Pay now, argue later…

CHRISTIE, D.

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The Court of Appeal has, this week, handed down its judgment in the *Grove v S&T* appeal. Confirming the first instance judgment of Coulson J, in construction contracts governed by the Housing Grants, Construction etc. Act 1996 (as amended), where there is a Payment Notice (as part of the operation of the payment cycle in the contract), if Employer has not served an appropriate notice that it will be paying less than the sum in the Payment Notice, then the Empoyer will have to pay the full sum – even if they disagree with the valuation.

The Court of Appeal have, however, confirmed that this does not prevent further steps being taken to resolve the actual valuation of the works subsequently. This would include adjudication (a form of fast track dispute resolution under the 1996 Act).

It is therefore the position, as with adjudication under the Act, that the payment provisions geared to the cash flow based idea of "pay now, argue later".

In terms of how the court got to this, the reasoning is summarised by others and Jackson LJ's judgment itself is customarily clearly written.

On thread is however worth focussing on. Now, one of the issues which students often have relates to the interaction between the terms of the Act and the terms of the contract. The basic rule is that if the contract complies with the Act, then the contract governs the situation. Jackson J has slightly muddied the waters on this front by saying that s.111 of the Act is the source of the right to payment, in the absence of a Pay Less notice and if the contract provides for this, it only serves as an "aide memoire". In context, his comments are:

> "*37. Section 109 of the HGCRA required a construction contract to provide*
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> *41. Under the Amended Act, the basic principles are the same as they were under the HGCRA. Sections 109 and 110 (1) of the Amended Act are substantially the same as their predecessors. Section 110A replaces old section 110 (2) with much more detailed provisions about the employer's Payment Notice. But the essential features are the same. The contract must require the employer to serve a Payment Notice within five days of the due date. If a contract complies with the requirements of sections 109 – 110A, those provisions have no operational effect. What matters is the contract and, in particular, how the contract deals with those matters which the statute leaves the parties to sort out for themselves. (The background statute could still be an aid to interpretation in the event of ambiguity.) If and to the extent that the contract does not comply with sections 109 – 110A, then the Scheme comes into force and overrides the offending contractual provisions*."

The source of the obligations themselves is therefore slight obscured. I think the "*What matters is the contract*" point in para. 41 is key. It applies if it complies with the Act. The "aide memoire" point is important however because, as noted above, the decision involves a tension between the obligation to pay under s111 and the right to adjudicate at any time under s. 108. Both rights are incorporated in the parties' contract but in terms of the extent to which they 'compete' with each other – it may have been

important for Jackson LJ to place them on an equal footing. (See discussion in para. 107 of the judgment). The tension is resolved by giving primacy to s111.

This would seem to fit with the overall objective of the legislation which is to promote the making of payments and cash flow, and resolving underlying issues between the parties later.

The question of when "later" is remains to be confirmed – and Jonathan Cope (in his blog post on the decision) has noted that this, to some extent at least, limits the right to adjudicate "at any time" (under s108 of the 1996 Act). The impact of this is not clear at the moment as it is difficult to deal with the concepts in the abstract (one benefit of the common law system is that we can wait and see what happens in concrete situations). Mr Cope has pulled out a couple of possible examples which look at situations where there is a dispute as to the validity of the notices, which is then followed by a dispute over the underlying value of the works. That adds complications which will need to be worked through in due course – looking at any overlap between substance and form of the notices in that particular instance, for example.

Moreover, one point which needs to be considered in when the "argue later" occurs is that there is a need for there to be a crystallised dispute in existence before an adjudication can be commenced. In the absence of a Pay Less notice at all, there might still be some lag before a dispute is crystallised.

Another useful point is the discussion about the requirements for the certificate – which are to be interpreted objectively ("*The question was how a reasonable recipient would have understood the notice*" – see para. 50) and can take account of other information which exists between the parties (although obviously relying on information being treated as being incorporated into the document is risky: better to be clear).

So, a welcome intervention from the court of appeal – but some issues still remain.

David Christie
Robert Gordon University