Pay less notices just got even more important ….

Gateley Plc

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There is a trio of recent cases all dealing with the scenario where the employer failed to issue a pay less notice. In the first two cases (*ISG Construction Ltd -v- Seevic College* [2014] EWHC 4007 (TCC) and *Galliford Try Building Ltd -v- Estura Ltd* [2015] EWHC 412 (TCC)), this resulted in the contractor starting an adjudication and the employer starting its own adjudication seeking a revaluation of the sum claimed in the interim application.

In the first case (*ISG -v- Seevic*), the court decided that the failure to issue a pay less notice meant that the employer had agreed the value of the works claimed in the interim application. As the adjudication had decided the question of the value of those works, it wasn't open to the second adjudicator to decide the same question.

Contractors often look to refer a dispute to adjudication on a technicality. The lack of a payment or pay less notice is a common technicality relied on by contractors. These types of adjudication have become known in the industry as 'smash and grab' adjudications.

Until recently, 'smash and grab' adjudications would very often result in an employer cross adjudicating. Employers would ask the adjudicator to value the work claimed for by the contractor in an interim application.

We have already seen an upturn in the number of 'smash and grab' adjudications. This is bad news for employers who can no longer look to defend the 'smash and grab' adjudication by way of a cross adjudication as to the value.

So what can an employer do? Well, in the second case (*Galliford -v- Estura*) the court helpfully clarified the position; what it had meant in the first case was that, although the employer had agreed the value of the works claimed in an interim application and the adjudicator had decided the question of the value of the works, that didn't mean that there was an agreement as to the value of the works at some other date. In other words, the employer couldn't start a second adjudication to revalue the works at the date of the interim application but that didn't stop the employer from challenging the value of the works in later applications. In short, the employer can correct any overpayment to a contractor in the next interim application or in the final account.

In the third case (*Harding (t/a M J Harding Contractors) -v- Paice & Anor* [2015] EWCA Civ 1231), the court highlighted that the principle that the employer was 'deemed to have agreed the valuation' applied only to interim applications and not to final accounts.

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