

Without clear guidance from the Court as to what you should or should not state, in grey area cases, what tips the balance between a valid and invalid payment notice?

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# Agenda

Statutory framework

Why does it matter?

Smash and Grab

Smash and Grab revisited?

What have the Courts told us?

My top tips

Questions

# Statutory framework

Housing Grants  
Construction &  
Regeneration Act  
1996



Part 8 Local  
Democracy,  
Economic  
Development and  
Construction Act  
2009  
(in force 2011)

# Statutory framework

- Application for payment
- Payment Notice – s 110A of Act.
- Payer's 'Pay Less' Notice – s111 of Act
- Notice must include
  - Sum considered due
  - Basis of calculation
- Final Date for Payment. Must pay notified sum by Final Date for Payment (subject to valid Pay Less Notice)

## Statutory framework

- Note: s110 B: *“This section applies in a case where, in relation to any payment provided for by a construction contract-*
  - (a) the contract requires the payer or a specified person to give the payee a notice complying with section 110A(2) not later than five days after the payment due date, but*
  - (b) notice is not given as so required.”*

# My starting thought

- Mr Justice Akenhead
- *“There is no doubt that the failure on the part of the CA to issue an Interim Certificate on time, which leads to the sum due for that period being effectively deemed to be that which was applied for by the Contractor, has spawned a large amount of litigation both on adjudication enforcement claims as well as in Part 8 proceedings.”*

# The consequence: Smash and Grab adjudications



**Matthew Harding  
(Trading as M J Harding  
Contractors) v Gary  
George Leslie Paice, Kim  
Springall [2015] EWCA  
Civ 1231**

**Galliford Try  
Building Ltd v  
Estura Ltd [2015]  
EWHC 412 (TCC)**

**ISG Construction Ltd  
v Seevic College  
[2014] EWHC 4007  
(TCC)**

What next?

# ISG Construction Ltd v Seevic College [2014] EWHC 4007 (TCC)

No Payment or Pay Less Notices

Adjudication no. 1; ISG entitled to circa £1m (application 13)

Notice of Adjudication no. 2 served 4 days before decision in Adjudication no. 1

Adjudication no. 2 decided true value of works was circa £300 (application 13)

ISG should repay the difference

# ISG Construction Ltd v Seevic College [2014] EWHC 4007 (TCC)

- Mr Justice Edwards-Stuart
- *“if the employer fails to serve any notices in time it must be taken to be agreeing the value stated in the application, right or wrong. In my judgment, therefore, in that situation the first adjudicator must be in principle taken to have decided the question of the value of the work carried out by the contractor for the purposes of the interim application in question.”*

# ISG Construction Ltd v Seevic College [2014] EWHC 4007 (TCC)

# Smash and Grab

- What about at final account stage?

Matthew Harding (Trading as M J Harding Contractors) v Gary George Leslie Paice, Kim Springall [2015] EWCA Civ 1231

- Court of Appeal
- Contract was terminated
- Contractor issued application for its final account
- Adjudication determined failure to issue Pay Less Notice – so entire sum due
- Employer paid
- Employer sought to start new adjudication on **value** of final account

Matthew Harding (Trading as M J Harding Contractors) v Gary George Leslie Paice, Kim Springall [2015] EWCA Civ 1231

*“the employer’s failure to serve a Pay Less notice (as held by the previous adjudicator) had **limited consequences**. It meant that the employer had to pay the full amount shown on the contractor’s account and argue about the figures later. The employer duly paid that sum...The employer is now entitled to proceed to adjudication in order to determine the correct value of the contractor’s claims and the employer’s counter claims.”*



# Adam Architecture Ltd v Halsbury Homes Ltd [2017] EWCA Civ 1735

- Court of Appeal decision
- Is a Pay Less Notice needed for:
  - Interim payments?
  - On termination of a contract?
  - Final payment due following completion of the works?

# Adam Architecture Ltd v Halsbury Homes Ltd [2017] EWCA

Civ 1735

Court of First Instance

Court of Appeal

- Employer was not liable to pay an invoice which architects had issued at the termination of engagements
- Employer did not need to serve Pay Less Notice because contract had been discharged and invoice was final account

# Adam Architecture Ltd v Halsbury Homes Ltd [2017] EWCA Civ 1735

- Section 111: applies to both interim and final applications for payment
- Section 111: applies to all payments which were “provided for by a construction contract”
- Consistent with earlier decisions: *Rupert Morgan Building Services (LLC) Ltd v Jervis [2003] EWCA Civ 1563* and *Harding (t/a MJ Harding Contractors) v Paice and another [2015] EWCA Civ 1231*

## Is ISG v Seevic still good law?

- Imperial Chemical Industries Ltd v Merit Merrell Technology Limited [2017] EWHC 1763 (TCC)
- ~~Smash and grab~~ “*phrase has clearly pejorative overtones*”.
- Fraser J reviewed ISG v Seevic and subsequent cases and said that they “*cast some real doubt on whether [ISG] would be decided in the same way now*”
- Did he go far enough?
- He did not say it was wrongly decided.

# Applications for Payment

# Henia Investments Inc v Beck Interiors Ltd [2015] EWHC 2433 (TCC)

## Henia Investments Inc v Beck Interiors Ltd [2015] EWHC 2433 (TCC)

- Employer did not have to pay out because:
  - Application for payment was invalid
  - Even if application was valid, the CA had issued a Pay Less Notice (no Payment Notice) on time.
  - *“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”*

# Muir Construction Ltd v Kapital Residential Ltd [2017] CSOH 132

- Kapital entered into contract with Muir
- 4.10.2 of the contract Pay Less Notice: “*shall specify both the sum that he considers to be due to the Contractor on the date the notice is given and the basis on which that sum has been calculated*”.
- Pay Less Notice: 21 December 2016

# Muir Construction Ltd v Kapital Residential Ltd [2017] CSOH 132

## Pay Less Notice =

- A formal letter +
- The Pay Less Notice itself +
- A note of outstanding snagging items  
+
- An opinion from a chartered architect

# Muir Construction Ltd v Kapital Residential Ltd [2017] CSOH 132

*“the extent of detail necessary for the notice to be valid depended on the circumstances of each case. Whereas here the retention amount is small and a very large amount of work is necessary for defects to be remedied it is enough for the defender to say the remedying of the defects will require a sum well in excess of the retention sum.”*

# Muir Construction Ltd v Kapital Residential Ltd [2017] CSOH

132:

## THE ENDING

- The judge held that a reasonable recipient could not work out from the information provided the basis on which the zero sum was calculated. There was no:
  - calculation which would allow reasonable recipient to understand how the zero figure was arrived at;
  - specification which would allow the reasonable recipient to make sense of figure arrived at; or
  - figures put forward.

## So the question?

- Without clear guidance from the Court as to what you should or should not state, in grey area cases, what tips the balance between a valid and invalid payment notice?

## Tips for Notices: Top Tips

- Set out sum due
- Set out basis on which that sum is calculated
- Clear and free from ambiguity

## Tips for Notices: Practical Advice

- Get your numbers right BUT also get the numbering right
- If sum due is zero – you still need to show how sum due is calculated
- Serve **ON TIME**
- Serve in accordance with contract
- Risk if you depart from previous practice
- Check whether application was valid – issue without prejudice to primary argument?

# Q&A

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