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Payment Update

David Bebb October 2015





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Introduction

- Reminder on payment under Construction Act 1996
- Summarise points from recent cases on payment
- Practical advice on how not to get caught out!



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Reminder on payment under Construction Act 1996

- Contract to include due date and final date
- Payment notice to be issued within 5 days of due date (what is due and how it's calculated)
- If no payment notice is issued then a valid application stands as the payment notice
- If no application made then a default payment notice is required
- Payless notice served before final date (can be 1 day before)
- Payless notice to say what is due and how it's calculated
- If sum not paid by final date the contractor can suspend
- If not paid by final date, adjudicator may order employer to pay regardless of why employer says it should not be paid.



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Recent cases

- Drought of case law on payment until 2014
- Half a dozen cases on payment alone
- Concentrated on the effect of not issuing payment and payless notices
- Gives us a bit of a steer now on what we all thought the Act meant
- Offers some guidance on the payment process generally
- Strays into adjudication territory (e.g. did adjudicator have jurisdiction?)



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Recent cases

ISG Construction Ltd v Seevic College [2014]

- JCT D&B – contractor required to submit applications
- No payment notice or payless notice issued and Seevic didn't pay
- ISG therefore start adjudication No 1 claiming the amount they applied for and win.
- Seevic start adjudication No 2 asking the adjudicator to value ISG's work.
- Second adjudicator decides value of ISG's work is less than ISG applied for and orders ISG to repay the difference.
- ISG refuse to repay and ask court to (1) enforce first adjudicator's decision and (2) declare second adjudicator's decision unenforceable.
- Held: (1) in the absence of fraud, contractors are entitled to the amount applied for regardless of the true value of the work otherwise it completely undermines the Act (2) second adjudicator had no jurisdiction (same dispute as the first adjudication)

So, happy days for contractors so far then.



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Recent cases

Harding (contractor) v Paice (employer) [2014]

- JCT Intermediate (important point)
- Final account submitted following termination of the contract by Harding (again, important point)
- No payment notice or payless notice issued and Paice didn't pay
- Harding start adjudication No 1 claiming the amount applied for
- Paice start adjudication No 2 asking adjudicator to value Harding's final account
- Harding ask court for an injunction to stop adjudication No 2 going ahead because (1) what has been applied for becomes the amount due and (2) second adjudication was covering the same issue as the first (which can't be done)
- Held: (1) Judge disagreed that the amount applied for became the amount due but this was due to wording in JCT 8.12.5. Wording on final account different from interim account

Case due to be appealed in November



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Recent cases

***Galliford Try v Estura* [2015]**

- Galliford submitted an interim application (very close in value to its final account even though significant work still left to do)
- No payment notice or payless notice issued and Estura didn't pay
- Galliford start adjudication 1 and win (same reasoning as Seevic)
- Estura didn't pay adjudicator's decision
- Estura start adjudication no 2 but adjudicator resigns
- Galliford ask court to enforce adjudication decision No 1
- Estura argued: (1) Galliford would get a "substantial windfall" and no incentive to complete final account process, (2) impact on Estura's cashflow as usually payment on final account would not be due until much later – not financially viable to reverse adjudicator's decision
- Held: Judge held these were very unusual circumstances but ordered judgment for Galliford. However, Judge stayed payment of amount in full.



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Summary

What can we learn from these 3 cases?

- Serving notices on time is vital
- Content of the notices just as important (pay less notice in Henia was invalid)
- Look carefully at what the contract requires in terms of content as well as timing (not only the amount due and the basis on which that sum is calculated)
- May be a difference between interim applications and final accounts but this will hang on wording of the contract
- The Act is not designed to finally determine an amount due for all time.
- Employers who have failed to issue notices cannot simply start another adjudication to value the contractor's works - this has to be done in later applications
- Galliford case "*unusual circumstances*" and appropriate only in "*rare cases*"
- Galliford is not a "get of jail card" for employers who have failed to issue notices
- Contract administrators need to be very careful about issuing certificates on time and the contents of those notices



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Recent cases

Caledonian Modular (contractor) v Mar City (employer) [2015]

- Highlights issues of not sticking to payment application process (very common in practice!)
- Caledonian's applications 1-14 all followed same format and issued towards end of month
- Applications 15 and 16 *off piste*: (1) Application 15 had valid pay less issue but email then issued only 12 days later and called Application 16 although still had reference to Application 15
- Mar asked Caledonian to confirm effect of email Application 16
- Caledonian adjudicate saying Application 16 was a valid application (even though issued early in payment cycle) and adjudicator agreed.
- Caledonian go to court to enforce adjudicator's decision.
- Held: Application 16 was not a valid application. Reasons: Application 16 was (more or less) the same Application 15; (2) Caledonian relied on a invoice as being a default payment notice (if they wanted it to, then they should have made it clear) (3) Application 16 was not clear that it was an application (4) Caledonian had a number of opportunities to explain that Application 16 was a new application but failed to do so.



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Recent cases

***Henia Investments v Beck Interiors* [2015]**

- Contract said interim payments due on 29 November and nearest business day in subsequent months (JCT approach)
- applications and certificates issued late.
- Adjudicator decides that application 18 (April 2015) made late by Beck stood as application for the May 2015 due date and therefore pay less notice was late.
- Parties end up in court.
- Held: (1) application made late by Beck did not stand as an application for the following month and so did not have to be considered



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Summary

What can we learn from these 2 cases?

- Stick to contractual dates for applications and certificates (both up and down the lines)
- If they do unravel then do best to get them back on track – good audit trail is essential
- Make clear that an application for payment is just that – ‘sneaky’ applications unlikely to be successful.



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CDM Regulations 2015 – What's new?

Jatinder Garcha - Partner





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Introduction

- Main Changes introduced by The Construction (Design and Management) Regulation 2015 (SI 2015/51)
- Who can be “Principal Designer” (“PD”)?
- Can the CDM Co-ordinator re-badge itself as the PD?
- Concerns raised by Design & Build Contractors about the PD role



CDM Regulations 2015 - Main changes

- Changes introduced by the new Regulations include:
 - Abolition of the CDM Co-ordinator role
 - Replacement with the new PD role - not only a change in name but also a slight change in role
 - New notification requirements – *construction work is scheduled to take longer than 30 working days and have more than 20 workers working simultaneously at any point in the project [emphasis added]*
 - Client must give the written notification to the HSE



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CDM 2015 Changes continued

- Enhanced Role of the Client:
 - Continued obligation to take reasonable steps to ensure that the PD and Principal Contractor comply with their duties [Regulation 4(6)]
 - Responsibility to perform residual roles
- Applicable now to domestic clients also:
 - Burden minimised by automatic passing of duties to other parties – but not all duties



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Who can be the Principal Designer?

- Under Reg 5(1)(a) (where applicable) the Client must appoint:
 - “a designer with control over the pre-construction phase as principal designer”
- The above requirement consists of the following two elements:
 - the entity must be a designer – *“means a person who (a) prepares or modifies a design; or (b) arranges for, or instructs, any person under their control to do so”*
 - the entity must have control



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Can a CDM-C be the Principal Designer?

- According to paragraph 72 of the HSE's Guidance note:
 - The term "design" includes drawings, design details, specifications, bills of quantity and calculations...
 - Designers include, amongst others, architects, quantity surveyors, temporary works engineers or anyone who specifies or alters a design
- Does a CDM Co-ordinator fulfil the above criteria??



Consequences for the construction industry

- The possible likely effects of not being able to re-badge the CDM Co-ordinator include:
 - Architects forced to undertake the CD role?
 - Do they have the necessary skills?
 - Effect on PI insurance
 - CDM Co-ordinators to become sub-contractors to designers?
 - Design & Build Contractors expected to take-over the role once construction on site commences?
 - Separate appointments will be required for the PD role – to allow for novation to the contractor or termination



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CDM Regulations 2015 – D&B Contractor's concerns

- Can the D&B Contractor take on the PD role even if it has not been involved in the early part of the design process?
- If the D&B Contractor does take on the PD role having not been involved in the early part of the design, what are the associated risks and liabilities?
- Can the D&B Contractor subcontract its PD role? If so, what are the contractor's obligations before doing so?



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Potential consequences for D&B Contractors

- D&B Contractors likely to be involved at an earlier stage of the design process?
- D&B Contractors may decide to invest in in-house capability to fulfil the PD role
- Novation of the PD to the D&B Contractor means that the client loses a fresh pair of eyes for looking at H&S issues
- Increased novation requirements



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The legal implications of BIM - where are we now?

David Bebb, October 2015





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Introduction

- Treatment of BIM Level 2 by the standard forms
- BIM Protocol
- Key problem of Level 2 BIM: Government Soft Landings and possible solutions
- Key problem of Level 3 BIM: Digital Built Britain and possible solutions



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BIM and JCT



- JCT's view: any BIM Protocol can be incorporated as a contract document
- Contractor required to carry out work '*in compliance with Contract Documents*' (circa clause 2.1)
- BIM currently only dealt with by way of Public Sector Supplement but this may change



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BIM and NEC3

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- NEC3: how to use BIM with NEC3 Contracts (April 2013)
- Suggests that (a) technical requirements are dealt with in the Works Information or Scope and (b) anything affecting rights and liabilities is dealt with in the conditions by way of Z clauses
- Why? Works Information can be varied whereas conditions cannot



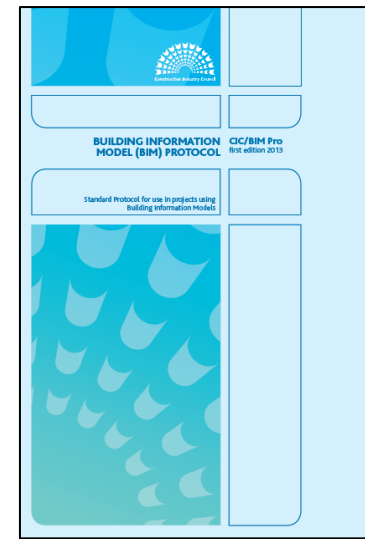
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BIM Protocol

- BIM Protocol '*the rules of the game*' for BIM Level 2
- Contract document which takes precedence over other contract documents in the event of conflict or inconsistency
- Most common CIC BIM Protocol (February 2013)





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BIM Level 2: Key problem

- Government Soft Landings
- 3 year post occupancy period
- Maintenance and operational requirements and standards



Government Soft Landings

Section 4 - Capital Cost and Operating Cost





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BIM Level 2: Solutions?

- Amend standard forms to make provision for extended monitoring on site
- Maintenance and operational requirements and standards
- Routine fitness for purpose obligations (*MT Højgaard A/S v E.On Climate and Renewables UK v Robin Rigg East Limited and another* [2015] EWCA Civ 407)
- Insurance arrangements



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BIM Level 3: Key problem

Digital Built Britain

- Builds on Publically Available Standards characteristic of Level 2 BIM
- Aim: digital design to be interconnected to all elements of built environment and extend BIM to operation of assets over lifetime where majority cost savings arise
- NB: No date as yet for BIM Level 3 compliance!





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BIM Level 3: Solutions?

- (In time) new standard forms to capture project feedback and performance based intelligence
- Project insurance



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Summary

- Level 2: no insurmountable issues
- Level 3: all change