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Be careful what you wish for, lest it becomes true

The effect of the payment provisions under the Local Democracy, Economic Development and Construction Act 2009

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Pay more or pay less, but remember the boot might be on the other foot on your next project

Do you remember the good old days when a payment notice did not really mean anything at all? If you provided one, all well and good, but if you did not and a dispute arose about the valuation of the works, the appointed adjudicator would normally say, in effect, 'I am not interested in bits of a paper, I want to establish the amount due, and that does not depend upon payment notices'.

There was an undercurrent of feeling that things needed to change, because if (in most cases) the lack of a payment notice did not have any real effect, then what was the point of having one at all! Consequently, certain pressure groups pushed for a change in the effectiveness of payment notices; they wished for a payee's payment notice to have a binding and conclusive effect. In reality, by the time that the pressure groups got to work, everyone had got used to the payment procedure under the old construction act (the *Housing Grants, Construction and Regeneration Act* 1996), everyone knew how they worked, and everyone could live with it. It was far from perfect, but its operation rarely resulted in a manifest injustice and it was better the devil you know, rather than the devil you don't.

There had been complaints in the early days. There had been thoughts that if there had been no payment notice and/or withholding notice, the amount that had been applied for was the amount that needed to be paid. Through some judicial interpretation of the law by the courts (for example the Scottish case of *SL Timber Systems Ltd v Carillion Construction Ltd* (2001) 1 BLR 516 and the Court of Appeal case of *Rupert Morgan Building Services (LLC) Ltd v Jervis* (2003) EWCA Civ 1563) it eventually became apparent to parties that (in most cases) if there was a dispute as to value, an appointed adjudicator had the jurisdiction to decide upon the amount actually due, and was not limited to the amount that had been applied for, or the amount stated on a payment or withholding notice.

Therefore, whilst there may have been concerns in the early days of the effect (or the lack of effect) of a payment notice, these concerns gradually subsided over time and had, in practice at least, been pushed well into the background by the time that the new construction act (the *Local Democracy, Economic Development and Regeneration Act* 2009) came into force in England on 1 October 2011.

However, with the new construction act, the world in respect of payment provisions changed completely. Now a payment notice (whether that was a payer's or a payee's payment notice) was king; a king that could only be trumped by a valid and timeous pay less notice. If it was not trumped in this way, then the notified sum stated on the applicable payment notice was the amount that was to be paid.

Before too long, disputes started arising regarding payment, and when it was apparent to people that the payment notice was king, as set out above, minds needed to be applied to see how the effect of a default payee's payment notice could be counteracted. The solution that was found was that if you were caught in the

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default payment notice trap, and therefore were obliged to pay the notified sum (and if you had not already trumped the payment notice with a pay less notice), then what you needed to do was start your own adjudication at the same time as the one that had been commenced against you in respect of an unchallenged payment notice. You had to ask the adjudicator in the adjudication that you had commenced to declare the true value due by an analysis of the account (rather than simply confirm what the notified sum due was arising from the payment notice).

The idea of this approach was that the first adjudicator would have to simply decide what the notified sum was (as stated on the payment notice) whereas the second adjudicator could declare the true value applicable (which the interested party naturally hoped would be considerably less than the notified sum). It would be that true value declaration that would be used to counteract the notified sum decision in any ensuing enforcement proceedings.

There were some murmurs of unrest about this potential approach, along the lines of ‘but surely if the notified sum is the amount due to be paid, another adjudicator must find that the amount due to be paid must be the notified sum’. However, by and large, these murmurs of unrest were pushed to one side.

With the above in mind, a new normality came into existence. Parties were reluctant to use the option of commencing an adjudication on the basis of an unchallenged notified sum arising from a default payment notice, because they were concerned they would just get drawn into a parallel adjudication dealing with the true amount due. Therefore things

in effect settled back down into a sort of status quo.

However, this approach of letting sleeping dogs lie was thrown into chaos by the *ISG Construction Ltd v Seevic College* (2014) EWHC 4007 (TCC) case. In that case, ISG had commenced an adjudication (no. 1) seeking payment of the amount set out in its payment application which had become the payee's default payment notice. The adjudicator duly decided that the notified sum stated on ISG's payment application was the amount to be paid.

To counteract this, Seevic College simply started its own adjudication (no. 2) to ask the second adjudicator (who, in reality, turned out to be the same person as the first adjudicator) to declare by an analysis of the account the actual amount due in respect of ISG's payment application. The second adjudicator did this and found that the amount due, through an analysis of the account, was much less than the amount due arising from the notified sum. However, at this point, ISG called foul on the basis that the dispute about the payment to be made in respect of its payment application had already been decided in adjudication no. 1 and therefore could not be decided again in adjudication no. 2 — since this would be the same as deciding the same dispute twice, something that is not permitted in adjudications.

This point of principle was referred to the Technology and Construction Court and Edwards-Stuart J heard the case and agreed with ISG. He said in his judgment that the statutory regime for payment would be completely undermined if a payer, having failed to issue the necessary payment or pay less notice, could refer to adjudication the question of the value of the payee's work at the time of the application and then seek a decision requiring either a payment to the payer or a repayment from the payee based on the difference between the value of the work as determined by an adjudicator and the sums already paid under the contract.

'Hurrah!' cried out all payees, this must be right, let there be rejoicings — that is until it slowly dawned on them that at some time in the future they may not be the payee but the payer, and the boot would be on the other foot. But that would not be a problem, they thought, because all you need to do is to get a valid pay less notice in on time and then the payee's payment notice will be trumped anyway.

However, to get a pay less notice in on time you need to know the final date for payment and, in many cases (particularly after practical completion has been achieved), this may mean reverting to the payment rules under the scheme and then trying to work out the payment due date and the final date for payment applicable from first principles, maybe a year or more after the practical completion date. Alternatively, even if the contract applies, words like 'during the period up to and including the month following practical completion of the main contract works, the due date shall be the same date in each month as that for the first payment and thereafter the same date at intervals of two months (unless otherwise agreed)' can be confusing on the first (and even the second) reading. It is obviously critically important that you get the date right, and the above situation does not help.

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Added to this is the position that a pay less notice is required to specify the sum considered to be due 'at the date the notice is given', but does this mean it is the amount due calculated at the date of the notice, or is it the amount due calculated at the payment due date on the basis that a payment is only due at one time in any payment cycle? Now the payer (who do not forget was at one time a payee) really is feeling the pressure to get the date right or suffer the dire consequences of being wrong. But this is what the payees asked for, and there is no going back. Pandora's box has been well and truly opened, for now at least.

In the *Galliford Try Building Ltd v Estura Ltd* (2015) EWHC 412 (TCC) case, Edwards-Stuart J, in what he described as being an exceptional case, made clear that there is nothing to prevent a payer challenging the value of the work in a subsequent application (which would only really be of assistance if a clause in the contract permitted repayments to be made, which is not always the case), and he also granted a stay of part of the judgment sum on the circumstances of that case, including the apparent impecuniosity of Estura Ltd.

In reality, none of these factors are likely to have any effect upon a party presently involved in adjudication proceedings. Therefore, as they say, we are where we are, but is that really where we want to be? Maybe so, maybe not, but the moral of the story is that you need to be careful what you wish for, lest those wishes may come true.

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