

WITHHOLDING PAYMENT UNDER JCT AND NEC CONTRACTS

Withholding Notices - what level of information is required?

Withholding Notices are the HOT TOPIC as their use becomes increasingly common and their effect increasingly marked. Two recent decisions, *Melville Dundas* decided by the House of Lords and *Aedas Architects Ltd v Skanska Construction UK Ltd*, a Scottish case, focus on the issues of withholding.

The law is clear in that a party cannot withhold a payment of a sum due after the final date for payment, unless it has issued an effective notice of intention to withhold, as provided by s111 of the HGCR Act 1996. The extent of the guidance provided by the Act as to the level of detail required in an effective withholding notice is provided at s111 (2). This simply states that the notice must specify— (a) the amount proposed to be withheld and the ground for withholding payment; or (b) if there is more than one ground, each ground and the amount attributable to it. Neither the Act, nor any decisions in the courts provide specific guidance or clarity as to what will constitute an effective withholding notice and how it should be drafted. The Judge in the *Melville Dundas* case “*stressed the need for clarity*” when withholding money against interim payments, in order to promote confidence in cash flow, as intended by s111 of the Act. In the case of *Aedas Architects Ltd v Skanska Construction UK Ltd*, the Judge stated that “*The contract demands attribution to each ground. It does not ask for any apportionments and in my view it is a competent way to proceed by debiting all sums. The Statute speaking of “each ground” says attribution “to it” must take place. In my view that also is what the counter notice has done. All the grounds which can be calculated have so been and a global figure debited. In my view that is compliance.*” Here the Judge distinguishes between *attribution* and *apportionment*. So..... the Act requires attribution to each ground but does not require apportionment. It follows on this view that a “global” sum could be attributed to all grounds in the withholding notice without being apportioned.

In conclusion, when drafting a withholding notice, as a safeguard it **is** important to set out the grounds and the amount attributable to each ground. Although the distinction between apportionment and attribution is not one which has been decided on by the English courts, to avoid the possibility of a withholding notice being challenged on this basis, it would be prudent to apportion and attribute where necessary.

A practical guide to defending withholding notices:

Provided that a party to a contract issues a compliant withholding notice setting out the ground or grounds and the sums attributable to each ground then the party may legitimately withhold.

So what can you do to defend that position?

Technical Challenge:

- Are the provisions of the contract compliant with the HGCR Act?
- Is the notice to withhold compliant with the contractual requirements?
- Is the notice to withhold compliant with the timing requirements?
- Is the notice to withhold compliant with the means of issue? (e.g. registered post?)

Contractual Entitlement Challenge:

- What is the cause (breach) of the contract giving entitlement to withhold?
- Is there a loss naturally flowing from that breach?

Quantum Challenge:

- Is the valuation of the withholding prepared correctly and/or in accordance with the contract?
- Is the evidential material fully auditable and relevant?
- Do the costs claimed/presented naturally relate and flow from the alleged breach?
- Have the quantities been properly calculated?
- Are the rates and prices fair and reasonable?
- Are the reference points correct?

Watch out for the new **Construction Contracts Bill** or to give it its full name “The Local Democracy, Economic Development and Construction Bill”, the new and improved version of the HGCR Act (1996) predicted to come into force late 2009/early 2010.

What’s new in the new Bill? – amongst other things

- The Act will now apply to contracts agreed in writing or orally
- Adjudication Costs—any attempt to allocate the costs of Adjudication between the parties will be invalid
- Conditional payment—ban “pay when certified” clauses
- Right to suspend – widen the right to suspend to

“.....suspend performance of any or all of his obligations.....”

Seminars 2009:

Our bi-annual seminar in Wakefield May 2009 entitled “Construction Contract Know-How – focus on Cash-Flow” was attended by over 60 delegates.

Some feedback comments were

“this was the most informative seminar I have ever attended” (Yorkshire/Midlands Main Contractor) and;

“good presentation – very relevant to the current market situation” (National Sub-Contractor).

Our next free seminar will be held at Pride Park in Derby on 11 November 2009 – look out for your invitation in October or check our website @ www.ramskillmartin.co.uk for further details.

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