

Ground-breaking case on payment claims: second adjudication on valuation permissible for final payments

Mrs Justice O’Farrell has clarified the position in respect of second ‘valuation’ adjudications, where a first adjudication has determined the sum payable for the final account based on the payment notice regime under the Housing Grants, Construction and Regeneration Act 1996. **Alexander Hickey QC** represented the successful Claimant.

Kilker Projects Ltd v Purton [2016] 14 October 2016 (TCC)

In *ISG Construction Ltd v Seevic College* [2014] EWHC 4007 (TCC) it had been held that a party who fails to give a payment notice or payless notice is deemed to agree the valuation for the purposes of that interim payment and must pay the notified sum. That party is not entitled to adjudicate upon the valuation of the interim payment.

For the past few months the construction industry has debated whether, despite the Court of Appeal’s judgment in *Harding v Paice* [2015] EWCA Civ 1231, the *ISG* principle as regards interim payments would apply equally to final payments under the Scheme where there has been no payment notice or payless notice.

The Act and the Scheme makes no distinction between interim and final payments. Some had argued that the Court of Appeal in *Harding v Paice* ducked the question as to whether *ISG* was good law; Jackson LJ suggested that contract terms for final accounts are different from interim payments but many were unconvinced that this was correct, particularly where payments under the Scheme were concerned. Some considered that *Harding v Paice* was limited to a termination final account so that *ISG* would apply to final payments.

In this important judgment in *Kilker Projects Ltd v Purton* [2016] (14 October 2016) Mrs Justice O’Farrell has decided that a party can adjudicate the valuation of a final payment under the Scheme even though there was no payment notice, and that there is a difference between final payment and interim payments. The Judge decided that a party who had lost a previous adjudication for want of a payment notice and had paid the notified sum (being the final account claimed by the contractor) was nonetheless entitled, having paid, to adjudicate the substantive valuation of the final payment and re-claim its money back.



Kilker, the main contractor, employed Purton, a joinery subcontractor, to carry out works at the Dorchester Hotel in Park Lane. Kilker had previously lost an adjudication in 2014 on a final payment claim by Purton because it failed to give a payment notice or payless notice. The adjudicator decided that Kilker had to pay Purton's claimed final account in the sum of £147,000. In enforcement proceedings in the TCC, Kilker argued that the payment regime under the Act and the Scheme did not apply because there was no contract. The TCC found that there was an oral contract that had been performed and the Scheme's payment terms were implied. Accordingly, Kilker had to pay the notified sum: *Purton v Kilker Projects Ltd* [2015] EWHC 2624 (TCC). Kilker paid in accordance with the judgment.

Kilker subsequently decided to adjudicate the substantive valuation of the final account. Purton argued that the adjudicator had no jurisdiction to decide the dispute under the Scheme and should resign because the previous adjudicator had already decided the same or substantially the same claim in respect of the final payment and the principle in *ISG* applied so that Kilker was deemed to have agreed the valuation of the final account because it had not given a payment notice or payless notice. It was argued the Scheme made no distinction between interim and final payments.

The adjudicator disagreed that he should resign and proceeded to value the final account which was not something carried out by the previous adjudicator. He decided that, based on a proper valuation the account was worth less than what Purton had claimed and consequently Kilker had overpaid by about £66,000. He ordered Purton to repay that amount to Kilker.

In enforcement proceedings Purton argued that the Court was bound to follow *ISG* in respect of final payments under the Scheme and that *Harding v Paice* in the Court of Appeal was distinguishable because it only applied to a termination account under a JCT standard form of contract.

Alexander Hickey QC representing Kilker successfully argued that the 1996 Act and the Scheme regulate payment and cash flow but do not decide the true substantive entitlement to payment under the contract on a conclusive basis. The statutory regime was pay now and argue later (including by way of adjudication). A party who has failed to give the requisite notices had to pay the contractor's claim as the notified sum but having paid is entitled to adjudicate the valuation to reclaim any overpayment. There was a difference between the position of interim payments and a final payment because the valuation of a final sum is a matter of substantive entitlement whereas the interim payment is simply on account until the final sum.

Significantly, Mrs Justice O'Farrell held at paragraph 24-26 as follows:

24 *The statutory payment provisions in the 1996 Act and the Scheme establish a regime for determining stage or periodic payments throughout a relevant construction contract. They*



do not affect the ultimate value of the contract sum that the parties have agreed is the price for the works and/or services provided. Very clear words would be required if Parliament intended to impose a scheme that would interfere with the commercial value of the bargain freely negotiated by the parties. As explained in above authorities, the statutory provisions are concerned only with cash flow and not the contract sum.

25. *Subject always to the express terms of the contract, where the “notified sum” is in respect of an interim payment, usually there is no contractual basis on which the contractor’s entitlement to that payment can be re-opened. Any errors can be corrected in subsequent interim or final valuations. Therefore, an adjudication decision as to the “notified sum” payable precludes a challenge to the interim payment on grounds of valuation in a subsequent adjudication – see: ISG and Galliford.*

26. *However, where the “notified sum” determined in adjudication is in respect of a final payment, unless the contract provides that such payment is conclusive as to the contract sum due, although the “notified sum” must be paid, either party is entitled to have the ultimate value of the contract sum determined in a subsequent adjudication, litigation or other form of dispute resolution – see: Rupert Morgan and Matthew Harding. It is not necessary for the contract to set out any specific mechanism for that final accounting exercise; payment of any final sum due to either party is based on enforcement of the contractual bargain.*

It is important to note that payment of the notified sum had already been made before the valuation adjudication was started, and thus the dispute was to reclaim the overpayment. This ruling should not be treated as condoning any attempt to resist final payment by commencing a valuation adjudication to avoid payment of the notified sum.

HELEN DENNIS

Editors: George Woods & Matthew Thorne

GWoods@4pumpcourt.com; MThorne@4pumpcourt.com

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Chief Executive Carolyn McCombe **Senior Clerks** Carl Wall and Stewart Gibbs
4 Pump Court, Temple, London EC4Y 7AN

Tel +44 (0)20 7842 5555 **Fax** +44 (0)20 7583 2036 **DX** 303 LDE www.4pumpcourt.com