

CONSTRUCTION : BULLETIN

Give Notice Or Pay On Demand

In the recent case of **ISG Construction Ltd v Seevic College** the court had to consider whether an employer, who had failed to issue both a Payment and a Pay Less Notice, could ask an adjudicator to assess the value of the contractor's works where a previous adjudication had already considered the contractor's Payment Application.

Background

Seevic engaged ISG under a JCT Design and Build Contract 2011 (the "Contract"). The Contract, in accordance with the Housing Grants, Construction and Regeneration Act 1996 (as amended) (the "Act"), provided for interim payments to be made to ISG.

Pursuant to the payment terms of the Contract, the contractor may make a Payment Application for the sum it believes is due, and/or the employer may give a Payment Notice stating the sum it believes to be due. The employer may give the contractor a Pay Less Notice where it claims to be entitled to withhold money and intends to pay less than the sum stated in the Payment Application or Notice.

If the employer fails to serve a Payment Notice and a Pay Less Notice, the sum stated in the contractor's Payment Application will become due.

On 13 May 2014, ISG issued its Payment Application No. 13 ("Application No. 13") which requested payment of £1.1m. Following Application No. 13, Seevic failed to serve a Payment Notice and a Pay Less Notice, and it did not pay any sums to ISG.

ISG referred the dispute regarding Application No. 13 to adjudication (the "First Adjudication") and Robert Juniper was appointed as the adjudicator.

It was apparent that Seevic was fearful of the adjudicator finding against them; so, four days before the adjudicator was due to issue his decision, Seevic commenced a second adjudication (the "Second Adjudication").

The adjudicator appointed in the Second Adjudication was also Robert Juniper and he was asked, by Seevic, to decide the value of ISG's works up to the date of Application No. 13.

It was Seevic's hope that the decision in the Second Adjudication would find that the true value of ISG's works up to the date of Application No. 13 was less than the value claimed in the First Adjudication, thus reducing the amount payable by Seevic to ISG.

On 5 September 2014, the adjudicator issued his decision for the First Adjudication, holding that £1.1m was owed by Seevic to ISG. However, Seevic did not pay any monies to ISG.

This was followed by the decision in the Second Adjudication on 10 October 2014, which held that the true value of the works in Application No. 13 was £315,450.47. Subsequently, Seevic issued ISG with a cheque for £315,450.47.

ISG made an application to the court for summary judgment. ISG wanted the court to enforce the decision of the First Adjudication and it also sought a declaration that the decision in the



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Second Adjudication was invalid for want of jurisdiction.

The Arguments

This case focused on two central issues. Both parties' arguments in relation to these issues are explained below.

ISG's arguments can be summarised as follows:

1. The value has already been determined – ISG submitted that the effect of the payment notice regime meant that there could be no dispute about the value of the work in Application No. 13.
2. Want of jurisdiction (no dispute) – ISG argued that the value of the works in Application No. 13 had already been determined because Seevic had waived its right to dispute the valuation when it failed to issue either a Payment Notice or a Pay Less Notice. As a consequence, ISG submitted, there could be no dispute between the parties forming the basis for the Second Adjudication.

Seevic's arguments can be summarised as follows:

1. The value has already been determined – Seevic submitted that the valuation of ISG's works had been specifically excluded from the First Adjudication by virtue of paragraph 5.9 of Mr Juniper's decision which stated “*For the avoidance of doubt I record that I have made no decision as to whether or not that is the true value of work undertaken by ISG.*”
2. Want of jurisdiction (no dispute) – Seevic argued that there was indeed a dispute because both parties disagreed about their rights under the Contract. Therefore, there was a dispute capable of being the subject of adjudication.

The Judgment

Despite Mr Juniper stating in his first decision that he had “*made no decision*” as to the actual valuation of Application No. 13, the judge, in considering ISG's Notice of Adjudication which sought “*A declaration as to the contractual value of ISG's works as at 13 May 2014 (being the date of ISG's Application Nr 13)*” held that, on a normal construction of the declaration, the adjudicator was clearly asked to determine the true value of ISG's works at the date of Application No. 13.

The judge concluded that if the employer fails to serve any notices in time, this can only be construed as agreeing the value stated in the contractor's application. Therefore, in this case, the adjudicator had, in principle, decided the question as to the value of ISG's works.

The judge also held that “ISG is entitled to a declaration that the decision of Mr Juniper in Adjudication No 2 is invalid for want of jurisdiction. He decided a question that, as between the parties, must be taken to have been decided by him in the first adjudication.”

The judge also set out the practical consequences if Seevic were hypothetically correct in their arguments:

1. “*The statutory regime would be completely undermined...*”
2. “*If this were permissible, any such decision by an adjudicator would trump the contractor's interim application because the contractor would then be entitled to an amount representing the value of the work properly executed, as determined by the adjudicator, less the sums already paid.*”
3. As there is “*no freestanding entitlement to payment under this form of contract outside the framework of interim applications and the final application. The contractor's only entitlement to payment during the course of the project is by way of an interim*

application. Absent fraud, in the absence of a payment or pay less notice issued in time by the employer, the contractor becomes entitled to the amount stated in the interim application irrespective of the true value of the work actually carried out.”

Analysis

This case is a perfect example of why it is so important to always comply with the payment provisions of the Act and the contract in question.

Had Seevic issued a Payment Notice disputing the sum claimed by ISG it may have been the case that Seevic would only have had to pay circa £300,000 to ISG. As it was, Seevic did not issue the requisite notice and, as a direct result, they had to pay £1.1m to ISG as well as ISG's costs of the application for summary judgment.

An employer should always have in mind the dates by which Payment Notices and Pay Less Notices must be served to avoid being bound by the sum specified in the contractor's application for payment.

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