

CONSTRUCTION : BULLETIN

Applications for Payment – The Importance of Getting the Timing Right



Hawkswell Kilvington

Following contractual procedures is not always an easy task. For contractors and employers alike, the complex rules and procedures set out in many standard form construction contracts can be confusing. Mistakes often occur and this can be particularly problematic when it comes to payment.

The recent case of *Henia Investments Inc v Beck Interiors Ltd* (2015) is the latest in a recent trend for cases involving disputes about the validity of payment applications.

Background

Beck Interiors Ltd (“Beck”) was engaged as a contractor by Henia Investments Ltd (“Henia”) under an amended JCT Standard Building Contract Without Quantities 2011 to carry out extensive fitting out and construction works at a property in South Kensington, London.

The payment terms under the contract were as follows:

- The due date for was the 29th of each month (or the next Business Day if the 29th landed on a weekend or public holiday).
- No later than seven days before the due date, Beck could issue an Interim Application, setting out the sum it considered due at the due date.
- Interim Certificates were to be issued by the Contract Administrator not later than five days after the due date.
- The final date for payment was 28 days after the due date. If no valid Interim Certificate was issued, Henia was obliged to pay Beck the sum set out in the Interim Application, unless Henia issued

a Pay Less Notice.

- Henia had until three days before the final date for payment to issue a Pay Less Notice.

On 28 April 2015, Beck submitted its Interim Application for Payment No. 18 identifying the net amount it considered due to be £2,943,098.95. The application was six days late.

On 6 May 2015, the Contract Administrator issued its Interim Certificate No. 18 in the gross sum of £3,988,108.69, showing a net sum payable of £226,248.95. The Interim Certificate was one day late.

Beck did not issue an interim application for payment for May 2015.

On 0:03am 4 June 2015, the Contract Administrator issued its Interim Certificate No. 19 in the gross sum of £4,007,586.56 showing a net sum payable of £18,893.53. This Interim Certificate should have been issued on 3 June 2015 and was therefore three minutes late.

On 17 June 2015, Henia issued a Pay Less Notice stating that the amount due to Beck was actually nil because Henia was entitled to deduct substantial liquidated damages for delay, far in excess of the £18,893.53 which would have been payable under Interim Certificate No. 19.

A dispute arose between the parties about whether:

- Beck’s Interim Application for Payment No. 18 of 28 April 2015 could be taken as a valid “default notice” for the purposes of the 29 May due date; and

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- Henia’s Pay Less Notice of 17 June was a valid Pay Less Notice.

If Interim Application for Payment No. 18 was a valid application for the purposes of the 29 May due date, the sum applied for within it would have become due automatically following the late issue of Interim Certificate No. 19 on 4 June. However, if Henia’s Pay Less Notice was valid, it would have made no difference if Interim Application for Payment No. 18 had become due because Henia would have avoided having to pay it.

Validity of the Payment Application

The court noted that an interim application under this form of JCT contract has potentially serious consequences because it can serve as a “default notice” and become due automatically where no Interim Certificate is issued. Consequently, the court stated that *“it must be clear that it [the application] is what it purports to be so that the parties know what to do about it and when”* and *“it must be clear and unambiguous that an application relating to a specific due date is being made”*.

The court noted that 29 April was the 18th due date under the contract, so labelling Interim Application for Payment No. 18 as number 18 was indicative of it applying to the 29 April due date, not the 29 May due date.

In addition, Interim Application for Payment No. 18 only valued the works up to 30 April 2015. With this in mind, the court found it difficult to believe that Interim Application for Payment No. 18 was genuinely an application for payment due up to the end of May 2015, as this suggested that Beck was either anticipating doing absolutely no work of value between 30 April 2015 and 29 May 2015 or that it was foregoing any interim entitlement to whatever work it was anticipating doing over those 29 days. Neither scenario seemed likely.

The court did acknowledge that it would have been possible that Beck intended Interim Application for Payment No. 18 to act as the application for the 29 May 2015 due

date, but it did not think this was actually the case. It seemed more likely that Beck had had a *“misguided hope that the 28 April application would be treated as an effective application for the April payment due date”* even though it was six days late. Furthermore, Beck had not explained to the Contract Administrator that Interim Application for Payment No. 18 was submitted too late to be considered for the 29 April due date but should instead be taken as an application in relation to the 29 May due date.

The court therefore decided that Beck’s Interim Application for Payment No. 18 was not a valid application for the purposes of the 29 May due date. It was simply not clear enough that it was intended to be taken as a document specifying the sum Beck considered to be due as at 29 May 2015.

Validity of the Pay Less Notice

After deciding that Interim Application No.18 was not valid for the purposes of the 29 May due date, it was irrelevant whether Henia’s Pay Less Notice was valid. However, the court considered the question anyway.

The Pay Less Notice had been served on time, but Beck had tried to argue that it was invalid on the basis that Henia had effectively challenged and overridden the valuation of the Contract Administrator rather than just making cross-claims or deductions envisaged by the contract.

The court noted that the wording of the contract expressly refers to the Pay Less Notice specifying the sum the Employer considers to be due and *“there is nothing in this wording which suggests that the Employer cannot legitimately challenge either the amount certified by the CA or the amount claimed within the Interim Payment Notice.”* Consequently, the Pay Less Notice can not only raise deductions specifically permitted by the contract and legitimate set-offs, but can also deploy the Employer’s own valuation of the works.

There was therefore no basis to suggest that the Pay Less Notice was invalid.

Analysis

Just like in the recent cases of *Leeds City Council v Waco UK Ltd* and *Caledonian Modular Ltd v Mar City Developments Ltd*, the contractor’s failure in this case to submit its application for payment on the correct date in accordance with the terms of the contract proved fatal to its ability to subsequently make a successful “smash and grab” adjudication claim for payment on the basis of the lack of a valid payment notice.

The ability for a payee to bring a claim for payment of a sum applied for where no valid payment notice or pay less notice has been issued in response to a payment application is an important one, but payees can only take advantage of this right if their applications for payment are submitted correctly. It is essential to ensure that applications are submitted on time to avoid missing out.

This case also demonstrates to paying parties, and those acting on their behalf, the importance of ensuring that payment notices or certificates are issued on time. If the contract administrator in this case had not issued his interim certificate late, the dispute would never have arisen in the first place.

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