

Payment Application and Pay Less Notice: the *Henia* Case

By Peter Sheridan

As noted in previous articles recently, payment notices have increased practical importance since the amendments to the Housing Grants, Construction and Regeneration Act 1996 (the HGCR Act) brought in by the Local Democracy, Economic Development and Construction Act 2009 (the LDED Act). If the employer fails to issue either a valid payment notice or a valid pay less notice, the contractor is entitled to be paid the sum for which it applies.

Again as we have seen in previous articles, adjudicators have tended to take a lax approach to the validity of the contractor's payment notice and have readily found contractors entitled to sums applied for on the basis of questionably alleged payment notices, whereas the courts have made it clear that it must first be investigated whether the payment notice relied on is valid: see *Leeds City Council v Waco UK Ltd* (2015) and *Caledonian Modular v Mar City Developments* (2015). It is important that these notices are valid, as they have potentially severe financial consequences if not acted upon correctly; it is therefore vital that they are clearly recognisable as payment notices.

In the most recent case, *Henia Investments Inc v Beck Interiors Ltd* (2015), the judge set out some fairly stringent requirements for these notices. Beck Interiors was carrying out extensive fitting out work for Henia under a JCT contract. Akenhead J stated that a document relied on as an interim application must be in substance, form and intent an interim application stating the sum considered by the contractor to be due at the relevant due date and it must be free from ambiguity. It must be clear that it is what it purports to be so that the parties know what to do about it and when. It must be clear and unambiguous that an application relating to a specific due date is being made. On the facts of this case, Beck Interiors' application for interim payment of 28 April 2015 was held not to be an effective interim payment notice in respect of the 29 May payment due date.

A second issue concerned a pay less notice from Henia. Akenhead J made the point that a pay less notice can validly be used by the employer to challenge the independent certifier's certified amount (as well as any payment application from the contractor). A pay less notice can be used both to challenge these amounts and to take account of any amounts to be set off. This was the position under both the statutory provisions and the JCT contract. The regime under the HGCR Act before amendment by the LDED Act was that a withholding notice was only for set-off and any certified amount had to be paid in the absence of a valid withholding notice (see the Court of Appeal decision in *Rupert Morgan* (2003)). The certified amount could only be reviewed in adjudication, arbitration or court.

The *Henia* analysis does mean that in cases where the employer challenges the certified amount, the contractor may find out only very shortly before the final date for payment that the sum to be received is less than expected by reason of a change in the valuation, by the employer, from that certified. If dissatisfied, the contractor in these circumstances may adjudicate or follow some other dispute

Sheridan Gold LLP

Authorised and regulated by the Solicitors Regulation Authority. Sheridan Gold LLP is a limited liability partnership registered in England and Wales, registered number OC351316.

[E info@sheridangold.co.uk](mailto:info@sheridangold.co.uk) | [W www.sheridangold.co.uk](http://www.sheridangold.co.uk)

resolution route. This may be a relatively rare occurrence, as employers are generally content with the certified amount. It does in any event seem to the writer that the judge is correct that the legislation allows an employer to challenge the certified amount in a pay less notice: see s. 111(1), (3), (4) and (6), under which the notified amount that has to be paid is the amount the employer specifies in the pay less notice he considers is due. Whether the legislation was right to put the matter so broadly rather than limiting s.111 to set-off is a separate policy question.

The pay less notice thus determines provisionally what sum is to be paid net of set-off. In the *Henia* case, Henia's pay less notice did not in fact challenge the certified amount but accepted it and set off liquidated damages, with the effect that the certified amount was reduced to £0.

The pay less notice was provided in time and was held to be valid and effective.

Peter Sheridan

psheridan@sheridangold.co.uk