

With-holding Notices, Friend or Foe ?

Depending on which side of the equation you sit, payer or payee, withholding notices can be either good or bad news.

A Compliant Notice

If serving a withholding notice, provided you stipulate the ground or grounds for withholding, together with the amount you intend to withhold for each ground, and serve the notice timeously, you will be entitled to withhold the sum(s) notified.

Compliance with the above provisions is relatively easy. The quantum does not have to be precise. If the withholding notice is due to the payee's alleged breach of contract the damages do not have to have been incurred. An assessment is all that is needed. The alleged breach does not need to be proven for the purposes of a successful withholding. The Good News – *Friend*.

It is not difficult to see that the process lends itself to abuse in that both the ground(s) and the quantum can be entirely spurious. Compliance with the requirements of the notice provisions however entitles the payer to hold onto the money.

The unscrupulous use of the withholding provisions can significantly increase the payment period stated in the contract. In certain circumstances it can bring about the demise of a payee. The Bad News – *Foe*.

Remedies

The quickest remedy is to commence an adjudication. You must have first written to the payer disputing the withholding notice to crystallise the dispute.

Unfortunately it will take at least five weeks to get an adjudicator's decision, and incur you in cost (as a minimum in terms of your own time if dealt with in-house) before you see any money on the basis you are successful – Further Bad News.

There is also the recourse for final dispute resolution under the Contract either arbitration or litigation. This is unlikely to prove beneficial however in circumstances of withholdings in respect of interim payments. This is due to the length of the process.

Is there a way to prevent the unscrupulous use of withholding notices? *Contact us to find out.*

Article By Brant Associates
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September/October 2009

We were pleased to be able to take a number of our clients to the British Touring Car Championships' penultimate round at Rockingham Speedway, Northamptonshire. The sun shone, food and drink flowed and a great day was had by all.

In addition we welcomed a new member to the family in Ian and Claire's son Fraser Harry Brant, born 04 September.

3 Peaks Challenge

On the Weekend of 27th June 2009, Ian, together with four friends raised £1,600.00 for Cancer Research UK by completing the 3 Peaks Challenge.

This involved climbing Ben Nevis, Scafell Pike and Snowdon, consecutively.

We would like to thank our clients for their kind contributions which helped raise this

considerable sum for such a worthy cause.



Brant Associates select a worthwhile charity to support each year.

News on the 2010 charity and events will be available in the New year.



Pictured above: (from left Ian Brant with team mates)

Sportsman's Dinner

On 3rd April 2009 Trevor, Mark and Ian took a number of clients to the Oundle Rotary Club's annual Sportsman's Dinner, held at the Great Hall, Oundle. This was a very enjoyable evening with the main speaker, Dave Basset, providing a very entertaining presentation followed by a very amusing comedian. Our attendance helped the Rotary Club (of which Trevor is a member, and former President) raise a significant sum for charity. We look forward to taking more of our clients to the equivalent event next year.

Letters of Intent and Quantum Meruit – Easy Street or Skid Row?

A significant element of the UK construction industry appears content to have their commercial and legal relationships defined on the basis of a letter of intent rather than by clear and definite Contracts. As a consequence questions often arise as to whether any liability arises from such letters, and if so, what that liability may be.

An example of the problems that can be involved is found in the case of ERDC Group Limited -v- Brunel University which arose from the construction of new sports facilities at the University's Uxbridge campus.

Brunel appointed ERDC on the basis of the JCT Standard Form of Contract With Contractor's Design, 1998 Edition, however as the scheme had not received full planning permission Brunel decided that formal execution of contract documents should be deferred until consent had been granted. In order to avoid delay ERDC agreed to carry out design works under the terms of a letter of appointment. In the event five letters were issued for both design and construction work; the first three were returned countersigned by ERDC, the remaining two letters were issued but were not countersigned or returned; authority under the last of these letters expired on 1 September 2002. Following this date ERDC continued with the works even though no further letters of appointment were forthcoming. ERDC left site, by agreement, at the end of March 2003 albeit the works were not entirely complete.

The contract documents were never executed.

Disagreements arose and in court ERDC claimed that as the work content had significantly changed from that upon which it had tendered and contended that in the absence of a formal contract it was entitled to have the works valued on a quantum meruit or costs plus basis. Brunel argued that the works should be valued in accordance with the arrangements set out in the JCT Standard Form which had, until late 2002, been followed by both parties.

In his judgment HHJ Humphrey Lloyd QC firstly summarized the position concerning letters of intent as follows

"Letters of intent come in all sorts of forms. Some are merely expressions of hope; others are firmer but make it clear that no legal consequences ensue; others presage a contract and may be tantamount to an agreement 'subject to contract'; others are contracts falling short of the full-blown contract that is contemplated; others are in reality that contract in all but name. There can therefore be no prior assumptions, such as looking to see if words such as 'letter of intent' have or have not been used. The phrase 'letter of intent' is not a term of art. Its meaning and effect depend on the circumstances of each case."

In Galliard Homes -v- J Jarvis & Sons (1999) it was held that an agreement between the parties did not have legal effect until a formal contract, being a contract under seal was executed, however in Harvey Shopfitters Ltd -v- ADI Ltd (2003) it was found the mere fact that the parties had contemplated executing formal documents but had not done so did not detract from the parties intention to be contractually bound.

HHJ Humphrey Lloyd QC held that in this case there had been a clear intention to create legal relations albeit it was accepted that Brunel never intended to contract unconditionally for the whole of the Works rather it had offered a limited contract by reference to value that would permit the formal contract, when executed, to take effect in retrospect. The court also had no problem in accepting that the second and subsequent letters were contracts that superseded the previous one and held that the fourth and fifth letters were accepted by ERDC's conduct in continuing to execute the works.

On the issue of valuation the court concluded that work done by ERDC up to the expiry of the last contract on 1 September 2002 should be valued under the JCT Valuation Rules that is at the relevant rates and prices from ERDC's tender; whereas for works executed after 1 September 2002 ERDC was entitled to be paid on a quantum meruit basis. However, it was held by the court that because the conditions after 1 September 2002 were not materially different to those prior to that date it would not be right to change from contract rates to an assessment based entirely on costs plus profit as a 'reasonable price' did not become unreasonable simply because the authority in the letter of appointment had expired; therefore the works should be valued by reference to ERDC's original rates.

This decision provides a timely reminder to parties, when assessing quantum meruit payments that they should be made from the standpoint of the financial advantage gained by the party instructing the additional work based on fair commercial rates, rather than purely on costs incurred in executing the work.

Article By Brant Associates

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