

ONLY A MATTER OF TIME[SHEETS]

SCOTT MILNER

Director, UK

This article concerns the 'old chestnut' of timesheets and approval by the other party (the payer or its representative) in accordance with the agreement. One would be excused for believing it should be simple to disprove time, however, where time has been recorded and verified, it is not always so easy to disprove and correct the time later if the agreed verification procedure has been followed but other contemporaneous records suggest that the time is incorrect.

Whether there is a specific agreement for the contractor to be reimbursed for his plant and/or labour on a time basis or a provision in a lump sum agreement for the resource involved with additional or substituted work to be recorded and the valued as 'daywork', these often include the requirement for timesheets, setting out full details of the resource and time spent, to be submitted periodically to the other party's authorised person for checking and/or authorisation for payment. Take a typical JCT Building Contract, for example, the recovery of time expended on daywork is on the proviso:

"...in any case vouchers specifying the time daily spent upon the work, the workmen's names, the plant and the materials employed shall be delivered for verification to the [Contractor (if sub-contract version) or the Architect/ Contract Administrator or his authorised representative (if main-contract version)] not later than 7 days after the works has been executed".

Many contractors and subcontractors will endeavour to follow this procedure but often ignore the fact that it is one of the last resorts for the valuation of a Variation. However, that is not the issue here. Below are two cases that consider disproving the time recorded in unverified timesheets and verified timesheets.

UNVERIFIED TIMESHEETS: *JDM Accord Ltd v Secretary of State for the Environment, Food and Rural Affairs, 16 January 2004, TCC*

In 2001, the UK witnessed the outbreak of the foot and mouth disease and, in response, the culling of herds of cattle around the UK as a measure to stop the spread of the disease. In light of this, DEFRA entered into a contract with JDM to construct burial sites and infrastructure works for which JDM was to be paid a reasonable rate for such labour and materials as it provided subject to the time/resource record being countersigned at the time by a DEFRA representative.

To achieve this, the parties agreed that a DEFRA representative was to be based on each site and his/her job was to record



the activity being performed, the resources and time spent. The record (which I will call the timesheet) was then to be signed each day by an employee nominated by JDM and by the DEFRA representative.

JDM produced timesheets to back up its claim for payment. Unfortunately, the timesheets were not on all occasions counter-signed at the time by a representative from DEFRA because many sites had no DEFRA representative present or where there was such a representative, in some cases the timesheets were not verified. DEFRA challenged the unverified timesheets and resulting invoice.

Given the nature, urgency and speed the works had to be performed, this method of recording the resources was the only reasonable means for JDM to prove its entitlement. Arguably, JDM had fulfilled its side of the bargain and DEFRA had not. However, does this make the unverified time or resource recorded right or wrong?

In respect of DEFRA's challenge, HHJ Thornton QC held:

"It would be to allow DEFRA to take advantage of its breach of contract if DEFRA was to be allowed to make any more extensive challenge to the time sheets than it could have done following their verification by one of its site based representatives. Thus, for any time sheets now in issue which had not been verified by DEFRA on site, DEFRA now has the evidential burden of showing that the contents of the time sheet were inaccurate.

In practical terms, therefore, DEFRA is restricted in its attack on the time sheets to showing that they contain arithmetical or other patent errors, that they are subject to some general error such as not allowing for deductible meal breaks, were fraudulently produced or were produced by a process which was inherently unreliable such that no weight may be placed upon them."

Where the unverified timesheet is claimed to be wrong, HHJ Thornton QC made it perfectly clear: (a) the paying party has the burden of proof of showing that the timesheets contained obvious errors such time for rest, meal breaks included or perhaps a process was created of concealing the error(s); and (b) in the absence of such proof, the timesheets and resulting were contemporaneous and had to be paid.

VERIFIED TIMESHEETS: *Premier Engineering (Lincoln) Limited v MW High Tech Projects UK Limited, 18 September 2020, TCC*

In February 2018, MW engaged Premier to provide manpower (trades and supervisors) and materials, to a large construction project in Hull known as the Energy Works Hull Project. MW usually specified its requirements on a weekly basis for the week ahead. Premier would supply them, and the men would be employees of and paid by Premier at hourly rates. It was for MW

to allocate work for Premier's men to do from time to time. Entry to the site on arrival and exit on departure was to be through turnstiles that recorded who had been on site and for how long.



The system that was operated was that, normally at the end of each week, Premier presented timesheets to MW setting out the hours that their men had worked plus other items such as allowances for travel. Premier initially maintained a sheet for signing in and out to support the hours that would be entered on the timesheets, though this paper system was later superseded. Also included on the timesheets would be incentive hours where MW had offered an incentive in particular circumstances: a typical example would be that if a man worked a particular number of hours or shifts he would be paid an additional bonus. The timesheets would almost always be signed by a representative of Premier to vouch for their accuracy. On presentation of the timesheets to MW, a responsible person would sign them off.

They would then be used by Premier as the basis of their invoicing, as contemplated by the agreement between the parties. It was common ground that the invoices were checked by MW on receipt. MW would then raise an internal Sub-Contract Payment Request which would specify the amount for payment to the subcontractor. That document was counter-signed by two senior employees and finally authorised for payment by another, yet more senior employee. There would be a supporting sheet which would show the extent of any reductions that had been made to Premier's invoice and where the reduction had been made. In some (but by no means all) cases, MW would then issue a Payment Notice.

The Judge (The Hon. Mr Justice Stuart-Smith) found signed timesheets are primary evidence of hours worked. As such, the whole purpose of the system is that they should be capable of being relied upon for the meaning they bear. Their effect, subject to mistakes, should be to record hours worked (and, in the present case, other bonuses and provisions such as holidays and travel) and to provide a solid and reliable foundation for invoicing. Other evidence may take the form of objective data (turnstile or biometric data): unless excluded by agreement there is no limitation on the evidence that might be relevant and admissible.

MW took issue with the time recorded in some of the verified timesheets and looked to other records to disprove or question the resource time that had been claimed by Premier.

TURNSTILE DATA

Where a claim for payment is made based on timesheets, turnstile data may be useful evidence against which to check a contractor's claimed hours. On this project, Premier distrusted the turnstile data for two main reasons: (i), they had reason to believe that the turnstiles did not always function and record workers' movements properly; and (ii), some part of their men's working days were spent outside the turnstiles for a number of reasons including use of offices and facilities for food, relaxation, safety briefing before the start of each shift (the latter being chargeable but would not be accounted for by turnstile data) were outside of the perimeter; and Premier carried out some work outside the perimeter.

Perhaps on this point a view could have been made of the 'reasonable' time that should have been expended outside the working area for food and rest and removal of that time from the timesheets. The Judge was of the opinion that the turnstile data, even if admitted, did not provide sufficient detail to support findings on productivity because it provides no evidence about what was being done by men outside the turnstile perimeter and no measurement of their productivity either outside or inside it.

The Judge went onto to find that in May 2018, there was an agreement between the parties to exclude turnstile data to check the timesheets.

PROGRESS/ PRODUCTIVITY DATA

MW disclosed one or more documents recording Premier's progress and occasional other documents which set out targets and achievements for subcontractors. Where Premier featured on these other documents, the relevant line on the document would usually cover the work of more than one subcontractor. The Judge held that these documents were inadequate evidence on which to draw conclusions about Premier's productivity or the reasons why subcontractor's targets were not achieved where that was shown on the sheets. Neither those documents nor any other evidence that has been brought to the attention of the Court would enable a judgment

to be made about the effectiveness of Premier's work that gave rise to that progress or whether there were reasons extrinsic to the quality of Premier's workforce and work which contributed to or determined the level of progress achieved from time to time.

The Judge further held, MW would have known if Premier's men were simply not working (or available to work) significant proportions of the times that they had been requisitioned by MW and should have been working and for which they were billing week by week. And, if they had known any such thing, MW would have been on Premier's back in no uncertain terms because of their financial need to accelerate. Similarly, if Premier's men had been unproductive because of incompetence or inadequate supervision by Premier, MW would have complained and there would be documentary references to such complaints: but there were not.

To be fair to MW, what the Judge alludes to in terms of recording productivity could, in my view, only be met by MW personnel recording more frequently (perhaps daily) and in greater detail, the task each labourer (or group of labourers) was performing and the time taken. That is an enormous task and it is arguable whether this is at all possible on a large industrial project with significant labour levels, disciplines and different tasks being performed from day to day.

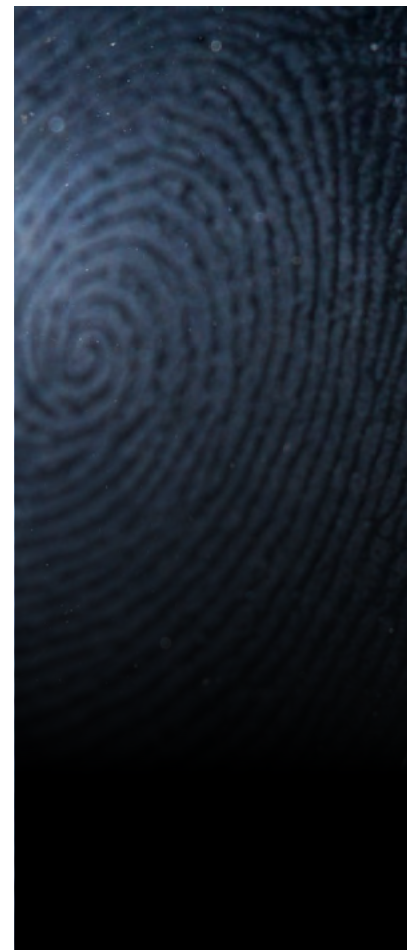
BIO-METRIC DATA

The judge noted that modest differences between timesheets and objective data from turnstiles or the biometric clock (e.g. finger print scanning for the purposes of clocking time in and out) were to be expected; but it is important to note that the parties did not agree that Premier should be paid with the detailed information from the objective data as the primary or determinative source of invoicing.

While objective data (whether from the turnstiles or the biometric clock) may assist in determining when men started and finished their working day, they do not assist in determining what they were doing during the day or why they were doing what. Consequently, the Judge rejected the use of objective data in support of MW's primary case, which it described as "Excessive breaks".

WHAT CAN BE LEARNT FROM THE ABOVE CASES?

Where the unverified timesheet is claimed to be wrong due to a paying party's failure to verify the time at the agreed intervals, JDM case makes it clear that the paying party has the burden of proof of showing that the timesheet contain obvious errors.



Whilst each case will turn on its own facts, the Premier case seems to be clear that if there is an agreement for use of specific data collection or approval system to verify timesheets, in the event of a dispute regarding the verified time, that data is the primary evidence of the agreed time and, subject to what the parties may have included in the agreement or agreed post agreement, secondary/ objective data may (or may not) be used to disprove the verified time.

In light of the Premier decision, it is recommended that if parties are willing to value work on a time expended basis, the agreement should, as a minimum, include provisions such as:

- Specify how the time is to be collected and verified.
- If more than one source of data collection is to be used which data collection tool is to take precedence in the event of conflict in the data.
- The frequency of verification and adjustment.
- Whether all time is recoverable or only the hours that the labour is productive at the work face.
- From which point of entry is time data collected (e.g. at entry to the site or the nearest time collector to the work face).
- If on reviewing the timesheet the payers representative does not agree with the time, take issue and record this in writing at the time.
- As an alternative to the above, a provision in the agreement and a statement on the template that signature on the timesheet is not to serve as conclusive evidence that the hours recorded are correct for the purpose of payment or is to serve only for the purpose of payment on account subject to the verification using one or more of the agreed data collection sources.

For further contractual advice on protecting your position on matters such as records and time keeping, please contact the writer or your nearest DGA office.

MORE INFORMATION

If you would like to find out more details about any of the subjects covered in this Ebriefing please contact DGA Group through the contact details below or at DGAGroup@dga-group.com

DGA GROUP HEADQUARTERS

25 Eastcheap
London
EC3M 1DE

Tel: +44 (0)203 961 5340

SINGAPORE

20 Anson Road
#19-02
Twenty Anson
Singapore 079912
Singapore

Tel: +65 62916208

HONG KONG

6/F Luk Kwok Centre
72 Gloucester Road
Wan Chai
Hong Kong

Tel: +852 3127 5580

UNITED ARAB EMIRATES

Office 615
Park Lane Tower
Al A'amal Street
Business Bay
United Arab Emirates

Tel: +971 4 437 2470

AUSTRALIA

Level 39
385 Bourke Street
Melbourne
Vic 3000
Australia

+61 (0)3 8459 2189

AUSTRALIA

Level 23
52 Martin Place
Sydney
NSW 2000
Australia

+61 (0)2 9220 5027

CANADA

61 Legacy Landing SE
Calgary
Alberta
Canada
T2X 2EH

Tel: +1(587) 586 5502

AFRICA

Building 2
Country Club Estate
21 Woodmead
Sandton
South Africa
2054

+27 (0)11 258 8703

DGA UNITED KINGDOM

