion he said at [78]:

“In my view the employer's failure to serve a pay less notice (as held by the previous adjudicator) has limited consequences. *It meant that the employer had to pay the full amount shown on the contractor's account and argue about the figures later. The employer duly paid that sum, as ordered by the previous adjudicator. The employer is now entitled to proceed to adjudication* in order to determine the correct value of the contractor's claims and the employer's counterclaims. Therefore the judge's decision was correct.” [Emphasis added]

18. It is to be noted that each but the last of these passages comes in the section of Jackson LJ's judgment entitled “The Scope and Effect of [the adjudicator's] decision in the third adjudication.” In each passage Jackson LJ includes reference to the client/defendant having paid the sums due under the first adjudication or to the client being entitled to retain monies that have been paid to him; and he does so in terms that suggest that the payment has been made before (or the monies being retained until) the employer proceeds to the true value adjudication.

19. There is therefore an unresolved area of latent ambiguity in the decision of the Court of Appeal in *Harding*, which I would summarise as follows:

i) The Court of Appeal did not expressly comment upon the observation of Edwards-Stuart J (which was itself obiter because the first issue before him had been stayed) that the right to bring the fourth (true value) did not detract from Paice's obligation to comply with the third adjudicator's decision in the meantime by paying the sum ordered by the third adjudication;

ii) The decision of the Judge below and the Court of Appeal was that Paice should not be restrained from bringing the true value adjudication;

iii) The decisions of the Judge below and of the Court of Appeal were both given after Paice had in fact paid the sums ordered by the third adjudication;

iv) Paice paid the sums ordered by the third adjudication after launching the fourth adjudication but before the fourth adjudicator had reached his decision. It was therefore not necessary for either the Judge below or the Court of Appeal to decide whether the true value fourth adjudication decision could have been relied upon as a defence to a claim for summary enforcement of the third adjudication at a time when the sum due under the third adjudication had not yet been paid;

v) There is nothing in the judgments of Edwards-Stuart J or the Court of Appeal that supports the proposition that a defendant who *has not* discharged his immediate obligation to pay pursuant to a first adjudication decision may rely upon a subsequent true value adjudication decision as a defence to an application to enforce the first adjudication decision;

vi) Although the passages cited above refer to the defendants having discharged the immediate obligation before later arguing about the figures in order to show that he has overpaid, there is no clear and unequivocal statement in *Harding* that discharging the immediate obligation is a prerequisite to (a) starting and/or (b) relying upon a later true value adjudication decision;

vii) The decision of the Court of Appeal implies 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. Paice did not pay its immediate obligation under the third adjudication *before launching* the fourth, and they were not precluded from proceeding with or relying upon the fourth adjudication for that reason. This suggests that the critical time will be the time when the Court is deciding whether to enforce the immediate obligation.

20. To add to the factual complexity, when the Court of Appeal in *Grove* returned to its decision in *Harding*, Jackson LJ included the statement that “after making [the full payment required by the third adjudication], [Paice] began a fourth adjudication seeking the correct valuation of the final account and an appropriate repayment from the contractor.” That summary does not accurately reflect what happened. I am not in a position to determine whether this summary materially affected the reasoning of the Court of Appeal either in *Harding* itself or in *Grove*.

21. Pausing for air at this stage, it seems to me consistent with the policy underlying the adjudication regime that a defendant who *has* discharged his immediate obligation should generally be entitled to rely upon a subsequent true value adjudication and that a defendant

who *has not* done so should not be entitled to do so. In answer to the question whether a person who has not discharged his immediate obligation *should* be entitled to rely upon a later true value decision by way of set-off or counterclaim in order to resist the enforcement of his immediate obligation I would give a policy-based answer that, in my view, he should not be entitled to do so since that would enable a defendant who has failed to implement the Payment or Payless Notice provisions to string the claimant along while he goes about getting the true value adjudication decision rather than discharging his immediate obligation and then returning if and when he has obtained his true value decision. In my judgment, the passages I have cited from *Harding* (at first instance and in the Court of Appeal) are at least consistent with and provide support for the policy-based approach I have outlined. Adopting a phrase from [141] of the judgment of Coulson J in *Grove* at first instance "the second adjudication cannot act as some sort of Trojan horse to avoid paying the sum stated as due".

22. *Grove* was a case involving an interim application for payment. At first instance ([2018] EWHC 123 (TCC)), Coulson J addressed the scope for sequential adjudications at [80], [83] and [103]. At [80] he addressed the question as a matter of principle and said:

"...It seems to me to be clear than an employer in the position of Grove must pay the sum stated as due, and *is then* entitled to commence a separate adjudication addressing the "true" value of the interim application." [Emphasis added]

23. The passage at [83] is to the same effect. Having reviewed the relevant authorities, Coulson J said at [103]:

"In my view, the Court of Appeal authorities all point the same way. An employer who has failed to serve its own payment notice or pay less notice has to pay the amount claimed by the contractor because that is "the sum stated as due". But the employer *is then* free to commence its own adjudication proceedings in which the dispute as to the "true" value of the application can be determined." [Emphasis added]

24. At [139], in a passage with which I respectfully agree, Coulson J addressed the problem of contractors being overpaid by the short contractual route, with the possibility that they would then hang on to the money until determination of the "true" value of their application. Coulson J's response was that:

"It is that particular problem which has given rise to this case. I consider that it is better met by an analysis which, following payment of the relevant amount, allows a second adjudication as to the "true" value, rather than some sort of ad hoc and partial stay of execution."

25. To my mind these statements are clear and unequivocal: the employer becomes free to commence his true value adjudication when (and only when) he has paid the sum ordered to be paid by the earlier adjudication.

26. The first issue for the Court of Appeal was whether the Judge had been correct to hold that a purported pay less notice served by the employer had been valid and effective. The Court upheld the judge's decision. The second issue, namely whether the employer was entitled to pursue a claim in adjudication to determine the correct value of the works on the date of the interim application therefore became academic; but it had been fully argued and the

Court of Appeal gave a reasoned judgment on it which, though strictly obiter, was delivered because it raised an issue of considerable importance to the industry and the profession. Jackson LJ gave the leading judgment, with which the other members of the Court agreed.

27. In the course of his review of the relevant authorities, Jackson LJ reiterated that the relevant provisions of the 1996 Act were concerned with cashflow rather than final determination of what sums were due to the contractor. Specifically, s. 111 of the 1996 Act "is still a provision dealing with cashflow and immediate payments": see [68], [88]. At [92] he continued:

"[Section 111] generates an obligation to pay the notified sum before the final date for payment. But section 111 is not the philosopher's stone. It does not transmute the sum notified … into a true valuation of the work done … . Subsequently the adjudication provisions of the Act or (if correctly drafted) of the contract come into play. Either party can challenge the correctness of the notified sum by adjudication: see the reasoning of this court in *Harding.*"

28. Following up the distinction between what I have elsewhere called the short route and the valuation route, Jackson LJ said at [95]:

"In my view, the distinction is a helpful one. The payment bargain dictates *what must be paid immediately*. The valuation bargain sets out the process for reviewing and adjusting the payments *which have been made*." [Emphasis added]

29. The central passage on this issue is at [100] and [104]-[111] which I set out in full below:

"100 Let me turn now to the mechanism by which an employer can recover any overpayment made at the interim stage, as a consequence of his failure to serve a Payment Notice or Pay Less Notice. In many cases, this can conveniently be done by way of adjustment at the next interim payment. However, in some cases, such as the present, that is not practicable. The judge held that the employer can recover any overpayment by virtue of an implied term, alternatively by restitution. Mr Speaight has launched a formidable attack on that analysis. Mr Nissen's principle response is that he does not need to rely upon any implied term or the doctrine of restitution. If an adjudicator finds that the employer has overpaid at an interim stage, he can order re-payment of the excess as the dispositive remedy flowing from adjudicator's re-evaluation. I agree with that analysis. The parties have agreed (albeit under statutory compulsion) that the adjudicator should have jurisdiction to deal with disputes between them, including any disputes concerning the correct valuation of work under clause 4.7. Having determined the true value of the works at an interim stage, the adjudicator (who powers are co-extensive with the powers of the court in matters such as this) must be able to give effect to the financial consequences of his decision.

…

"104 The next question which arises is this. If the employer has a right to dispute by adjudication the valuation contained in an interim application, despite the absence of any Payment Notice or Pay Less Notice, when can he exercise that right? Coulson J held that the employer can only exercise that right after he has paid the notified sum as required by section 111: see [90] and [103].

105 Mr Speaight says that the judge did not state the juridical basis for that proposition and, on analysis, there is none. If the employer has an accrued right, he can exercise it at any time. This means that an employer who has failed to serve any Payment Notice or Pay Less Notice can escape the statutory consequences of his omission. He can sit tight refusing to pay and, at the same time, commence a 'true value' adjudication. That adjudication will be completed within 28 days. The contractor probably cannot issue proceedings and obtain summary judgment, enforcing payment pursuant to section 111 within that period. By the time of the summary judgment hearing the employer can point to the re-valuation decision and say that the 'notified sum' in the contractor's interim application has been superseded. Mr Speaight submits that this state of affairs would undermine the legislation. The employer can avoid meeting his payment obligation under section 111 with impunity, by the simple expedient of exercising his contractual or statutory right to adjudicate. That, says Mr Speaight, calls into question the correctness of the judge's whole approach.

107 Mr Speaight's argument has attractions, but I do not accept it. Both the HGCRA and the Amended Act create a hierarchy of obligations, as discussed earlier. The immediate statutory obligation is to pay the notified sum as set out in section 111. As required by section 108 of the Amended Act, the contract also contains an adjudication regime for the resolution of all disputes, including any disputes about the true value of work done under clause 4.7. 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. Section 111 (unlike the adjudication provisions of the Act) is of direct effect. It requires payment of a specific sum within a short period of time. The Act has created both the prompt payment regime and the adjudication regime. The Act cannot sensibly be constructed as permitting the adjudication regime to trump the prompt payment regime. Therefore, both 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 the has complied with his immediate payment obligation.

110 In summary the position is this. The judge held that the employer must make payment in accordance with clause 4.9 of the contract (or, as I would say, in accordance with section 111 of the Amended Act) before it can commence a 'true value' adjudication. I accept, as Mr Speaight submits, that the judge did not give reasons for that conclusion. Nevertheless, I think that the judge's conclusion was right for the reasons which I have set out above.

111 If I am wrong in the four proceeding paragraphs, the consequence will be that the employer can commence a 'true value' adjudication without troubling to meet its payment obligation under section 111 Act. That would be unfortunate for the construction industry and it would indicate a need for statutory amendment. But that unfortunate state of affairs does not cause me to reject my earlier conclusion that the employer, who has failed to serve any timeous Payment Notice or Pay Less Notice is nevertheless entitled to embark upon a 'true value' adjudicator.”

30. In providing his executive summary and conclusion at [124] Jackson LJ said:

“Coulson J has held that the Pay Less Notice was valid, despite the fact it referred back to a spreadsheet sent five days earlier; if it had been invalid, Grove would have been required to pay £14 million to S&T pursuant to section 111 of the Housing Grants, Construction and Regeneration Act 1996, as amended; but thereafter Grove would have been entitled by adjudication to determine the true value of the work done and to recover any overpayment.”

31. I note the following points from these passages:

i) At [100] Jackson LJ accepted the submission that, *where the employer has overpaid*, a subsequent true value adjudicator can order re-payment of the excess. To similar effect, at [108] he said that the policy of the 1996 Act is that there should be prompt payment *followed by* any necessary financial adjustments;

ii) The obligation to make payment pursuant to an adjudication decision reached by the short route is “immediate”;

iii) At [107] Jackson LJ held that “both the act and the contract [prohibit] the employer from embarking upon an adjudication to obtain a re-valuation of the work before he has complied with his immediate payment obligation”: see also [110] which is to the same effect. This goes further than merely requiring that the immediate payment obligation must have been discharged before the employer may rely upon a later true value adjudication decision. It was evidently a considered statement of principle, which was reflected in the Court's conclusion that Coulson J had been correct to hold that the employer could only exercise his right to dispute by the sum claimed in the interim application by bringing a true value adjudication “after he has paid the notified sum as required by section 111” and his executive summary: see [104] and [124];

iv) The pragmatic answer to concerns about insolvency, given at [109], was that in any case where there is a perceived risk of insolvency the employer should be scrupulous to protect itself by serving timeous Payment Notices or Pay Less Notices.

32. In his submissions for the defendant in the present case, Mr Ward was unable to identify any good or substantial reason why there should be a difference in the approach of the Court to the present issue depending upon whether the original application was interim or final. There are factual differences – for example, by the time of an application based upon a final account the contract works will have been concluded; and the employer may express more lurid concerns (whether well founded or not) about the contractor's solvency. But neither of these differences seem to me to subvert the basic policy underlying the 1996 Act and the Scheme3. It is true that the maintenance of cashflow after the works are completed is not necessary to fund the continuation of the works themselves; but the need for cashflow in the construction industry is not limited to a particular contract: payments at the end of a particular contract may be vital to enable the contractor to continue to operate going forward, quite apart from the need to fund the continuing obligation to make good or complete works under the contract in question. In other words, deprivation of cashflow may have a serious adverse influence on a contractor whether it occurs during or at the end of the works. And, as I have noted above, Parliament and the Court of Appeal have recognised the risk of insolvency at various stages and provided pragmatic answers: see [12] and [31] above.

33. For these reasons, I am unable to discern any material difference in policy as it affects the enforcement of an employer's immediate obligation to pay, whether that arises in relation to interim or final applications. Furthermore, I am unable to discern any support for different treatment in the authoritative statements of principle and reasoning to which I have referred above.

34. I recognise that the relevant section of the judgment of the Court of Appeal in *Grove* is technically obiter. However, it was provided after full argument and was expressly intended to provide authoritative guidance on an issue that Coulson J had decided in the contractor's favour. I would feel obliged to follow it even if I did not agree with it. As it happens I agree with the reasoning and the outcome.

35. In my judgment, 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. Both policy and authority support this conclusion and that it should apply equally to interim and final applications for payment.

36. That is sufficient to dispose of the present application to rely upon Mr Sliwinski's decision. The Defendant has not discharged its immediate obligation to pay the sums ordered by Mr Sutcliffe and may not rely upon the subsequent decision. There will therefore be summary judgment for the Claimant to enforce Mr Sutcliffe's decision. Mr Sutcliffe's decision provided expressly for the addition of interest, which should be included.

37. The decisions of Coulson J and the Court of Appeal in *Grove* are clear and unequivocal in stating 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. 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: 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.

A claim for VAT

38. In the course of the hearing the Claimant suggested that, if Mr Sliwinski's award fell to be enforced or taken into account, additional provision needed to be made for VAT. As I have decided that Mr Sliwinski's award does not fall to be enforces or taken into account, that issue does not arise and I do not decide it.

Conclusion

39. There will be summary judgment for the Claimant to enforce Mr Sutcliffe's decision in the sum of £106,160.84 plus interest. The parties should submit an agreed draft order setting out the financial consequences of his decision and this judgment. The Defendant will pay the Claimant's costs of these proceedings to be assessed if not agreed.