

What's going on with Pay Less Notices?

Is the position clear following *Henia v Beck*?

David Pliener

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Pay Less Notices: Formalities

- ▶ **Section 111(3) HGCRA:** Payer's intention to pay less than the notified sum
- ▶ **Formalities: Section 111(4) HGCRA**
 - Content:
 - Sum the payer considers to be due on date notice is served; and
 - the basis on which that sum is calculated.
 - Timing:
 - Provisions of contract; or
 - **Paragraph 10 of the Scheme:** not later than seven days before the final date for payment.

Pay Less Notices: Case Law

- ▶ ***Henia Investments Inc v Beck Interiors Ltd*** [2015] EWHC 2433 (TCC);
[2015] B.L.R. 704; 161 Con. L.R. 51; [2015] C.I.L.L. 3727

Henia v Beck [2015] EWHC 2433 (TCC)

- ▶ **JCT SBC/XQ 2011** (as amended)
- ▶ Payment due dates **29th** each month: **clause 4.9.1**
- ▶ Interim Application ***“not less than 7 days”*** before due date: **clause 4.11.1**
- ▶ Interim Certificate ***“not later than 5 days”*** after due date: **clause 4.10.1**
- ▶ Final date for payment **28 days** from due date: **clause 4.12.1**
- ▶ Pay Less Notice ***“not later than three days before”*** the final payment dates: **clause 4.12.5**

Henia v Beck: Factual Matrix

- ▶ **Payment due date: 29 May 2015**
- ▶ (Invalid) contractor application **28 April 2015**

- ▶ Pay Less Notice dated 17 June 2015
 - **Valuation** in (late) Interim Certificate No.19
 - Deducted LADs

Henia v Beck: Can you revalue claim in PLN?

- ▶ *“...intends to pay less than the sum stated in the Interim Certificate or Interim Payment Notice”*
- ▶ *“...notice of the payer’s intention to pay less than the notified sum”*

Henia v Beck: Validity of Pay Less Notice

- ▶ Akenhead J:
 - Nothing in wording to suggest limited scope of Pay Less Notice.
 - Nothing commercially illogical about it.
 - Allows Employer to challenge the independent certifier.

- ▶ *“...the 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” [32]*

Henia v Beck: Validity of Pay Less Notice

- ▶ Renders Payment Notice irrelevant
- ▶ Ignores fact that contractor's valuation carries no weight
- ▶ Does it apply even if employer issues Payment Notice?
- ▶ Parties have agreed on independent valuation process
- ▶ Leaves contractor in the dark until verge of final payment date

The Right Decision?

“If a payee only has two days notice of what is being paid, this may not give him enough time to ascertain if he agrees with the payment offered and raise any queries with the payer. It also means that he can only refer the matter to adjudication if the amount is disputed towards the end of the payment process – which will delay the opportunity to receive money even further.”

Consultation Report, 2006

Jawaby Property Investment v The Interiors Group

- ▶ No Payment Application

- ▶ Was there a valid Pay Less Notice?
 - JPIL argued, if 7 Jan TIG email enough for Payment Application, then 18 Jan email from JPIL enough for Pay Less Notice.

 - Unsurprisingly, Carr J equally unimpressed.

Jawaby Property Investment v The Interiors Group

- ▶ *“It is an essential requirement for the service of a contractual notice that the sender has the requisite intention to serve it. The senders’ intention is a matter to be assessed objectively taking into account the context.” [63]*
- ▶ *Objectively constructed, the 18th January email was intended...to provide APS’ mark-up of the Valuation, which both parties were aware was not a Payment Certificate...Equally, the required breakdown of the Payment Certificate cannot have been intended to be also a Pay Less Notice. They are, as TIG points out, different documents under different clauses with different effects.” [64]*

Jawaby Property Investment v The Interiors Group

- ▶ *“In this context, it is highly significant that the form of the 18th January email is completely different to the Pay Less notices that were served previously on behalf of JPIL.” [66]*
- ▶ Also, *Henia* spoke about need for Interim Application to be “... *in substance, form and intent an Interim Application...and it must be free from ambiguity*”

So, what's going on with Pay Less Notices?

- ▶ *Henia* says Pay Less Notices can revalue.
- ▶ *Obiter*, but bound to be persuasive.
- ▶ Arguably limited to where Contract Administrator involved?
- ▶ Unlikely can rely on late Payment Notice as valid Pay Less Notice?

Thank you!

Any Questions?

David Pliener

+44 (0)20 7242 2523

david.pliener@hardwicke.co.uk

www.hardwicke.co.uk/people/pliener-david