

Recent Court Judgement Decides Employer Cannot Circumvent Payment Rules

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In the recent case of Downs Road Development LLP v Laxmanbhai Construction, the Technology Construction Court (“TCC”) has considered the issue of the validity of payment notices for the first time. The judgement in this case should serve as a clear warning bell that the courts intend for payment notices to be as clear and honest as possible in order for them to comply with the Housing Grants, Construction and Regeneration Act 1996 (“HGCRA”).

First and foremost, employers should be aware that payment notices must reflect the actual value that the employer genuinely considers to be due, along with a breakdown of the basis by which that sum was calculated. Downs, the employer, had attempted to utilise a payment process where it would issue an initial, interim, payment notice in response to the contractor’s application for payment, which would be for a nominal sum of money (97p) to be revised later with the amount it actually considered to be due on the relevant payment date. The rationale was that this would buy time for Downs to ensure “valuations [were] fairly assessed”, but this approach represented an attempt to circumvent section 110A(2)(a) of the HGCRA. While the wording of the Act requires the notice to specify “the sum that the payer considers to be or to have been due at the payment due date”, the Court’s addition of the word “genuinely” clearly reflects that an obviously false belief in the amount due will render a notice invalid. This reinforces that the purpose of the provision in the Act is to assure payment notices reflect the amount due to the contractor, and that the notice can be used to set the agenda for any subsequent adjudication.

In Downs, this judgement would have enabled the contractor (Laxmanbhai Construction) the opportunity to begin a ‘smash and grab’ adjudication for the amount specified in the payment application, totalling roughly £1.8m, as Downs clearly lacked genuine belief that the initial payment notice for 97p was the amount due, and the Court held that an indication the amount would be revised later in no way improved the validity of the initial notice. Had the contractor then elected to begin a smash and grab adjudication, Downs would have been liable for the full amount in the absence of a valid payment notice.

Unfortunately for Laxmanbhai, they had felt their position was sufficiently strong to refer the dispute to a true value adjudication, and while they were awarded £100,000 in this decision, Downs then successfully sought a declaration from the TCC that the Decision was unenforceable due to the failure of the adjudicator to consider a counterclaim which the employer was entitled to raise and have considered. With no valid payment notice or enforceable decision from an adjudicator, it was only because the TCC did not consider it within their jurisdiction to consider the liability of the employer that Downs avoided having to pay the full £1.8m.

Quigg Golden Comment

The lesson for contractors is that smash and grab adjudications will be a more valid option than ever when faced with shaky payment provisions. Payment notices that do not accurately reflect the amount due however may now form grounds for challenge, whether this concerns obviously incorrect sums such as the 97p notice in *Downs*, or sums that can be proven to be dishonest through correspondence and other means. Employers must be aware that their payment notices should reflect the sum that they honestly believe to be due, to protect from this new potential kind of smash and grab claim.

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