

CASE IN BRIEF

M Davenport Builders Limited v Greer & Anor [2019] EWHC 318 (TCC)

By Laura Badcock & Kate Badcock

Late in 2018 the UK Court of Appeal gave its eagerly awaited decision in the case of *S&T (UK) Limited v Grove Developments Ltd*¹ (Grove), settling the long-raging debate of reconciling default liability and subsequent merit-based adjudications.

In *Davenport*, the UK Technology and Construction Court recently gave the first decision following *Grove*. Could this be seen in fact to complicate matters?

The issue before the Court in *Davenport* was whether a claimant who had obtained an adjudication determination on the merits could rely on it by way of set-off or counter claim to overcome an earlier adjudication on default liability (commonly termed the “smash and grab” or “slam dunk” adjudication in the UK).

Facts

The plaintiff (M Davenport Builders) and defendants (Mr and Mrs Greer) were parties to a construction contract with no express provision for payment details or adjudication. The contract was therefore subject to the adjudication provisions in the UK Housing Grants, Construction and Regeneration Act 1996 (**HGCRA**). This is the parallel act to the New Zealand Construction Contracts Act 2002 (**CCA**). Following a dispute, the plaintiff obtained an adjudication determination in its favour for some £106,000 on a default liability basis. The defendants did not pay the amount determined and commenced a second adjudication. The second adjudicator found that the defendants owed nothing to the claimants on a merits basis. The plaintiff then filed an application for summary judgment to enforce the first adjudication determination.

Can a defendant who has obtained a determination on the merits rely on it by way of set-off or counter claim to overcome an earlier default basis determination? A comparison with *Harding* and *Grove*

The UK Court of Appeal first provided guidance on the issue of whether a defendant can undertake further adjudications without paying an amount already ordered in an early adjudication in *Harding v Paice* in 2015².

In *Grove* the Court of Appeal seemed to have resolved this issue by categorically stating that a defendant must make payment before *commencing* a further merits-based adjudication. Whilst this part of the judgment was obiter (as the Court’s earlier findings negated the need to decide the point) it is clear the Court intended its comments to be “authoritative guidance” on the issue.

statement” on whether a defendant may commence proceedings before paying (pay attention to the quoted comment, as we will return to it later!).

In *Davenport Stuart-Smith J* noted that the Court in *Harding* did not make a “clear and unequivocal statement” on whether a defendant may commence proceedings before paying (pay attention to the quoted comment, as we will return to it later!). It seems likely that the Court did not make a definitive statement on this issue in *Harding* as the defendant had paid the amount owing by the time the case was heard.

In analysing *Harding*, *Stuart-Smith J* said that the Court of Appeal decision implied 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. He went on to say that this suggests that the critical time is at enforcement of the obligation (not the commencement of further adjudication). Therefore, on this approach, a defendant may be restrained if they have not paid amounts owing when the Courts are deciding whether to enforce the obligation.

Interim vs final payment context

Whilst the relevant claims in *Harding* and *Davenport* were final claims, the relevant claim in *Grove* was a progress claim. *Stuart-Smith J* noted that there was no “good or substantial reason” to treat applications based on interim and final payment claims differently as the same principles apply to interim and final payments throughout the HGCR; immediate payment is the priority in order to protect cashflow. This principle will easily transfer to a New Zealand context. The purposes of the CCA are designed to protect cashflow through facilitation of regular and timely payments. This purpose and Lord Denning’s infamous statement on cashflow as the “lifeblood of the enterprise” are particularly important in New Zealand now given the current climate where many contractors appear insolvent. Of some importance, unlike the HGCR the CCA provides no distinction between interim and final payment claims. Any distinction at an adjudication or enforcement stage would therefore likely be meaningless.



Decision

In *Davenport* Stuart-Smith J noted agreement with Grove regarding the “clear and unequivocal” statements that a defendant may only commence adjudication once they have paid any amounts previously determined (there’s that definitive statement that the Court omitted in *Harding*!). However, following the principles set out in *Harding*, he found that this did not mean that the Court would always restrain the commencement or progress of an adjudication. He gave no indication of when or why the Court might not restrain in such circumstances. This may well be because the issue before him was whether the award from the second adjudication could be used as a set-off or counterclaim. It was therefore being decided in similar circumstances to *Harding* (i.e. at the time of enforcement).

Comment

Overall, the principles of the HGCRA sit comfortably alongside the CCA; this is the well-established ‘pay now, argue later’ philosophy of both schemes. The adjudication provisions at s 108 of the HGCRA likewise correspond well with s 25 of the CCA. There is clear agreement throughout *Harding*, *Grove*, and *Davenport* that if a defendant *has* paid an amount previously ordered they *will* be entitled to launch an adjudication on the merits and rely on it. There is also agreement throughout that a defendant who *has not* paid any amounts previously ordered *will not* be entitled to rely on any subsequent adjudication determinations in their favour. This is consistent with the principles of both the HGCRA and CCA schemes.

It seems that where Stuart-Smith J referred to the “latent ambiguity” in *Harding* regarding the critical time at which a defendant is restrained, it was his intention that his decision would remedy this. Notwithstanding that, it is strongly arguable that *Grove* resolved the ambiguity and in reality there was no need for Stuart-Smith J to go further.

Whilst Grove did not expressly disagree with *Harding*, the Court in *Grove* stated that the defendants in *Harding* paid the amount due before commencing the subsequent adjudication. This was a clear error of fact, as the defendants had not paid before commencing the subsequent adjudication (but had paid before the plaintiff sought to enforce the first determination). Based on the Court’s reading in *Grove*, the defendants in *Harding* would have been compliant with the new principle set out in *Grove*. As such, the Court would not have seen any ambiguity which needed to be resolved.

In any case, *Grove* clearly prevents a defendant from commencing an adjudication on the merits before paying the amounts determined to be owed on a prior default liability adjudication. This impliedly removed any ambiguity present in *Harding*; a defendant is unable to commence a further adjudication on the merits as the result of failing to pay an amount determined in an earlier default liability adjudication. As a matter of logic, they must therefore be prevented from relying on a merits-based adjudication determination at the enforcement stage given the jurisdictional bar in the first place. As a result, the principle expounded in *Davenport* appears to be something of a nonsense.

It seems inevitable that this issue will come before the English Court of Appeal again (whether on appeal from this decision or another) given the ambiguity that *Davenport* potentially creates. At that stage it would be expected that the Court of Appeal will clarify any ambiguity that arises from the three decisions.

In the meantime, however, claimants should heed the point that the Courts are all in symphony on; if you want to commence an adjudication on the merits you will need to have paid any sums determined to be payable in a prior default liability adjudication. Failure to do so will likely expose the claimant to a significant jurisdictional challenge, and maybe even injunctive relief preventing the adjudication, both of which will likely be successful given the Court of Appeal’s position in *Grove*.

Given the parallels of the HGCRA and the CCA, that position would likely prevail in the New Zealand courts.

and partly due to the Building Act 2004. In particular, section 14E of the Building Act provides:

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End Notes

1. S&T (UK) Limited v Grove Developments Limited [2018] EWCA Civ 2448.
 2. Harding v Paice [2015] EWCA Civ 1231.
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