

PAY LESS NOTICES – A REQUIREMENT IN RESPECT OF BOTH INTERIM AND FINAL PAYMENTS

- ▶ This article considers the decision of the Court of Appeal in *Adam Architecture Ltd v Halsbury Homes Ltd [2017] EWCA Civ 1735*
- ▶ Reversing the decision at first instance, the Court of Appeal has confirmed that the requirement in Section 111 of the Construction Act 1996 (as amended) to give a pay less notice applies to any payment arising under a construction contract, whether interim or final
- ▶ The case reminds employers of the need to serve a pay less notices in respect of any payments claimed following completion or termination of a contract

What is it about?

In October 2015 Adam Architecture Ltd (Adam) agreed to carry out work for the employer, Halsbury Homes Ltd (Halsbury) pursuant to the RIBA Conditions. Adam began work but on 2 December 2015 Halsbury emailed Adam to say that it intended to continue with another firm. Adam stopped work and by letter dated 3 December 2015 submitted an invoice for work up to 2 December 2015. Halsbury failed to pay the invoice or submit a pay less notice. Adam obtained an adjudicator's decision in its favour requiring Halsbury to pay the invoice. Subsequently both parties commenced proceedings against the other. Adam sought to enforce the adjudicator's decision and Halsbury sought a declaration that the statutory payment regime under the Construction Act did not apply to the invoice and that the adjudicator's decision was unenforceable.

At first instance Edwards-Stuart J concluded that Halsbury was not required to serve a pay less notice in respect of the invoice because:

- ▶ Halsbury's email of 2 December had been a repudiatory breach of the contract which was accepted by Adam's emails and letter of response on 3 December enclosing its invoice. As such the parties were discharged from their primary obligations under the contract, including any obligations pursuant to the Construction Act 1996 to serve a pay less notice
- ▶ The RIBA Conditions did not require Halsbury to serve a pay less notice in respect of a termination account.

The Decision

Adam did not rely on Section 111 of the Construction Act in the original proceedings but sought to rely on it on appeal.

Section 111(1) provides that "*..where a payment is provided for by a construction contract, the payer must pay the notified sum (to the extent not already paid) on or before the final date for payment*" and Section 111(3) states that "*The payer may in accordance with this section give to the payee a notice of the payer's intention to pay less than the notified sum*".

The Court of Appeal took the view that it was "*unrealistic for us to ignore the relevant provisions of the 1996 Act*" and to do so would be "*to do a disservice to the construction industry*". Overturning the first instance decision, the Court of Appeal held that the wording of Section 111 of the Construction Act was clear and the requirement under that section to give a pay less notice applies to any payment arising under a construction contract, whether interim or final, even if the final payment arises following termination of the contract.

The Court of Appeal did not consider that Halsbury's email of 2 December constituted a repudiatory breach of the contract which was accepted by Adam. The invoice was an account following termination under clause 5.17 of the RIBA conditions. The termination account constituted a "*payment provided for by a construction contract*" and as such the statutory payment regime applied.

What now?

The case clarifies that the requirement to serve pay less notices is not limited to interim payments. Employers must remember to serve a pay less notice in respect of final or termination accounts, even where the contract does not expressly provide for the need to do so, or risk having to pay the full amount claimed and then having to commence a recovery action in litigation or arbitration, against a payee who may not have the means to repay in the final reckoning.

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