

**CI Arb East Anglia Branch**

**Adjudication Update 2015  
(Umpteenth (at Least) Update)**

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**Last 12 Months**

- There are 20 odd England and Wales Cases
- Only 5 cases in Scotland
- What I said last year – ‘Still not enough on Local Democracy, Economic Development and Construction Act 2009 but not much on the Act itself’
- Now there is something and it is where we are going tonight

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**Notices and Payment**

- Payment under Local Democracy, Economic Development and Construction Act 2009 was always going to be a mess
- The Courts plainly do not like it and haven't got their heads around it yet
- It seems we are in an era of very strict compliance with applications and notices
- If you don't comply the Courts will probably jump to a part 8 Declaration

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## A valid application or notice

- **The Act**

(2) A notice complies with this subsection if it specifies—

- (a) in a case where the notice is given by the payer—
  - (i) the sum that the payer considers to be or to have been due at the payment due date in respect of the payment, and
  - (ii) the basis on which that sum is calculated;
- (a) in a case where the notice is given by a specified person—
  - (i) the sum that the payer or the specified person considers to be or to have been due at the payment due date in respect of the payment, and
  - (ii) the basis on which that sum is calculated.

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## Scope of Notice requirements

- **S 110 deals with dates and timings**
- **S 110A is payment notices**
- **S110B is default notices**
- **S111 is Pay Less Notices**
- **They all have the requirement on content outlined in the previous slide**

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## Four cases on Default

- **ISG Construction Ltd v Seevic College [2014] EWHC 4007 (TCC) (03 December 2014)**
- **Harding (t/a M J Harding Contractors) v Paice & Anor [2014] EWHC 3825 (TCC) (21 November 2014)**
- **Galliford Try Building Ltd v Estura Ltd [2015] EWHC 412 (TCC) (27 February 2015)**
- **Paice & Anor v MJ Harding (t/a MJ Harding Contractors) [2015] EWHC 661 (TCC) (10 March 2015)**

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**ISG Construction Ltd v Seevic College**  
**The Facts**

- JCT Design & Build 2011
- ISG made Application for Payment No 13
- There was no Payment Notice or Pay Less Notice
- The contract provided that in the absence of a Payment Notice the Application for Payment became the notified sum and therefore the amount due

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**ISG Construction Ltd v Seevic College**  
**The Facts**

- ISG took the matter to Adjudication (Adjudication No 1)
- The Adjudicator found in their favour saying the Application for Payment being the Default Notice became the amount due.
- The Adjudicator qualified his Decision he said he had not valued the works
- Before Adjudication No 1 was finished Seevic commenced Adjudication No 2

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**ISG Construction Ltd v Seevic College**  
**The Facts**

- Seevic sought a valuation of the works in a lower sum than Application for Payment No 13 and repayment of the money that had been gained in Adjudication No 1
- ISG were awarded £1,097,696.29 In Adjudication No 1
- The value in Adjudication No 2 was £315,450.47
- Seevic sought £768,525.36 back

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### **ISG Construction Ltd v Seevic College Judgment**

- Seevic did not resist enforcement of Adjudication No 1 which they had not paid
- They sought to set-off the amount in Adjudication No 2 of £315,450.47
- The Court would not enforce Adjudication No 2 on the basis that Adjudication No 1 established the amount due and that was the same as the value of the works
- Adjudication No 2 was seeking to run the same dispute that had already been decided again.

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### **Harding (t/a M J Harding Contractors) v Paice & Anor**

- These parties had fallen out
- Harding had terminated his Employment under the contract
- Adjudication No 3 dealt with Harding's Termination account
- On the basis there was no Payment Notice or Pay Less Notice and there was an obligation to pay the sum in the Termination Account Harding won by default

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### **Harding (t/a M J Harding Contractors) v Paice & Anor**

- The Adjudicator said he had not valued the works
- Paice commences Adjudication No 4 to have the value of the Termination account determined in a lower sum
- Harding seeks an injunction and gets it temporarily preventing Adjudication No 4

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### Harding (t/a M J Harding Contractors) v Paice & Anor Judgment

- The injunction was lifted
- Adjudication No 4 was allowed to proceed
- What is due under clause 8.12.5 is the "... amount properly due in respect of the account". The adjudicator has not determined what is "properly due". He has determined that, in the absence of a valid Pay Less notice, the employer must pay the amount stated in the contractor's account within 28 days.
- it seems to me that it is open to the employer to have determined, either by adjudication or litigation, the question of what sum is properly due in respect of the contractor's account

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### Galliford Try Building Ltd v Estura Ltd The Facts

- GTB won Adjudication No 1 by default on the basis that there was no Payment Notice or Pay Less Notice (this is the same as ISG v Seevic)
- Estura started Adjudication No 2 to determine the value of the works that they said the Adjudicator in Adjudication No 1 improperly did not address

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### Galliford Try Building Ltd v Estura Ltd The Facts

- The Adjudicator in Adjudication No 2 resigned because he said he had no jurisdiction (based on ISG v Seevic)
- GTB seeks enforcement
- Both ISG v Seevic and Harding and Paice were mentioned and clarified in this case

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### Galliford Try Building Ltd v Estura Ltd Judgment

- Adjudication No 1 was enforced
- GTB was given summary judgment
- Order for a stay for part of the sum on the grounds that GTB might have a 'windfall'

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### Paice & Anor v MJ Harding (t/a MJ Harding Contractors) [2015]

- This concerns Adjudication No 4
- It was the one where an injunction was sought in the previous trial – the injunction application failed
- The adjudicator went on to decide Adjudication No 4
- His Decision was not enforced on the grounds that there was no jurisdiction because there was the prospect of an overlap between what was decided in Adjudications 3 and 4.

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### Three more cases on substance of the notice

- Leeds City Council v Waco UK Ltd [2015] EWHC 1400 (TCC) (22 May 2015)
- Caledonian Modular Ltd v Mar City Developments Ltd [2015] EWHC 1855 (TCC) (29 June 2015)
- Henia Investments Inc v Beck Interiors Ltd [2015] EWHC 2433 (TCC) (14 August 2015)

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### So What's New

- Greater use of Part 8 to avoid or get round enforcement through Summary Judgement
- This is a final determination of the position in law – a construction point - it cannot be fact heavy
- A short self contained point, no oral evidence, short interlocutory hearing.
- Swot up on course of dealing, waiver and estoppel

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### Leeds City Council v Waco UK Ltd

- Part 8 proceedings
- It all turned on what the contract said about dates for Applications
- The parties habitually did not comply with Application dates by up to 4 days
- Move into another gear after Practical Completion, payments moved to two monthly intervals
- Were Applications late or premature?
- Declaration that Application 21 was not a valid Application.

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### Caledonian Modular Ltd v Mar City Developments Ltd [2015]

- Part 8 again
- Two Adjudications. The first was paid before this bit got into court
- The second jumped the gun on dates – it was early having regard to the payment dates in the contract
- Nevertheless Mar issued a Pay Less Notice
- Declaration to set aside not a valid application

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## Henia Investments Inc v Beck Interiors Ltd

- Part 8 again
- This was before a decision was even made
- The Application was made too late for one date and too early for the next date
- Surprisingly the Pay Less Notice was held to be valid
- Where a Contract Administrator is in breach dealing with extension of time this does not bar the Employer from taking Liquidated and Ascertained Damages

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## Summary

- ISG v Seevic is clear: where there is no Payment Notice or Pay Less Notice the Default Notice determines both the sum due and the value of the works. That is still good law if all the ducks are in a row on what makes a valid Application
- Sum due and value are one and the same thing

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## Summary

- Dates and substance of Applications must be strictly adhered to
- The best defence is Application not valid
- There is no reason an Adjudicator cannot deal with this
- The industry is making it too easy to flout the Local Democracy, Economic Development and Construction Act 2009 payment provisions

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