

Construction Law Training – Session 2

The Construction Act(s) and JCT Payment Cycles

Presenter

Andrew Rush

Senior Partner

Andrew used to be an engineer. After requalifying as a lawyer he spent time at a leading City firm before establishing an industry-leading construction team at large regional firm and becoming a member of the Legal 500 'Hall of Fame' in the process. His background allows him to get to the root of the issue and provide pragmatic commercial advice alongside specialist construction legal advice.

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Presenter

Hanna McNab

Partner

Most of Hanna's work involves disputes, but she is equally adept working on contract documents, giving ad hoc advice, and providing training. Hanna is queen of the escrow agreement, is involved with all sorts of industry bodies and committees, and, most importantly, is our Social Secretary (an honour she prizes above all others). Legal 500 has said Hanna is "on course for a very successful career". Hopefully that career is in law.

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Partners



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Amy Martyn
Paralegal



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Trainee Solicitor



Amelia Formoy
Trainee Solicitor



October 1st, 2025

Anchor welcomes a new director

Firm News



Anchor is pleased to announce the arrival of the highly experienced Legal Director Katrina Bretten.

We're delighted to announce [Katrina Bretten](#) has today joined Team Anchor.

Katrina is a non-contentious specialist, having practiced in construction law for 15+ years and with previous experience in real estate. She joins from a full service law firm, and has also spent time working in house at a major local main contractor.

As with all at Anchor, Katrina has experience working for a wide range of clients, including employers, developers, main contractors, sub-contractors and professionals. Her previous property experience also means she's well placed to work alongside property teams as part of development transactions.

Katrina will be based in our growing Cambridge office in the heart of the city's professional district on Station Road, which coincidentally today celebrates its first birthday. Her arrival further strengthens our development and non-contentious offerings, both in Cambridge and beyond.

Commenting on her arrival, partner and head of development [Rory Abel](#) said: "I'm very pleased to have Katrina join us – she's been on our target list for a while! She is extremely knowledgeable and has a fantastically cool head – I am sure our clients (and the rest of the team!) will love working with her".



ARCHITECT'S ESTIMATE: The cost of construction in heaven

MANAGEMENT CONTRACT: The technique for losing your shirt under perfect control

COMPLETION DATE: The point at which liquidated damages begin

LIQUIDATED DAMAGES: A penalty for failing to achieve the impossible

QUANTITY SURVEYORS: People who go in after the war is lost and bayonet the wounded

LAWYERS: People who go in after the Quantity Surveyors and strip the bodies

SUB-CONTRACTOR: A gambler, who never gets to shuffle, cut or deal

TENDER SUBMISSION A poker game in which the losing hand wins

TENDER SUM: A wild guess carried out to two decimal places

SUCCESSFUL TENDERER: A contractor who is wondering what he left out

An ARCHITECT is a man who knows very little about a great deal, and keeps knowing less and less about more and more until he knows practically nothing about everything.

A CONSULTING ENGINEER knows a great deal about very little, and goes on knowing more and more about less and less until he knows practically everything about nothing.

A CONTRACTOR starts out knowing practically everything, but ends up knowing nothing due to his association with Architects and Consulting Engineers.

Session 2

1. Part 1 – The Construction Act(s)
2. Part 2 – Payment Cycles under JCT Contracts



Part 1 – The Construction Act(s)

How did we get here?

- Sir Michael Latham: “*Constructing the Team*” 1994
- Industry was (and still is?) a “*basket case*”
- Recommendations:
 - Partnering
 - New form of dispute resolution
 - Supply chain needed certainty of payment
- And so, the Construction Act was born!



Construction Act – 1st Attempt

- Housing Grants, Construction and Regeneration Act 1996
- Scheme for Construction Contracts (England and Wales) Regulations 1998
- Notices:
 - Section 110 Notice
 - Withholding Notice (S. 111)
- Suspension / Adjudication / ban on “pay when paid”

What went wrong?

- Pay when paid clauses – way round with pay when certified
- Adjudication, but what about oral contracts?
- Payment certainty not achieved
- Employers and contractors still not valuing applications
 - *Rupert Morgan Building Services v Jervis* (2003) – payee entitled to payment of sum in architect's certificate where no withholding notice issued by payer
 - *S L Timber Systems Limited v Carillion Construction Limited* (2001) – no automatic entitlement to payment in absence of certificate

Construction Act – 2nd Attempt

- Local Democracy, Economic Development and Construction Act 2009
- Scheme for Construction Contracts (England and Wales) Regulations 1998 amended by the Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011
- Notices (different regime):
 - Section 110A Notice - Payment Notice
 - Section 111 Notice – Pay Less Notice
 - Section 110B Provisions – Default provisions

What went wrong?

- Did it go wrong? - Do we have greater certainty on payment? [See later]
- Consequences of No Notices!!
- *ISG Construction Ltd v Seevic College* [2014]
- *Grove v S&T*
- System abused? Too complicated?

What does the Construction Act cover?

- Covers all construction contracts involving “Construction Operations”
- Covers all professional appointments
- Now covers non-written contracts
- Still does not cover “domestic occupier” projects

What rights apply to construction contracts?

- The right to adjudicate
- The right to suspend
- The right to compliant payment terms



What works are covered?

Introductory provisions

104 Construction contracts.

- (1) In this Part a “construction contract” means an agreement with a person for any of the following—
 - (a) the carrying out of construction operations;
 - (b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;
 - (c) providing his own labour, or the labour of others, for the carrying out of construction operations.
- (2) References in this Part to a construction contract include an agreement—
 - (a) to do architectural, design, or surveying work, or
 - (b) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape,in relation to construction operations.

- (1) In this Part “construction operations” means, subject as follows, operations of any of the following descriptions—
- (a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land (whether permanent or not);
 - (b) construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land, including (without prejudice to the foregoing) walls, roadworks, power-lines, **[F1** electronic communications apparatus], aircraft runways, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;
 - (c) installation in any building or structure of fittings forming part of the land, including (without prejudice to the foregoing) systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems;
 - (d) external or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration;
 - (e) operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site clearance, earth-moving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works;
 - (f) painting or decorating the internal or external surfaces of any building or structure.

What works are covered – points to note

- Painting / Cleaning / Scaffolding – all expressly referred to
- *Savoie & Savoie v Spicers Limited* – sufficiently attached
- All professional appointments
- Labour only is covered
- Note don't have to be covered??



What works are not covered?

106 Provisions not applicable to contract with residential occupier.

- (1) This Part does not apply—
 - (a) to a construction contract with a residential occupier (see below), **[F2** or
 - (b) to any other description of construction contract excluded from the operation of this Part by order of the Secretary of State.]
- (2) A construction contract with a residential occupier means a construction contract which principally relates to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence.

In this subsection “dwelling” means a dwelling-house or a flat; and for this purpose—

“dwelling-house” does not include a building containing a flat; and

“flat” means separate and self-contained premises constructed or adapted for use for residential purposes and forming part of a building from some other part of which the premises are divided horizontally.

What works are not covered – points to note

- Power generation is limited to activities directly related to the generation of power.
- So a road on the site up to the power station is still covered under the Construction Act.
- Supply only contracts are NOT covered.

Suspension for non-payment

112 Right to suspend performance for non-payment.

- (1) **[F16]** Where the requirement in section 111(1) applies in relation to any sum but is not complied with, the person to whom the sum is due has the right (without prejudice to any other right or remedy) to suspend performance of **[F17]** any or all of his obligations under the contract to the party by whom payment ought to have been made ("the party in default").
- (2) The right may not be exercised without first giving to the party in default at least seven days' notice of intention to suspend performance, stating the ground or grounds on which it is intended to suspend performance.
- (3) The right to suspend performance ceases when the party in default makes payment in full of **[F18]** the sum referred to in subsection (1).
- [F19]** (3A) Where the right conferred by this section is exercised, the party in default shall be liable to pay to the party exercising the right a reasonable amount in respect of costs and expenses reasonably incurred by that party as a result of the exercise of the right.
- (4) Any period during which performance is suspended in pursuance of **[F20]**, or in consequence of the exercise of, the right conferred by this section shall be disregarded in computing for the purposes of any contractual time limit the time taken, by the party exercising the right or by a third party, to complete any work directly or indirectly affected by the exercise of the right.

Where the contractual time limit is set by reference to a date rather than a period, the date shall be adjusted accordingly.

Suspension for non-payment

- Have to give 7 days notice in writing (email fine – but check contract)
- Part of, or all of the Works
- What does it mean to say “sum” has not been paid – is it due?

Pay when certified clauses

113 Prohibition of conditional payment provisions.

- (1) A provision making payment under a construction contract conditional on the payer receiving payment from a third person is ineffective, unless that third person, or any other person payment by whom is under the contract (directly or indirectly) a condition of payment by that third person, is insolvent.

- [F10]** (1A) The requirement in subsection (1)(a) to provide an adequate mechanism for determining what payments become due under the contract, or when, is not satisfied where a construction contract makes payment conditional on—
- (a) the performance of obligations under another contract, or
 - (b) a decision by any person as to whether obligations under another contract have been performed.

Retention – Generally

- Ban on Pay When Certified Provisions Section 110(1A)
- Main Contract – Still based on certificate
- Sub-Contract – By reference to time period



Retention – In practice

- Main Contract unamended
- Sub-contract – 1st half – on completion of or stated period after completion of Sub-Contract Works
- Sub-Contract – 2nd half – fixed time period and if all defects completed
- Sub-sub-contract – as sub-contracts



Part 2 – Payment Processes

The Act and the Scheme

The Legislation – The Basics

- Every construction contract must have an adequate mechanism for determining what payments become due and when the amount is payable – need:
 - Certainty of due date (or implied by Scheme)
 - Obligation to issue payment notice within 5 days of due date (or implied by Act / Scheme)
 - Certainty of final date (or implied by Scheme)
 - Obligation to issue pay less notice (or implied by Act / Scheme – 7 days if not specified)
- Must be adequate not FAIR

The Legislation – The Basics

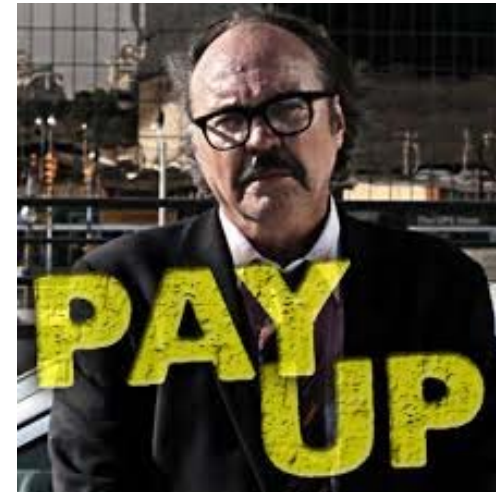
- No Contract – New Act / Scheme Dates
- Incorrect Contract – New Act / Scheme for “missing bits”
- Unamended Contract – JCT / NEC – Compliant – Use Contract Dates
- Bespoke Terms:
 - Amendments to Standard Form – Revised Contract Dates
 - Payment Schedules – Schedule Dates

The Legislation – Two Systems

- 1) Payer led system (s.110A(1)(a))
 - Payer is required to give a payment notice within 5 days after the payment due date
 - NEC is payer led
 - JCT is payer led (note D&B is different).
- 2) Payee led system (s.110A(1)(b))
 - Payee is required to give a payment notice within 5 days after the payment due date
 - Scheme is payee led.

The Legislation – Payment Notices

- The payment notice must be given no later than 5 days after the payment due date
- This is a requirement of the Act and mirrored in the Scheme
- Cannot extend this under contract
- Payment notice must specify:
 - The sum that is due at the due date
 - The basis on which it is calculated



The Legislation – Pay Less Notices

- Pay less notice must specify:
 - The sum considered to be due on the date the pay less notice is served
 - The basis of the calculation
- Scheme - Pay less notice must be given 7 days before final date for payment
- Contract – often only required 1 day before final date for payment
- No pay less notice? Pay notified sum by final date for payment



Payment under the Scheme

- Due date = Application date
- Payment Notice = due date + 5 days
- Pay Less Notice = final date – 7 days
- Final date = due date + 17 days

Payment under the Scheme



JCT Payment Provisions

Payment under JCT (non-D&B) 2024

- Application date = No later than Interim Valuation Date
- Due date = IVD + 7 days
- Payment Notice/Interim Certificate = due date + 5 days
- No Payment Notice/Interim Certificate? Application becomes Payment Notice OR Contractor can issue (default) Payment Notice
- Pay Less Notice = final date – 5 days
- No Pay Less Notice? Sum payable is sum stated in Payment Notice
- Final date = due date + 14 days

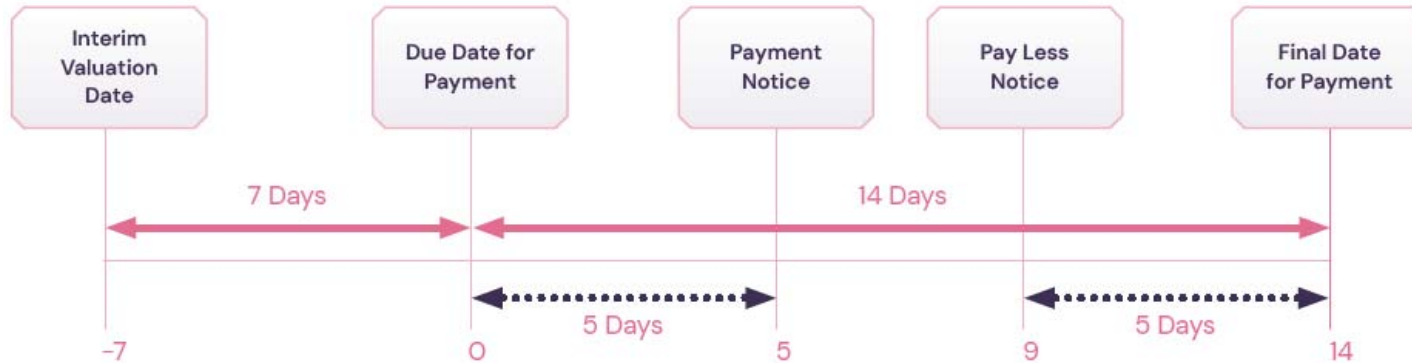
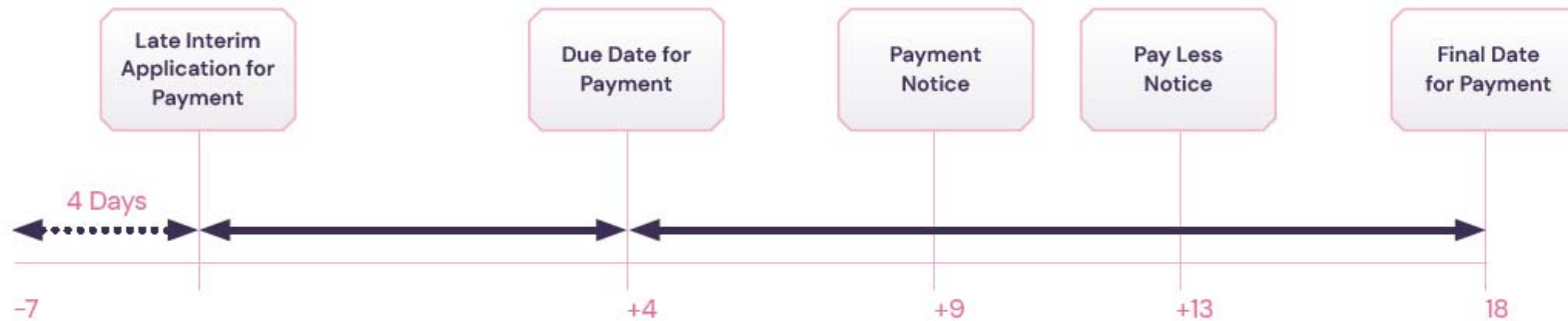
Payment under JCT (non-D&B) 2024



Payment under JCT D&B 2024

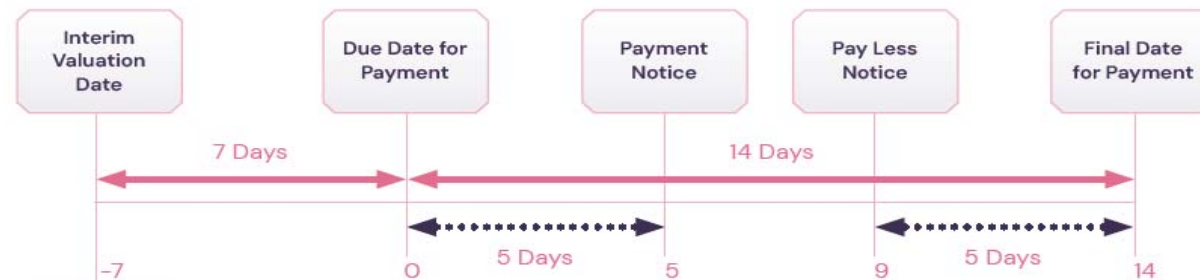
- Payee led
- Application date = Either no later than the IVD or after the IVD
- Due date = IVD + 7 days OR Application + 7 days
- Payment Notice = due date + 5 days
- No Payment Notice? Application becomes Payment Notice
- Pay Less Notice = final date – 5 days
- No Pay Less Notice? Sum payable is sum stated in Payment Notice
- Final date = due date + 14 days

Payment under JCT D&B 2024

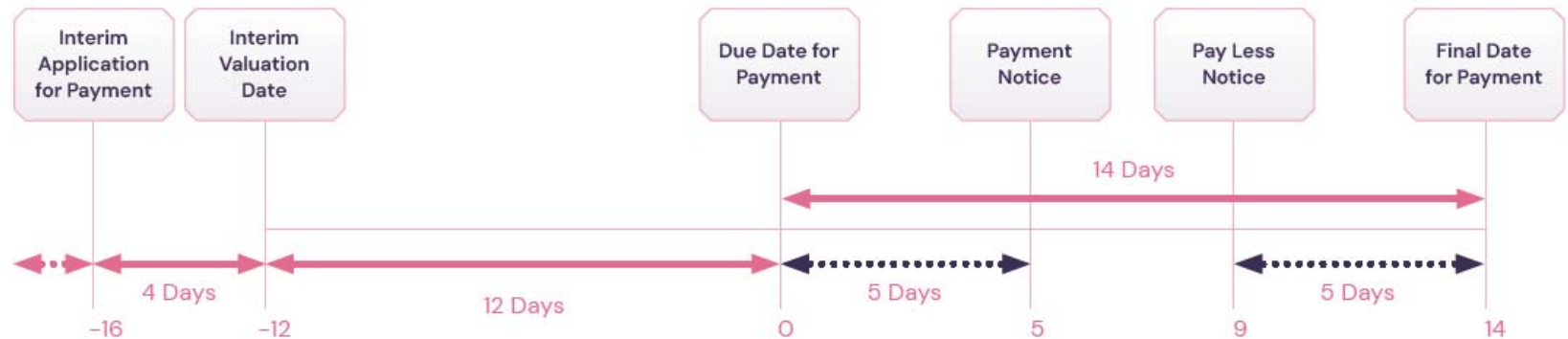


JCT – Main Contract –v- Sub-Contract

Main Contract



Sub-Contract



Final payment / final certificate

- When is the due date for the final payment?
- Understand the process
- Look at whether the Final Certificate becomes conclusive and challenge in the correct timescale if necessary

1.9 Effect of Final Certificate

1.9.1 Subject to clause 1.9.2 (and save in respect of fraud), the Final Certificate shall have effect in any proceedings under or arising out of or in connection with this Contract (whether by adjudication, arbitration or legal proceedings) as conclusive evidence that:

1.9.2 The effects of the Final Certificate specified in clause 1.9.1 shall be suspended pending the conclusion of any adjudication, arbitration or other proceedings, and shall thereafter be subject to the terms of any decision, award or judgment in and any settlement of those proceedings:

1.9.2.1 where those proceedings are commenced before or within 28 days after the date of issue of the Final Certificate; or

Questions

Question 1 – The Basics

- Gallagher Brothers Limited, a reputable contractor based in the Manchester area, entered into an unamended JCT Design & Build 2024 Contract.
- The first Interim Valuation Date was stated in the Contract Particulars to be Friday 13 June 2025.
- **What date does the Payment Notice need to be issued in September 2025?**
 - 24 September 2025
 - 25 September 2025
 - 26 September 2025
 - 27 September 2025

Question 2 – Reckoning Periods

- Gallagher Brothers Limited has entered into another JCT Design & Build 2024 Contract. The due date for payment is the 17th of each month, with the Interim Valuation Dates being 7 days beforehand.
- Gallagher Brothers Limited issued a valid application for payment in April 2025, which stated the due date as 17 April 2025.
- The Contract was amended such that the final date for payment was 24 days after the due date and the date for issuing a pay less notice was 7 days before the final date for payment. The 24 days was to allow for the Luxembourg funder to release payments (and wasn't contrived at all ...)
- In response to the application the Employer's Agent, Supersonic & Partners, issued a payment notice on 22 April 2025, valuing the works at £1m.
- Shortly after issuing the payment notice, significant defects appeared in the works. As such, Supersonic & Partners issued a pay less notice on 7 May 2025 certifying a sum due to Gallagher Brothers Limited of £nil.
- **Was the pay less notice in time?** Take note of clause 1.5 of the Contract:

1.5 Reckoning periods of days

Where under this Contract an act is required to be done within a specified period of days after or from a specified date, the period shall begin immediately after that date. Where the period would include a day which is a Public Holiday that day shall be excluded.

Question 3 – Change of Approach

- Gallagher Brothers Limited have entered into a third JCT Design and Build 2024 Contract, this time with no amendments. The Interim Valuation Date is stated as the 21st of each month. Supersonic & Partners is again the Employer's Agent.
- The Employer, Mr Bonehead (a Rock n Roll Star), liked to be involved in each valuation (only in a monitoring capacity of course and in no way influenced Supersonic & Partners' independence as Employer's Agent). He therefore visited the site on the 10th of each month, when he was in the country as part of his travels All Around the World.
- Little by Little the parties moved away from the dates in the Contract to suit Mr Bonehead's attendance on site. Gallagher Brothers Limited would issue a draft application for payment shortly before the 10th of each month, with a subsequent valuation being certified by Supersonic & Partners on the 17th of each month.
- As the project neared practical completion, the parties began to fall out. Mr Bonehead lost interest in the works and the difference between the sum Gallagher Brothers Limited applied for and the sum Supersonic & Partners certified widened.
- Just before PC, on 21 August 2025, Gallagher Brothers Limited issued an application for payment seeking payment of £2m (£500k for measured works, £500k for variations and £1m for loss and expense).
- The regular site meeting occurred on the 10 September 2025 and Supersonic & Partners issued a payment notice on 17 September 2025 valuing the works at £750k (£500k for measured works, £250k for variations and £0 for loss and expense).
- Last week Gallagher Brothers Limited served a Notice of Adjudication seeking payment of the £2m stated in its application for payment on the grounds that Supersonic & Partners had failed to issue a payment notice in time.
- **Allowing for the vagaries of adjudication, what is the likely outcome?**
 - (1) The course of dealing means the payment notice was in time and Mr Bonehead is required to pay to Gallagher Brothers Limited £750k.
 - (2) The payment notice was out of time, so Mr Bonehead is required to pay Gallagher Brothers Limited £2m

Question 4 – Unsubstantiated Loss & Expense

- Gallagher Brothers Limited have now entered into a JCT Standard Building Contract without Quantities 2024. The Contract Particulars have not been completed. The Date of Possession was 31 October 2024.
- Gallagher Brothers Limited issued an application for payment on 28 March 2025 seeking payment of £1m (£500k for work carried out and £500k for loss and expense). The project was just about to achieve practical completion and the claim for loss and expense had never been notified previously. No extension of time had been awarded.
- The Architect/Contract Administrator, Lyla, issued an interim certificate on 12 April 2025 (a Sunday – hard working architect) in the sum of £500k, making clear that Gallagher Brothers Limited had not justified any claim for loss and expense.
- Gallagher Brothers Limited are a contentious bunch and had a Masterplan. Immediately after the final date for payment had passed, they issued a Notice of Adjudication seeking payment of the £1m applied for.
- **Allowing for the vagaries of adjudication, what is the likely outcome?**
 - (1) The course of dealing means the payment notice was in time and Mr Bonehead is required to pay to Gallagher Brothers Limited £750k.
 - (2) The payment notice was out of time, so Mr Bonehead is required to pay Gallagher Brothers Limited £2m

Case Law

Why is there so much law on this?

- If no notices - sum has to be paid irrespective of valuation
- SMASH AND GRAB - an adjudication on notified sum pursuant to section 111 of Construction Act – e.g. application made by payee and no effective payment or pay less notice issued by payer
- Technical adjudication i.e. based on procedure – substantive valuation not relevant (or is it?)
- Accords with “*pay now, argue later*” policy underlying Construction Act
- Sums involved can be enormous (Galliford Try v Estura)
- Risk of insolvency – finger than pointed at certifier!!

Case Law – New Construction Act

- *Post-2011, Construction Act included provisions regarding default payment and pay less notices*
- *ISG Construction v Seevic College (2015) – employer not entitled to challenge true value following smash and grab decision*
- *Galliford Try v Estura (2015) – followed principle in ISG but only enforced part of smash and grab decision ("manifest injustice")*
- *S&T v Grove (2018) – payer can start a true value adjudication but only after paying notified sum*

Recent Case law

- *AM Construction v Darul Amaan Trust* (2022) – existence of notified sum is enough to prevent true value adjudication – no need for smash and grab decision
- *Henry Construction Projects v Alu-Fix* (2023) – stayed true value adjudication held to be ineffective where later decided that there was a notified sum
- *VMA Services Limited v Project One Limited* [2025] – smash and grab as a defence to a true value adjudication

Questions

Thank you

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