



Technical

Payment and Pay Less Notices and Ensuring Payment

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Introduction

1. In the last few years there have been a number of cases regarding the interpretation of payment provisions in the Local Government, Economic Development and Construction Act 2009 (the “*Construction Act*”) which are now incorporated into most standard forms of construction contract.

Payment Notices

2. The new regime is similar to the previous one (from May 1998 to 2009), in that a party due to make payment (the “*Payer*”) still has to issue a payment notice not later than five days after the due date.
3. However, whereas previously there was no real detriment or sanction to the Payer if it failed to issue this notice, now if the deadline for issuing the Notice passes and a Payment Notice is not issued, the party due to receive payment (the “*Payee*”) may give the Payer a Payment Notice – known as a “*Payee’s Notice in Default*”. This notice can be issued at any time, by the Payee, after the date that the Payment Notice was to be issued.
4. This Payee Notice in Default should state the amount considered due and the basis of this calculation and this becomes the sum due.

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Pay Less Notices

5. The 2009 Act places an obligation on the Payer to pay the “*notified sum*”. If deductions are to be made against the notified sum, the Payer is required to issue a “*Pay Less Notice*” before the final date for payment. This Pay Less Notice must specify the sum that the Payer considers to be due on the date the notice is served to the Payee and the basis on which that this sum has been calculated.
6. This notice must be given not later than the prescribed period before the final date for payment, specified in the Contract or the Scheme.

Cases

7. Unsurprisingly, the crucial importance of payment in the construction industry, coupled with what some see as draconian consequences for failing to issue the correct notice, has generated a number of significant cases which have explained and/or clarified the interpretation of the Act and the Scheme and/or the standard forms of contract.
8. These cases include: *ISG Construction Ltd. v Seevic College, Leeds City Council v Waco UK Ltd., Galliford Try Building Ltd. v Estura Ltd., Henia Investments Inc. v Beck Interiors Ltd., Caledonian Modular Ltd. v Mar City Developments Ltd., Harding v Paice, Jawaby Property Investment Ltd. v The Interiors Group Ltd., Kilker Projects v Rob Purton, Surrey and Sussex Healthcare NHS Trust v Logan Construction (South East) Ltd. and Kersfield Developments (Bridge Road) Ltd. v Bray and Slaughter Ltd.*

Form, Substance and Intent

- Drawing together the substance of these cases brings to light a number of broad principles, which anyone involved in applying or making payment under a construction contract should be aware of.
- Many of these cases are centred around the question of what happens when no Payment and Pay Less Notice is issued.
- The ISG and Galliford Try cases clarified that, in the absence of such notices, the Payee may issue an Interim Payment Notice **or**, alternatively, rely on the sum claimed in properly issued valid Applications for Payment. The Payee will be entitled to the sum detailed in its Application/Notice.

- It does, however, seem there was a realisation that this element of the Act/Contract was potentially open to abuse by a “crafty” Payee, especially when dealing with an inexperienced or naïve Payer. This resulted in many what are often referred to as “smash and grab” adjudications.
- In the six to seven months leading up to 2016, there were several cases regarding this issue and the courts seem to have attempted to re-balance this position. Caledonia, Henia and Severfield all elaborated on what would constitute a valid Application/Notice and detailed the effect of such a document not being prepared and issued strictly in accordance with the Contract.
- In Henia, it was decided that an Application for Payment that was six days late was not a valid Application under the Contract and, as such, the absence of a Payment Notice and/or a Pay Less Notice was immaterial.
- It should also be noted that the Judge also said that, if the Application for Payment had been issued on time, a Payment Certificate issued by the Payer (which was in effect three minutes late) would also have been viewed as invalid and the Payee would have been entitled to the sums claimed.
- Coulson J., in his Judgement on Caledonia, stated with regard to the principle that, in the absence of a valid Payment Notice and/or Pay Less Notice, the Payee is entitled to the sum detailed in a valid Application for Payment/Interim Payment Notice, that

“...if contractors” (Payee’s) “...want the benefit of these provisions, they are obliged, in return, to set out their interim payment claims with proper clarity. If the employer is to be put at risk that a failure to serve a payless notice at the appropriate time during the payment period will render him liable in full for the amount claimed, he must be given reasonable notice that the payment period has been triggered in the first place”.

- This was further confirmed in Coulson J.’s later Judgement in the Severfield case.
- After this veritable flurry of cases, a further case was decided early in 2016. This case – *Jawaby Property Investment Ltd. v The Interiors Group Ltd.* – confirmed and elaborated on the Court’s

view on what was required of an Application for Payment/Interim Payment Notice to make it valid and therefore enforceable.

- The Hon. Mrs Justice Carr stated that, to decide whether an Application for Payment/ Interim Payment Notice was indeed valid and enforceable, an assessment must be made as to whether the Notice is clear in “*Form*”, “*Substance*” and “*Intent*”. This principle has been applied to more recent cases, including *Surrey and Sussex Healthcare NHS Trust v Logan Construction (South East) Ltd.* and *Kersfield Developments (Bridge Road) Ltd. v Bray and Slaughter Ltd.*
- Broadly, for an Application/Notice to be deemed valid, it must be on time (i.e. it must be issued at the time required and *not a minute later*), it must be clear that the Application/ Notice is a Notice requiring action by the Payer, it must be prepared in sufficient detail to allow the Payer to understand the claim (in accordance with the Contract or if no contract exists to a reasonable standard), all stated dates must be correct and it must be in accordance with the Contract.

Summary

- Quite simply, all the i’s should be dotted and all the t’s crossed. The Court’s view is that the obligation on the Payer to pay sums applied for by the Payee in the absence of a contrary Payment and Pay Less Notice is so draconian that the Application/Notice must be strictly in accordance with the Contract and that any flaw should prevent the Application/Notice from being enforceable.
- In our view, **to assume that a failure by the Payer to issue a Payment/Pay Less Notice automatically entitles the Payee to sums detailed in an Application/Notice would be wrong.** You must ensure that the Application/Notice is prepared and issued strictly in accordance with the Contract.

and FINALLY,

- Some other noteworthy points addressed in the string of cases are:
- **Final Accounts and Termination Accounts will be viewed and treated differently.**

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- **Erroneous claims included in an Application/Notice will not invalidate the Application/Notice if it is, to all other intents and purposes, in accordance with the Contract.**
 - **In most cases concerning interim payments, a Payer will not be able to commence a second Adjudication on the “true” value of the application.**
 - **A Pay Less Notice can incorporate an entire revaluation of the Contract; it is not simply a document detailing deductions from a previous Payment Certificate/Notice. This does raise the question as whether a Payment Notice is truly required and we shall review and consider this in a future article.**
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