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J2J Construction:
"Smash and
Grab"
Adjudications

Welcome to this seminar
hosted by Laurence Page
and Louis Zvesper.

This session will start at
9am.

Please could you make sure
your microphones are
muted.

Thank you.

1

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Smash and Grab Adjudications

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Louis Zvesper

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Introduction

1. The framework
2. True value adjudications
3. A couple of examples
4. Practical tips

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Section 1: Framework

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The statutory framework

- Contract validity threshold: are requirements in ss109, 110 and 110A met?
- Content of paying party's response: always look at s111 (contractual terms are a mere "aide memoire")

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Contract validity threshold

- Does the contract provide for interim payments? (s109)**
 - If no: paras 1, 2 and 12 of Scheme applies
 - Periodic payments are based on value of work in the relevant period
 - Relevant period is every 28 days
- Does the contract include a mechanism for determining what sums become due and when? (s110(1)(a))**
 - Question of fact
 - Caledonian Modular Ltd v Mar City Developments Ltd* [2015] EWHC 1855 (TCC): the court will strike down a contract that permits contractor to issue payment notices every few days and ignore earlier pay less notices.

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Contract validity threshold (cont'd)

- Does contractual timetable mean the final date for payment is after the due date? (s110(1)(b))**
 - If not, paragraphs 3 to 8 of Scheme apply.
- Does contract require employer to serve a payment notice no more than 5 days after due date? (s110A)**
 - If not, paragraph 9 of Scheme applies

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No payment notice served in time? The default payment notice

- Statutory default is that payee can issue its own payment notice (s110B(2)).
 - This has the effect of delaying the final date for payment
- But... if contract permits/requires payee to issue a payment application, then the payment application is treated as the payment default notice (s110(4))
 - This applies for most standard form contracts

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Paying Party's Response: Payment notice and Pay Less Notice

1. The employer must pay the notified sum by the final date for payment, unless it has specified a lesser sum in a **payment notice** or a **pay less notice**.
2. If payee has issued a default payment notice, the employer can still issue a pay less notice.
3. If no payment notice or pay less notice is served in time: payee can commence smash and grab adjudication.

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Pay Less Notice: requirements

1. Section 111(3) and (4): a PLN must specify (i) sum that the payer considers to be due on the date the notice is served; and (ii) the basis on which that sum is calculated.
2. Ideally, calculation of sum due should be set out in the PLN.
3. **Grove**: "A pay less notice will be construed by its background." Does it provide an adequate agenda for a dispute about valuations/cross-claims?
4. **Jawaby v Interiors Group**: did sender (objectively) intend to send a PLN?
5. **Surrey and Sussex Healthcare**: don't look at specific detail of language used. Look at the intention to be conveyed to a reasonable recipient.

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Chronology: diagrams

<https://www.rics.org/globalassets/rics-website/media/ehdtdm-professional-standards/sector-standards/construction/black-book/interim-valuations-and-payment-1st-edition-rics.pdf>

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11

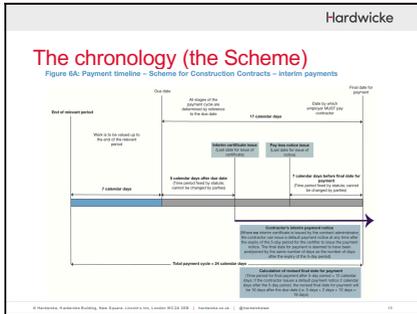
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The chronology (JCT D&B 2011)

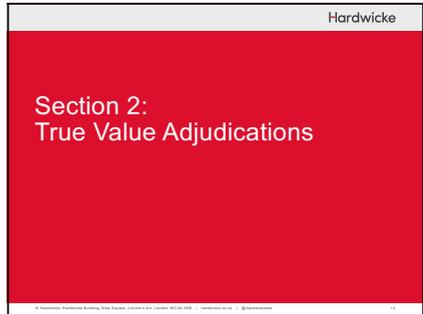
Figure 2: Payment timeline – JCT Design and Build Contract 2011

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12



13



14

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- ### Options
- Pay
 - Resist enforcement
 - Part 8 – validity of notices
 - Stay of enforcement
 - Set off
 - True value adjudication
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15



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S&T v Grove [2018] EWCA CIV 2448

- High Court
 - Grove submitted a PLN
 - Adjudication found that invalid
 - Resulting in payment of £14million on short contractual basis

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S&T v Grove [2018] EWCA CIV 2448

- Reviewed authorities on validity of notices
- Held PLN valid
- Also considered the right to adjudicate 'true value'
- First principles:

"90. Accordingly, for these six reasons, it seems to me to be clear that 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"

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S&T v Grove [2018] EWCA CIV 2448

- Reviewed CoA authorities:

"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."

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S&T v Grove [2018] EWCA CIV 2448

- Reviewed TCC cases

"118 In my view, the concept of a deemed agreement, which lies at the root of ISG v Seevic and Galliford Try v Estura is not only unjustified, but it is also an unnecessary complication, given the clear distinction in the contract between 'the sum due', on the one hand, and 'the sum stated as due', on the other."

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S&T v Grove [2018] EWCA CIV 2448

- Upheld in the Court of Appeal

"99 the judge's six reasons support my view that the employer, having failed to serve a Payment Notice or Pay Less Notice, is nevertheless entitled to adjudicate to determine the true value of an interim application.

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S&T v Grove [2018] EWCA CIV 2448

"107. 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 construed 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 he has complied with his immediate payment obligation.

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Davenport v Greer [2019] EWHC 318 (TCC)

- C sought to enforce 'short contractual' payment adjudication
- D resisted on basis of existence of true value adjudication as set off

"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."

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Section 3: Examples

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Check the diary

Event	Date (ICT)	Date (Schema)	Date (Schema)
Payment application	22 March	22 March	1/6
Due date	25 March (day zero)	25 March (day zero)	25 March (day zero)
Interest certificate	30 March (+5)	30 March (+5)	30 March (+5)
Default payment notice	(The PA)	(The PA)	1 April (+7)
Pay less notice	3 April (+9)	4 April (+10)	6 April (+12)
Final date for payment	8 April (+14)	11 April (+17)	13 April (+19)

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Section 4: Some tips

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Practical guidance

- Review dates
- Conjure up a payment notice/pay less notice.
- Jurisdictional challenge
- Natural justice challenge
- Failure to give reasons
- Fraud
- But...be realistic!

• The seminar digested: Pay first, argue later

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27