Construction Law *Update*

Winter 2016/17

Second adjudication valuation allowed for final account

It is long established that a party's failure to issue a payless notice means that the sum applied for becomes the 'notified sum', (see section 111 Construction Act and the case of ISG Construction Limited v Seevic College). An adjudication where the party seeking the payment relies on there being no payless notice is known as a 'smash and grab adjudication'. Any attempt in a second adjudication to have a valuation of the same application would fail. If it was an interim payment, then the paying party would have to ensure that the relevant payment and/or payless notices were served on the contracts next due date. In relation to final accounts following termination under the JCT Immediate Form Contract, (as in the case of Harding v Paice), the parties are entitled to adjudicate in order to determine the correct value of the payees claims and counter claims. In respect of other final accounts, it was unclear whether ISG v Seevic applied to all final accounts.

The case of Kilker Projects Limited v Purton has clarified that where an adjudicator has found that a payer must pay up following his failure to issue a payment notice and payless notice against the final account, the payer is entitled to refer the merits of that valuation for determination in another adjudication. In other words, there is a difference between final payment and interim payments. The Construction Act 1996 and the scheme regulate payment and cash flow, but do not decide the true substantive entitlement to payment under the contract on a conclusive basis. The statutory regime was pay now and argue later.

Kilker were a main contractor and employed Purton a joinery subcontractor to carry out works at the Dorchester Hotel. Kilker had lost an adjudication on a final payment claim by Purton because it failed to give a payment notice. Kilker paid the notified sum following enforcement proceedings in the Technology and Construction Court (TCC).

Subsequently Kilker decided to adjudicate the substantive valuation of the final account, in other words to have a decision made on the proper value rather than be stuck with paying the notified sum after the smash and grab adjudication. Purton argued that the adjudicator had no jurisdiction as the previous adjudicator had already decided the same or substantially the same claim, in respect of the final payment and the principle in ISG applied, so that Kilker was deemed to have agreed the valuation of the final account because it had not given a payment notice or payless notice.

The adjudicator in the second adjudication had ordered Mr Purton to repay Kilker around £55,000 and to pay his fees. In the TCC Mr Purton's arguments lost and the Judge said that the Construction Act and the scheme do not *affect the ultimate value of the contract sum that the parties have agreed as a price for the works and/or services provided. Very clear words would be required if Parliament intended to impose a scheme that would interfere with the commercial value of the bargain freely negotiated by the parties.*

So the final sum due to either party in the contract is based on the enforcement of their contractual bargain and not a value established following a failure to issue the correct notices.

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Key changes to JCT Design and Build Contract

The Design and Build 2016 is the second arrival in the 2016 edition of JCT contracts, following the release of the Minor Works family in June 2016. New features as part of the update include:

- Incorporation of the provisions of the JCT Public Sector supplement 2011 that relate to fair payment, transparency and building information modelling, (BIM).
- Adjusted to reflect the CDM Regulations 2015 and the Public Contracts Regulations 2015.
- Amendments to the works and existing instructions and insurance provisions to make them more flexible.
- Revision and simplification of the Section 4 Payment Provisions.
- Inclusion of provisions for the grant of Performance Bonds and parent company guarantees.
- Extension of the optional provisions for Collateral Warranties from sub-contractors to include third party rights.

One of the greatest changes is to payment provisions in Section 4. There is a new mechanism for adjusting the contract sum, and a move towards a common payment regime for interim and final payments, normally 14 days from its due date. There is also a new procedure at clause 4.20 for the prompt assessment of loss and expense. This includes the requirement to provide monthly updates until information reasonably necessary to allow ascertainment of the total amount of loss and expense has been supplied.

In relation to insurance, schedule 3 has been simplified. Insurance option C now allows a 'replacement schedule' to suit the parties' particular insurance requirements. This will give greater flexibility.

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Gullands ranked as leading law firm in legal directories

Gullands has once again been commended for its consistently high levels of service by The Legal 500.

Gullands has been ranked as a leading firm in five separate legal sectors

- Crime
- Charities
- Family
- Tax, trust and probate
- Construction

Heading the criminal department, John Roberts and Patrick Bligh are referred to as "the key figures at Gullands Solicitors" in The Legal 500, whilst head of construction, David Brown is described as being "adept at handling adjudications and assisting with JCT contracts".

Gullands' criminal, employment and construction departments have also been commended in Chambers & Partners 2017.

This year's directory awarded Gullands' criminal department a Band 1 ranking, whilst recognising Gullands' employment department as a noted firm. Gullands' David Brown and Amanda Finn were also highlighted for their work in the construction and employment departments, with David receiving a Band 2 ranking as a 'Leading Individual'.

Blair Gulland comments: "We are delighted that Gullands' track record and standing in the South East has once again been acknowledged and praised by both The Legal 500 2016 and Chambers and Partners 2017 directories. As a firm we have in-depth specialities in a range of areas and a strong reputation for handling complex, challenging work, so we are thrilled that this hard-work is being recognised."

Impact of health and safety sentencing guidelines on the construction sector

There have reportedly been as many £1 million plus fines since 1st February 2016, as there were in the previous 20 years. Balfour Beatty have set aside a £25 million "reassessment of potential liabilities on historical health and safety breaches". All this follows new sentencing guidelines, featuring:

- Fines based on turnover.
- Focus on potential outcomes and harm risked, not just what actually happened.

We look at the impact of the guidelines so far:

Near Misses

MJ Allen Holdings had a "near miss" when an employee slipped working on a factory roof. The potential outcome was death or life limiting injury and a medium likelihood of this occurring. This placed the incident in *harm category 2*. Turnover was in the *medium* bracket (£32 million in 2014) giving a starting point of £240,000. After a one third discount for a guilty plea, the penalty was £160,000, even though no one was hurt.

Demolition subcontractor Allan Thomson tragically ignored a similar "near miss" on a warehouse roof, only for not one, but two workers to fall from the same roof, the second to his death. Thomson received six years for manslaughter and his company was fined £400,000. The principal contractor was jailed for eight months and his company fined £90,000.

Work at Height

Faruk Patel was jailed for 30 months for gross negligence manslaughter after instructing a labourer to work near an open skylight. Scaffolders Ben and James Marshall received suspended prison sentences after a worker fell from a flat roof. Marshalls had removed a safety rail, replacing it afterwards to cover their tracks. Montway were fined only £144,000 after a similar fall, an apparently modest sum for injuries entailing three months in hospital, but probably in keeping with the guidelines for a £10 million turnover company. In Span Roofing Contractors, the main contractor was fined £65,000 under regulation 13(2) CDM 2007, following a seven metre fall. A director of the subcontractor company received a CSO.

Turning to employers who should know better, British Telecom were fined £500,000 after an engineer fractured his spine. He briefly managed to hold himself suspended, before finally losing his grip and falling. BT was fined £600,000 for two ladder falls, one leaving a worker partially blinded.

Plant and Tools

Lack of monitoring and health surveillance of workers using vibrating tools in Asset International was high culpability, because the breach had existed since the Vibration at Work Regulations came into force. The seriousness of harm risked fell into category B (substantial and long term effect) and the likelihood of harm was high, so the harm category was 2. This gave a starting point of £450,000 for a £12 million turnover company. As it was at the lower end of the scale, the Judge set the starting point at £400,000. He reduced it by £100,000 due to a good safety record and subsequent improvements plus a further third off for a guilty plea. The resulting fine was £200,000, more than one might have expected for a control of vibration offence.

In September 2016 housebuilder Crest Nicholson was fined £800,000, after a foreman was struck by a HGV suffering life changing injuries, due to a failure to manage and monitor vehicle movements in breach of regulation 36 (1) CDM 2007. Finally mention must be made of the wholly avoidable overturning incident involving a dumper in MJL Contractors, resulting in a worker losing both legs. MJL Contractors were fined £200,000

How to Respond

Organisations should study the definitions of *culpability* and the *aggravating factors* and make sure the definitions do not apply to them.

Failing to act on previous incidents is an indicator of "high culpability", so organisations must enforce systems of monitoring and review including near misses.

Finally, directors and senior managers should study HSE guide Leading Health & Safety At Work (INDG 417 rev1), especially operating a "living" health and safety policy. In other words, enacted daily on the ground and reviewed at least once a year.

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Interim Payments

A recent Court of Appeal decision in Balfour Beatty v Grove Developments, has upheld the decision of the TCC and concluded that the contractor had no right to receive interim payments after the planned date of practical completion. In the case the parties were using a JCT Design Build Contract 2011 edition. They agreed a schedule dealing with the making of 23 interim applications and payments and did not provide for what would happen if there were contract overruns. The works progressed but were in delay and the dates in the schedule came and went and the parties were unable to agree a new set of monthly dates. In the TCC it was held that Balfour Beatty had no contractual right to make or be paid in respect of interim application 24 or any subsequent applications. They had no right to apply for further payments until the contract's final payment mechanism kicked in after practical completion. The fact that the parties did not provide interim payments covering all of the work under the contract was no reason to import the Scheme for Construction contract's 1998 payment provisions to supplement the parties' agreement and to enable the contractor to generate interim payments covering what the parties' agreement did not cover.

This case will generate considerable interest, because payment schedules of the type the parties agreed can have real advantages in identifying the precise dates on which applications are to be made, notices are to be given and payments are to be made.

The Court of Appeal agreed with the TCC decision. They rejected the contractor's argument that there had been a fresh contract for monthly interim payments. They considered the argument that the effect of the parties' contract as amended by the payment schedule, was that interim payments were to continue at monthly intervals beyond the planned completion date and so after the date set out in the payment schedule had been exhausted. Two of the Court of Appeal Judges decided that on a proper construction of the payment schedule, the parties had agreed that the contractor was only entitled to 23 interim valuations and that the contractor had been 'imprudent' in agreeing to an arrangement in which if practical completion was delayed, it would have to wait potentially months or years for the date of the final payment. However, the Court could not invoke commercial common sense unless the natural meaning of the words the parties had used was unclear.

The second argument was that the employer's construction of the payment schedule would infringe the rights afforded to a party to a construction contract by section 109 to stage or periodic payments. In those circumstances the Scheme for Construction Contracts 1998 was to apply instead.

However, the Court said that section 109(2) gives the parties considerable latitude as to the system of interim payments that they may agree and the parties are free to determine the frequency of interim payments and the amounts to be paid. However, the court did suggest that if the parties were going to depart from the scheme, then they must draw up a system of interim payments in good faith.

There was one dissenting Judge in the Court of Appeal. So the outcome may have been different if the case had gone before another TCC Judge. The lesson to be learnt is to ensure that any schedule agreed between the parties or other similar amendment, spells out their intentions in respect of the sort of gap highlighted by this case.

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