



Technical

Pay Less Notices - The Second Bite

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The New Construction Act

1. The Local Democracy, Economic Development and Construction Act 2009 came into force on 1 October 2011. The Act modifies some sections of the 'old' Housing Grants and Construction Regeneration Act 1996. The modified 1996 Act is often referred to as the New Construction Act. Amongst other significant changes the new act addresses some of the issues that have been experienced in respect to payment.

For ease of reference when referring to subcontractors, the principles equally apply to a contractor.

The Old Act

2. Under the old Act it was usual that either;
 - the sub-contractors would value the work and make applications for payment; or
 - the main contractor would value and certify the work.
3. If the contractor disagreed with the application or wanted to pay less than certified then they would issue a withholding notice setting out the amounts to be withheld and the grounds for withholding (s111).

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4. Under the old Act the contractor was supposed to issue a payment notice (s110) saying how much they would pay. There were no 'sanctions' if payment notices weren't issued.

The New Act - Sanctions

5. The new Act introduces 'sanctions' if the Contractor does not issue a payment notice within 5 days of the due date. The 'sanction' is that the sub-contractor can serve a 'notice in default' setting out the amount due. If the sub-contractor has already issued an application for payment then that application is in effect the Notice of Default. The New Act does not allow the sub-contractor to issue a further Notice of Default. This means that the sub-contractor can't increase the amount it has applied for in anticipation of the contractor not issuing a pay less notice.

The Pay Less Notice

6. If the Contractor doesn't issue a Pay Less Notice in time then the amount set out in the application or Notice of Default becomes the amount that must be paid. If the Contractor is late issuing its notice then it cannot argue that the amount is not due. Although the Contractor may be able to correct any mistakes during the next payment cycle – unless the Sub-contractor has gone bust.
7. The new Act says that the Pay Less Notice must set out the sum considered to be due and the basis of the calculation. It is suggested that the requirement for the basis of calculation to be set out will be satisfied if the calculation is set out as a simple mathematical calculation:

$$(\text{£X} - \text{£Y} = \text{£Z})$$

8. The pay less notice is often said to give the Contractor a second chance if it has failed to issue a payment notice.

Problems with Inflated Applications or Default Notices

9. The serious issue for the Contractor is that if the Sub Contractor has issued an inflated application or Notice in Default and the Contractor fails to serve either a payment notice or a payless notice because the amount that the Sub Contractor has notified becomes the amount that must be paid.

The Final Date for Payment – Deadlines

10. The Contractor and Sub-contractor can agree the minimum period of time that notice must be given before the final date for payment. The less notice that is given benefits the Contractor because they can leave it until the day before the final date for payment. This gives the Contractor more time to calculate set offs and deductions.

Don't miss the deadline!!!

Payment Notices and Zero Amounts Due

11. Many commentators say that a payment notice must still be given, even if the sum due is zero. This would mean that if a construction contract provided for monthly payments and allowed for a final release of a retention (at completion of making good of defects) by requiring monthly assessments throughout a defects liability period, the payer would still have to give a payment notice every month until the final release of retention was paid.
12. If you require assistance with any of the above issues, contact Ramskill Martin at any of our offices detailed below.

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