

Payment Notices and Successive Adjudications: A Final Account Case

By Peter Sheridan

As previously discussed, the sum due as an interim payment to a contractor is normally the sum that results from the employer's payment notice and pay less notice, if any. But 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.

In *ISG Construction Ltd v Seevic College* (2014) and *Galliford Try Building Ltd v Estura Ltd* (2015), Edwards-Stuart J decided that, where an adjudicator decides that the amount of interim payment is fixed by the contractor's application, the employer having failed to issue a payment notice or pay less notice, the amount applied for is deemed to be agreed and is also deemed to be the correct valuation. It is not permissible to have a second adjudication, on the correct valuation in accordance with the contractual rules for valuation.

Again as previously discussed, the Court of Appeal decided in *Harding v Paice* (2015), in relation to the final payment following termination (not interim payment, as in *ISG* and *Galliford Try*), that there could be a second adjudication on the correct valuation, after a first adjudication decided purely on notices. The writer noted at the time that the approach taken in *Harding v Paice* would be likely to be taken in any final account case (not just where there is termination).

That issue has now been addressed by a Technology and Construction Court judge in the recent case, *Kilker Projects Ltd v Purton* (2016). The dispute concerned a final account, and there was a first adjudication, decided in favour of the contractor purely on the basis of notices, *i.e.* the contractor was entitled to the sum applied for in the absence of a payment notice or pay less notice. The amount of the final account was therefore decided without regard to the correct valuation on the basis of the valuation rules in the parties' contract.

It was held that an adjudicator who decided in a second adjudication that a sum was due back to the employer, on the basis of a decision as to the correct valuation, did have jurisdiction to do so, as the dispute as to the correct valuation was not the same or substantially the same as the dispute decided in the first adjudication.

The judge in the *Kilker* case accepted uncritically the position concerning interim payment as stated in *ISG* and *Galliford Try*. The judge was therefore driven to the view that the position is different for final payment from the position for interim payment. The judge's view is thus that there cannot be a second adjudication on the correct valuation in respect of an interim payment, but there can in respect of a final payment. The latter point (and, therefore, the result in *Kilker*) is, in the writer's view, correct and supported by authority in the shape of *Harding v Paice*. The position is less certain for interim payment, as the writer remains doubtful that *ISG* and *Galliford Try* are correctly decided. It may be that the Court of Appeal will have an opportunity to consider that at some point in the future.



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