Holding back the waves

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Laurence Cobb looks at two recent cases that illustrate the issue of payment notices

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The issue of payment notices continues to be prominent. In the wise words of CoulsonJ in the recent case of Caledonian Modular Ltd v Mar City Developments Ltd [2015]EWHC 1855 (TCC) :

> 'One of the more baleful effects of the amendments of the 1996[Housing Grants, Construction and Regeneration] Act has been a large increase in thenumber of cases before adjudicators (and thus before the Technology and Construction Court (TCC)) in which the claimant contractor argues that there was an automatic right to payment in full of the sum claimed.'

In *Caledonian* and also in the recent case Henia Investments Inc v Beck Interiors Ltd [2015] EWHC 2433 (TCC) the court has looked at the thorny issue of pay less notices and provided more guidance. In both cases, it was found that there had been an attempt to argue a failure by the potential payer to prevent payment being due.

Payment notice date

In *Caledonian*, Mar City engaged Caledonian to carry out works on a letter of intent, which was agreed by the parties to be a construction contract. The argument centred around the date a payment notice was validly submitted, a crucial issue because this would determine whether an adjudication decision could be enforced. Generally, thecourt will not look at an issue ruled on by an adjudicator, but in this case the issue was short and self-contained and required no oral evidence.

In summary, Coulson J found that the papers claimed to have been submitted by Caledonian as a payment notice did not constitute a valid payment application, beingdescribed as a ?final account application summary? and an ?updated account?. Further,Caledonian?s previous 15 interim applications were clearly stated as applicationsfor payment, unlike the one being considered.

It was a mockery of the notice provisions to provide for a scenario where an interim application was submitted, correctly challenged by a valid pay less notice, and then allow a claiming party to add a small variation, resubmit another application and hope that this would be ignored or not challenged in time, thus giving the claiming party apotential windfall.

The *Caledonian* case certainly emphasises the need for a claiming party to describe its submissions and their nature clearly, and as usual Coulson J applied ahealthy dose of good sense to this area of great concern to the industry. But suchinterventions on the facts are rare and not to be relied on as a lifeboat to those in trouble with their notice procedures.

Timing

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The *Henia Investments* case also addressed the timing of payment and pay less notices.

It was found that neither parties had followed the contractual requirements ofthe payment regime under the contract. Interim application 18 was issued six days lateand both interim certificates 18 and 19 were issued late. Nor was it clear to which dateinterim application 18 related.

The court said that it was crucial that any interim application must be clearlyidentifiable as such to avoid ambiguity. Interim application 18 was not ?freefrom substantial ambiguity? because it was unclear whether it applied to the Aprilor May due date, and was therefore invalid.

The case further looked at the ability of the client to serve a potentially valid payless notice if it disagreed with the view of the contract dministrator. It was foundthat on the facts of the case the employer could have issued the pay less notice insuch circumstances, raising the question as to whether a contract administrator,knowing that the client disagrees with its certificate, should point out that it has theoption to serve its own pay less notice.

If we look at the Caledonian and Henia cases, it can be suggested that this showsa trend by the courts to address potential smash and grab adjudications by claiming parties where technical breaches of payment procedures may not reflect what is due on themerits of the case.

Whether or not that is the case, and however welcome such an approach may be to those managing projects, unless those in control of client purse strings take the greatest care in administering the payment processes and regimes under construction contracts, the courts for all their efforts to deliver good sense, may have similar success to King Canute in keeping the tide back when it comes to windfall claims.

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Further information

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