



CONSTRUCTION & ENGINEERING BRIEFING

March 2016

In the case of Harding trading as MJ Harding Contractors v Paice and another [2015] EWCA Civ 1231(18 November 2015) the Court of Appeal ("CoA") agreed that despite failing to issue a valid pay less notice and being ordered by an adjudicator to pay sums claimed, an employer can commence further adjudication to challenge the value of a contractor's (final) application.

THE FACTS OF THE CASE

Mr Paice and Mrs Springall ("**Employer**") engaged Harding ("**Contractor**") under a JCT Intermediate Building Contract 2011. The Contractor terminated the contract and submitted his account for the works. A valid pay less notice was not served by the Employer and the Contractor commenced adjudication arguing that as a result he was entitled to the full amount claimed. The adjudicator agreed and this sum was subsequently paid by the Employer. The Contractor then sought an injunction to prevent the Employer commencing a further adjudication for a decision on the value of the contract works. After an injunction was refused by the Technology and Construction Court ("**TCC**") the Contractor appealed this decision.

ISG CONSTRUCTION LTD V SEEVIC COLLEGE ("ISG")

Until the decision by the TCC not to grant an injunction the facts in this case appeared to be

following a similar pattern to those in the earlier case of ISG (albeit ISG was an interim valuation scenario). In ISG, however, a second adjudicator's decision on value was set aside by the TCC on the basis that it related to the same question as previously decided and the adjudicator therefore lacked jurisdiction.

COURT OF APPEAL DECISION

The CoA upheld the decision of the TCC and did not grant the Contractor an injunction. It found that the adjudicator had not previously offered any decision on value, it was the failure to serve a valid pay less notice that resulted in the Employer being obliged to pay the sum claimed and this failure should not permanently deprive the Employer of a right to challenge the Contractor's valuation. The Employer was entitled to commence adjudication to assess the value of the termination account and determine sums due under the building contract.

QUESTIONS

This decision is likely to be welcomed by employers as preventing what is arguably an administrative error resulting in an irreversible windfall payment to a contractor. On analysis, however, there remain some unanswered questions.

Firstly, whilst the decision does not sit harmoniously with the decision in ISG, the CoA did not overrule the earlier case and went so far as to state that nothing in ISG contradicts their conclusion that a different regime should apply in relation to final accounts. Whilst this provides relief for employers, it is questionable whether this could be the intended consequence of the Construction Act, which does not draw a distinction between payment provisions in relation to interim applications and those in relation to final accounts.

Secondly, although it seems likely this judgement would be applicable to all final accounts the judgement deals with the valuation of the works upon termination of the contract and as such it is unclear whether the approach of the courts will be that it also relates to other valuations.

SUMMARY

One thing that is clear is that where a payer fails to issue a valid pay less notice they must pay the sum stated as being due in the default payment notice without the need for the amount payable to be valued. There is now case law suggesting that at a later date an employer can refer a dispute in relation to the valuation of the work to adjudication, however, the extent of the ability to do this is not yet clear.

It should not be forgotten that the decision of an adjudicator is only an interim decision and as such a party will be in a position to refer the dispute to an arbitrator / the courts.

Our advice in relation to payment notices remains constant: it is of paramount importance that employers ensure that both they themselves and those tasked with administering

their contracts fully understand and strictly comply with the payment notices provisions of the contract. The provisions will be interpreted strictly and the consequences of non-compliance may be far reaching.

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