



CONSTRUCTION & ENGINEERING ALERT

September 2015

Interpreting the payment provisions in construction contracts: clarification and guidance provided by the TCC

- To be effective, an application for payment needs to be free from ambiguity. It should state the sum considered due and the relevant due date so that the parties to the contract are left in no doubt as to the period of valuation to which it relates.
- A pay less notice can be used not only to raise deductions and set-offs but can also deploy an employer's own valuation of the works. It can properly challenge either the contract administrator's certificate or any interim payment notice issued by the contractor.

THE CONSTRUCTION ACT

The Housing Grants, Construction and Regeneration Act 1996, as amended by the Local Democracy Economic Development Construction Act 2009, is the single most important piece of legislation affecting the UK construction industry.

The Act, commonly known as the "Construction Act", applies to all contracts for the carrying out of "Construction Operations" which include the construction, alteration, maintenance, repair and demolition or dismantling of buildings.

The payment provisions, which were tightened up in 2011, are a fundamental pillar of the Construction Act and create strict requirements relating to payment under construction contracts.

In the last year there has been a flurry of cases relating to the payment provisions under JCT Contracts, perhaps suggesting that the JCT need to consider whether they could improve the clarity with which the parties' payment obligations and the importance of compliance with such are expressed within their contracts.

Last month, the Technology and Construction Court, a specialist court dealing principally with technology and construction disputes, handed down its judgment in the most recent case in this series, *Henia Investments Inc. v Beck Interiors Limited*.

WHAT HAPPENED

Henia Investments Inc ("**Employer**") engaged Beck Interiors Ltd ("**Contractor**") under an amended JCT Standard Building Contract 2011, with a date for completion of 5 September 2014.

Interim payment due dates were set at 29th of each month (or nearest business day) and the Contractor was entitled to issue an interim application not less than seven days before the due date. The final date for payment was twenty eight days from the due date. Pursuant to the building contract and the Construction Act, the contract administrator was required to issue an interim certificate within the specified time frame of no later than five days from the due date, setting out the sum it considered due to the Contractor. If the Employer wished to issue a pay less notice, this needed to be done no later than three days before the final date for payment.

The works were significantly delayed and on 28 April 2015, six days late, the Contractor issued interim application no. 18, stated as relating to the period up to 30 April 2015. The contract administrator's responding interim certificate was issued one day late, on 6 May 2015. No interim application was issued in May and on 4 June 2015 an interim certificate was issued by the contract administrator, just three minutes outside of the required five day timeframe. This was followed by a timely pay less notice stating that the Employer considered the sum specified in the May interim certificate to be a correct valuation of the works but when off set against liquidated damages for forty weeks delay the sum due to the Contractor was £0.

THE COURT'S DECISION

The first question asked of the Court was whether the late application no. 18 could constitute a valid interim payment notice in respect of the May due date. Several considerations were provided by the Court for its answering 'no' to this question, including the fact that the works were stated as being valued up to the 30th April meaning that relating it to the May due date would exclude the next twenty nine days of work.

The Court stated that to be effective, an application for payment needs to be "*free from ambiguity...stating the sum considered by the Contractor as due as at the relevant due date*" with the effect that the parties to the contract "*know what to do about it and when*".

The next issue the Court was asked to consider was whether the pay less notice was valid and effective. Whilst acknowledging that in this instance, as a result of the total breakdown in the certification machinery this issue became superfluous, the Court helpfully discussed whether a pay less notice generally can properly challenge either the contract administrator's certificate or an interim payment notice. It answered 'yes' to this question for various reasons including that as a matter of commercial common sense an employer may wish to disagree with the independent valuation of the contract administrator.

It gave clear guidance that a "*Pay Less Notice can not only raise deductions specifically permitted by the Contract and legitimate set-offs but also deploy the Employer's own valuation of the Works*".

Finally, the Court was asked whether a failure on the part of the contract administrator to make a decision in respect of the Contractor's application for an extension of time would render the non-completion certificate invalid or prevent the Employer from levying liquidated damages. Whilst acknowledging that as a result of changed circumstances any comment provided would be *obiter*, the Court's opinion again favoured the Employer and it stated that the contract administrator's failure in this respect would not prevent liquidated damages being claimed and/or deducted.

SUMMARY

This case not only provides clear guidance in relation to the specific issues under consideration but reinforces the spate of recent cases which have highlighted the importance of complying with payment provisions and adhering to requisite timelines for payment in construction contracts.

Earlier this year in *ISG Construction Ltd v Seevic College* ([see our previous alert](#)) the TCC held that under a JCT Design and Build 2011 contract in the absence of a valid payment notice or pay less notice the employer was taken to have agreed the value stated in the valid contractor's application and this sum became due. The contractor's application can therefore take on a crucial role and in light of this it is important that the application itself is clear and unambiguous regarding the amount it considers due and the due date to which the application relates. *Henia Investment Inc v Beck Interiors Ltd* specifies that if this criteria is not met the application for payment will not be effective and no payment will be due from the employer.

Whilst employers will welcome the fact that this ruling clarifies the function of a pay less notice and confirms this can provide a second chance to value the works, the general guidance given in relation to administering the payment terms and the tone of the judgment is equally important to anyone working under or administering building contracts.

The case once again highlights the importance of employers ensuring that both they themselves and those tasked with executing the payment provisions of a construction contract fully understand the requirements of such provisions and the implications of non-compliance. The provisions of the Construction Act and the relevant construction contract will be interpreted strictly and must be complied with.

The Construction Act will be 20 years old next year, yet the succession of cases heard by the TCC during the last year illustrates clearly that parties are still struggling with interpreting its provisions, especially where payment is concerned.

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