



DECODING COMPLEXITY.

A REMINDER ON PAY LESS NOTICES

MUIR CONSTRUCTION LTD V KAPITAL RESIDENTIAL LIMITED

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MUIR CONSTRUCTION LTD V KAPITAL RESIDENTIAL LIMITED [2017]

A reminder of the detail required to be included in Pay Less Notices was set out in Lord Bannatyne’s opinion in the Scottish case of Muir Construction Ltd v Kapital Residential Limited [2017] ScotCS CSOH 132. The parties negotiated and entered into a “Settlement Contract” which contained provisions for Kapital to withhold retention money until the completion by Muir of any outstanding defects.

The specific provisions in the “Settlement Contract” required Kapital to issue a “Pay Less Notice” if it wished to withhold payment of any retention. Kapital issued a letter to Muir, along with a formal “Pay Less Notice”, a list of outstanding defects and an architect’s opinion on these items. Kapital sought to rely on these documents as a valid “Pay Less Notice” and as the basis for certifying zero. However, there was no estimate or calculation of the likely value of the defects. Lord Bannatyne rejected these documents as a valid “Pay Less Notice”, at paragraph 89 saying: ‘There is no calculation put forward which would allow a reasonable recipient to make any sense of the figure arrived at’.

The definition of a “Pay Less Notice” was set out in the “Settlement Contract” at clause 4.10.2. The wording of this clause is similar to the payment notice requirements set out in Section 110A(2a) of the Housing Grants, Construction and Regeneration Act 1996 as amended by the Local Democracy, Economic

Development and Construction Act 2009 (“the Construction Act”), see below:

Cl.4.10.2 - Settlement Agreement	s.110A(2a) - Construction Act
<p>“A Pay Less Notice”...shall specify both the sum that he considers to be due to the Contractor at the date the notice is given and the basis on which that sum has been calculated. (emphasis added)</p>	<p>Payment notices: contractual requirements</p> <p>A notice complies with this subsection if it specifies...</p> <p>(i) the sum that the payer considers to be or to have been due at the payment due date in respect of the payment, and</p> <p>(ii) the basis on which that sum is calculated (emphasis added)</p>

The wording of the Settlement Agreement was very similar to the wording of the Construction Act in that the basis on which the sum was calculated must be provided. This was the issue addressed by Lord Bannatyne. His further comments at paragraph 90 provided a reminder as to the level of detail required:



"I am persuaded that the PLN [Pay Less Notice] in order to properly provide a basis 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."

ADVICE WHEN PREPARING A PAYMENT OR PAY LESS NOTICE

When preparing a payment notice or pay less notice, an Employer or Contractor must ensure that they comply with the three steps below to withhold monies successfully:

- (i) Clearly set out the ground(s) for withholding payment;
- (ii) Clearly identify the amount(s) of money being withheld against each ground for withholding payment; and
- (iii) Indicate how each amount of money withheld is calculated. Paying parties must ensure they properly detail payment and pay less notices in line with the points above. Whilst this is a Scottish case, it is very likely that the requirements set out by Lord Bannatyne would also apply to cases in England and Wales.

ABOUT THE AUTHOR



Martin Campbell is a Managing Consultant with HKA based in the company's Glasgow office. He is a Chartered Quantity Surveyor and has extensive contractual and commercial management experience in the UK, Middle East and South East Asia across a wide range of sectors. Martin routinely provides quantum support in building and infrastructure disputes. Martin's knowledge of the industry is based upon his time working as a quantity surveyor and subsequently as contract administrator for major contracting organisations.