



What level of detail should a pay less notice include in order for it to be valid?

Muir Construction Ltd v Kapital Residential [2017] CSOH 132

This Scottish judgment gives guidance as to the level of detail required to be included in pay less notices. Although it is not binding in England and Wales, it is likely to be persuasive. It reiterates that all parties making payments must include sufficient detail in their pay less notices, or they may be required to pay the amount claimed by the other party, in full, even where they have claims that exceed the amount said to be due.

Background

It should hopefully now be clear to all in the construction industry that if a payment or pay less notice is issued late then it will not be valid. The amended Construction Act give a precise time by which pay less notices must be issued by the paying party, so it is clear whether pay less notices have been issued late or not. If a payment or pay less notice is not issued in time, the other party may well be entitled to payment of its application in full, without any deduction, withholding and set-off.

However, all the Construction Act dictates about the content of payment and pay less notices is that they must set out “*the sum that the payer considers to be due*” and “*the basis on which that sum is calculated*”. This leaves open an important question about just how much detail is required in order for a pay less notice (or payment notice) to be valid.

Decision

In the Scottish case of *Muir v Kapital*, Muir claimed £102,000 which Kapital held as retention. Kapital claimed that there were defects in Muir’s work and that some of it was incomplete. They issued what they claimed to be a pay less notice, which stated “*We consider that the sum that is due on the date this notice is given is: Zero (£0.00) (the ‘Amount Due’) ...*”. It appears that Kapital’s claims were in excess of the amount of retention claimed by Muir, but no further basis was given for that figure in the notice or the letter that accompanied it.

The court held that Kapital “sets forth no figures and thus no basis substantiating the zero sum figure in the [pay less notice] or in any of the other documentation upon which it relies” and considered that their position “amounted to no more than saying the sum retained is not a large one and given the number and nature of problems... the cost of remedying these would clearly amount to a figure well in excess of the retained sum”.

The court went on to decide that the pay less notice did not provide a proper basis for the zero sum stated to be due and was accordingly invalid and ineffective.

What does this mean for parties making payment and parties claiming payment?

The court indicated that in order to be valid, a pay less notice needs “at least to set out the grounds for withholding and the sum applied to each of these grounds with at least an indication of how each of these sums were arrived at”. So, a party making payment needs to do at least that and make sure there is a clear basis of calculation, even where sums have not yet been firmed up, otherwise it runs the risk of having to pay the amount applied for in full.

Each pay less notice will still be taken on its own merits, so it is important that the level of detail given is adequate in the circumstances.

On the other hand, parties that are to receive payment should consider whether the pay less notices they receive meet the minimum requirements indicated in *Muir v Kapital*; deficient notices may allow them to claim the amount applied for in full and apply significant commercial pressure.

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**CONTRACT &
CONSTRUCTION
CONSULTANTS**

Contract & Construction Consultants

Cavendish House
15 Whiteladies Road, Clifton
Bristol, BS8 1PB

T: +44 (0) 117 925 9001

E: enquire@contract-consultants.com

W: www.contract-consultants.com