

# Bingham's Corner

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## EYES WIDE SHUT

### THOSE PAYMENT NOTICES: PIPE UP OR PAY UP

*Companies have been ignoring applications for payment for decades even though doing so invariably lands them in a whole heap of trouble. The payer screamed that this isn't the true value of the interim account. Quite probably it isn't, said the adjudicator, but that's what is to be paid anyway.*

Look up Salcombe Harbour Hotel if you fancy a few days in a top-notch hotel. Rent one of the five-bedroom suites. Galliford Try's staff have spent umpteen days there - building the place. It is one of those nice size projects at about £8m. That's where it started. The fuss I will tell you about came when an interim account popped up from Galliford Try at £12.6m.

Now then, how did we use to deal with an approach for payment? Well, in decades gone by, we would gawp at the contractor's account, say damn all and eventually pay a lump of cash we were comfy with. And when the contractor eventually received the cheque with a remittance advice telling him nothing but the bare figures, he would go berserk. Things sort of changed 17 years ago when the Construction Act said the payer was supposed to send a payment notice broadcasting what he said he might pay. But no one bothered to send that notice. Things sort of changed again when the Construction Act underwent a refurb job. Payment notices got a bite - one hellava bite. And somehow the bite has been slow to, well errr, bite. Three recent cases have come trotting along together to tell us about the bite. Go to the third, the Galliford Try case, because it sweeps up the other two: ISG vs Seevic College; and Harding vs Paice.

In came the Galliford Try interim application at £12.66m. The developer and hotel owner is called Estura. The contract document is the ordinary JCT family. Perhaps Estura's folk were away on holiday or asleep or busy; their reaction to the £12.66m application was to say nothing. They get two goes at rejecting the builder's application. First is to serve a payment notice (with a different, presumably lower sum). The second is to send a later "payless notice" indicating a sort of counterclaim. But nothing like that was used. In which case the application for payment becomes the "notified sum". It's a default system. If you don't pipe up, you have to pay up. And by the way, all contract documents must contain that rule. If not in the document, the

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Construction Act imports the rule by law. No escape. So Galliford Try knocked on Estura's door for the gross £12.66m less previous paid.

Just as in ISG vs Seevic, the payer screamed that this isn't the true value of the interim account. Quite probably it isn't, said the adjudicator, but that's what is to be paid anyway. It's nothing to do with the value of work. It's a default system. More likely, and this I feel uncomfortable about, it is a penalty for keeping quiet. Get this fixed in your head: never ignore a demand for payment. Don't behave the way we in construction have done for all time by tossing an application for payment on one side. Tackle it head on. Pipe up.

In ISG vs Seevic, interim application No.13 met silence. The adjudicator quite properly ordered the application to be paid in full less previous. He very fairly said in that formal decision: "I have not valued the work." This, he said, is the default position. True. So Seevic began an adjudication on interim No.13 (again) requiring a decision as to the value. Can't do that. No second bite of that cherry is allowed. The default cash payable is deemed to also be the value.

Go back to Galliford Try. Here we have the same circumstances of silence, so the application becomes payable. The judge helpfully said: "In the ordinary course of things any errors in an interim application, or the consequences of an employer's failure to issue the relevant notices can often be put right on a subsequent interim application." So, if the contractor is overpaid on interim 13, the ordinary position is that the overpayment can be corrected by an adjudicator in applications 14 or 15 etc. OK? Hmmm.

Some say that the JCT does not provide for repayment via a subsequent interim valuation. Some say you must wait until the final account because there in JCT it allows the repayment. True, the JCT does not say repay via interim accounts. Some say the JCT needs to move at lightning speed to put an express term into all its documents. It's easy. They only need copy what NEC says.

But if JCT can't move at emergency pace to bring in an express term, some say the Scheme deals with overpayments of interims via repayment. Goodness knows whether these folk are right. The notion is that when a gap is found in the contract itself, the payment rules in the Scheme fill the gap. It looks for "circumstances" not dealt with in a document. Each valuation date gives rise to a notified sum. That sum is the difference between the value of the work at that date and the sums paid. So there you have the balance to be paid. Some say: Hmmm. I say, come on JCT, hands to the pump.

As for the beautiful hotel job, Galliford Try didn't get their £4m, they got £1.5m instead. It was a brilliant Lord Denning style approach. The £4m would "stifle further pursuit by Estura of its rights", so the judge used his powers "as best I can". It's the way of things, I think.

