



CONTRACT &  
CONSTRUCTION  
CONSULTANTS

## Dealing with final payment notices: don't get caught out

### ***Systems Pipework Ltd v Rotary Building Services Ltd [2017] EWHC 3235 (TCC)***

Contracts frequently provide for final payment notices that are final and binding upon the person receiving them unless challenged within a short period. Generally if such a final payment notice is given and no challenge is made, then no adjudicator, arbitrator or court can open it up again, even if the sum it contains is incorrect. The judgment in *Systems Pipework v Rotary* gives important guidance on the standards to which those notices, which have very significant consequences, will be held.

#### **Background**

The Construction Act states that payment notices, including the final payment notice, must set out “*the sum that the payer considers to be due*” and “*the basis on which that sum is calculated*”. As this recent judgment makes clear the sum due is not the same as a gross valuation and it is important that each of your applications, valuations and notices carefully set out the actual amount of money due and not just a gross ascertainment of the value of the works to date. A failure to set out a sum due will make any notice invalid.

#### **Decision**

Systems carried out work for Rotary under a contract which required that a final statement would be final and binding unless challenged within 14 days. Systems made an application for final payment in respect of half of the works (the DC1 works) in May and also provided an interim application in relation to the rest of the works (the DC2 works).

Rotary did nothing until 2 September when it purported to issue a final account assessment in respect of both the DC1 Works and the DC2 works. Systems issued an adjudication to challenge parts of this assessment relating to the DC2 works only on 16 September. Rotary contended that the 2 September assessment was a final statement pursuant to the contract that had not been validly challenged within 14 days and was therefore binding.

HJ Coulson rejected Rotary's arguments, finding in summary:

- The notice did not set out a sum due, merely a gross ascertainment of value, and was therefore invalid under the terms of the contract (this is equally applicable to interim notices under the Scheme for Construction Contracts and the Construction Act).
- The notice was invalid because it did not state it was made in accordance with the final notice provisions of the contract. Given the "draconian" consequences of that clause it should have done. In other words, it should have said something like 'this notice is given in accordance with clause 28.6'.
- By issuing a notice of adjudication in respect of some of the items concerned with the final statement, Systems had adequately challenged the "final notice".

### What does this mean for parties making payment and parties claiming payment?

- Payment notices and applications must set out a sum due, otherwise you risk the notice being invalid and not getting paid at all!
- If you are giving a final payment notice you must ensure that it is such a notice by including clear reference to the relevant provisions of the contract and that all of the details are correct. HJ Coulson's point that draconian clauses must be referred to by a party if they wish to rely on them is surprising and unusual but it is for now good law and should be followed.
- When you receive a final payment notice review it as soon as possible and if you disagree with it you must challenge it within the prescribed contractual period (via the mechanism required by the contract) or risk it becoming final and binding and incapable of being challenged.

#### Free initial consultation

If you have a contractual problem, are involved in a project which is going wrong, or if you have a dispute, we can assist. We offer a *free one hour initial consultation* to all clients. Please get in touch for more information.



CONTRACT &  
CONSTRUCTION  
CONSULTANTS

#### Contract & Construction Consultants

Cavendish House  
15 Whiteladies Road, Clifton  
Bristol, BS8 1PB

T: +44 (0) 117 925 9001

E: [enquire@contract-consultants.com](mailto:enquire@contract-consultants.com)

W: [www.contract-consultants.com](http://www.contract-consultants.com)