Final account applications – the importance of the payer notice

Professor Rudi Klein Barrister reviews more cases on the topic of payment and focuses on the legalities of final account applications.

The setting for the case of Kilker Projects Ltd (Kilker) v Rob Purton t/a Richmond Interiors (Purton) was the palatial splendour of the Dorchester Hotel in Park Lane, London. Purton had entered into an oral, or word of mouth, contract with Kilker for specialist joinery works at the hotel. It should be noted that this was an oral contract for works (including variations) that were ultimately valued at almost £800,000. The dispute between the parties was about the sums due in respect of the final account.

The facts

Purton had submitted its final account application to Kilker. Kilker had not responded with either a valid payment notice or pay less notice, as is required by the Housing Grants, Construction and Regeneration Act 1996 (the Construction Act). Following Kilker's failure to pay the amount applied for, Purton referred the matter to adjudication. In the absence of valid payment notices and/or pay less notices, the adjudicator decided – in accordance with the amended Construction Act – that the amount applied for had to be paid by Kilker. Kilker duly paid £147,223.00 plus the adjudicator's fees and expenses.

But Kilker did not leave things there. It felt that it had overpaid Purton. It then launched its own adjudication with the aim of establishing the true value of the final account and securing repayment of any overpaid sums. The adjudicator granted a declaration that the true value of the final account was £745,709 and that Purton would have to repay £55,676 plus VAT. Purton didn't pay and Kilker issued proceedings to enforce the decision.

The arguments in court

Kilker's position was that the statutory payment notice procedure was primarily concerned with improving cashflow. But it was not aimed at deciding contractual entitlement to payment on a conclusive basis. It could go to adjudication at the end of the job to obtain a decision on the other party's proper entitlement under the contract.

Purton's defence was that Kilker's failure to issue a payment notice and/or a pay less notice meant that Kilker had, in effect, agreed the valuation for that payment cycle and must therefore pay the application in full. Such agreed valuation could not be re-opened in a subsequent adjudication, although it could be challenged by Kilker in any subsequent litigation or arbitration.

Purton was relying upon passages in a judgement of one of the earlier cases on payment notices, ISG Construction Ltd v Seevic College in 2014. In that case, the judge held that in the absence of any payment notices, the amount in the contractor's application is deemed to be the value of the works included within the application and the sum applied for must be paid, and that if the payer fails to serve any notices in time it must be assumed that it has agreed the amount applied for, right or wrong.

Therefore, the first adjudicator must have decided the value of the work included in the application.

In a later case (Galliford Try Building v Estura Ltd), the same judge decided to clarify his position. A paying party can challenge the value of work by, if necessary, revising it downwards following the next application. In the 2015 case of Matthew Harding t/a MJ Harding Contractors v Paice, the Court of Appeal decided that a payer could determine in adjudication the valuation of the final account following termination of the contract (despite the fact that there was an earlier adjudication in which the adjudicator ordered payment of the contractor's application because of failure by the payer to serve a valid pay less notice).

The judge's decision

The judge confirmed that the statutory payment provisions do not affect the ultimate value of the contract sum that the parties have agreed as the price for the work and/or services to be provided. The judge stated: "They are concerned only with cashflow and not the contract sum." The first adjudication determined that the application had to be paid in the absence of any payment notice. Kilker had to pay the full amount in the application. But that adjudication was not about determining the proper value of the final account. In this case, therefore, the adjudicator had jurisdiction or the power to determine the dispute and his decision should be enforced.

Conclusion

This case reinforces the message emerging from other payment cases that failure by a payer to issue valid payment and/or pay less notices means that the amount applied for must be paid (providing the application is issued in accordance with the contract and sets out the sum due and the basis on which it is calculated). If the payer believes that an overpayment has been made this can be rectified in subsequent payment cycles. As far as final account applications are concerned then, the payer has the right (subject to anything in the contract to the contrary) to refer any disputes for the valuation of the final account to adjudication.

Subcontractor liability for acts and omissions

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Kara Price, a lawyer within Bond Dickinson's specialist construction team, reviews a recent judgement which is very topical for subcontractors.
Main contractor Willmott Dixon Construction Ltd (Willmott Dixon) appointed Robert West Consulting Ltd (Robert West) to design the underpinning of a shared gable wall. Willmott Dixon subcontracted the underpinning itself to Toureen Contractors Ltd (Toureen).

The party wall allegedly suffered damage as a result of the underpinning. Willmott Dixon brought a claim against Robert West, alleging Robert West's design had been defective, causing delay and loss. One of Robert West's defences was that the damage had partially been caused by Willmott Dixon's contributory negligence, on the basis that Toureen had been negligent.

The general rule of contributory negligence is that a main contractor is not liable for the negligence of its independent subcontractors except where:

1. the main contractor has actual knowledge that the subcontractor's work has been done in a foreseeably dangerous way and condones it; and
2. the main contractor owes a "non-delegable duty", i.e. a duty to procure the careful performance of the works by its subcontractor which it cannot delegate to anyone else.

Robert West initially based its defence on the first exception; however, it later applied to the court to amend its defence alleging that Willmott Dixon was vicariously liable for Toureen's alleged negligence.

The court held that Robert West's arguments had no prospect of success because:

- vicarious liability does not extend to independent subcontractors; and
- the question really was whether Willmott Dixon owed a "non-del egable duty" to Robert West. The court also rejected Robert West's arguments in this respect.

The case is a good reminder of when a main contractor will, and will not, be liable for the acts and omissions of its subcontractors. Of course, it is possible to avoid such uncertainty through the contract – for example, by including a clause stating that the main contractor is liable for all acts and omissions of its subcontractors.

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FIND OUT MORE
kara.price@bonddickinson.com
0191 230 8860