

# RESOLUTION

The Newsletter of ARBICON ADR Ltd

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## ***Miss a payment notice at your peril!***

Following the introduction of the Housing Grants, Construction and Regeneration Act 1996 (the Construction Act), construction contracts must incorporate an “adequate payment mechanism. This means that it should be easy to identify a “due” date for payment and thereafter a “final” date for payment together with a time period between the two dates. If these dates cannot be identified the “scheme” applies.

Furthermore within this payment period the paying party has a right to serve a “withholding notice”, which must stipulate the amount withheld and the grounds for withholding that sum. In other words a right to have a change of mind over what was agreed say if a matter of set off arises. Most standard forms and indeed the Scheme provide a process involving a “payment notice” to be issued by the paying party within 5 days from the “due date”, with a provision for withholding thereafter prior to the final date for payment.

It is also a common misconception by the payee that their application for payment becomes a “sum due”. Unless the contract expressly says so and nearly all standard forms do not, the application for payment is not the “sum due”. Only the paying party’s “payment notice” has any effect on the “sum due”.

So what happens when the paying party does not issue its payment notice? There is no payment identified to be due, the application for payment has no effect contractually so does the whole payment process collapse? It is in effect a breach of contract, but what remedy can be sought for such an omission of duty? There is no penalty. The paying party who thinks he is streetwise therefore would consider this obligation to issue a “payment notice” a flaw in the law, since if there is no penalty for non-compliance why should one be issued? If such a notice is not issued rights to suspend the works will be clouded, the value of works will be uncertain a convenient way to delay payment and impose commercial pressure so why comply? There is no doubt the current legislation does not go far enough to protect payees and the update to this Construction Act expected next year will deal with this problem fully.

On a more common, less cynical, level the paying party will when a payment becomes due consider that there are a number of issues that have arisen, thus contra charges apply, so in turn there is nothing due. On this basis no “payment notice” is issued and as such the logic would be that as no payment has been certified there is nothing to withhold thus no withholding notice is required. Is this a familiar situation?

Problems for the paying party start in any of these situations where payment or withholding notices are not served when the payee takes the matter to adjudication.

***Professional Quantity Surveying Services & Alternative Dispute Resolution Services***

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or visit our website at [www.arbicon.co.uk](http://www.arbicon.co.uk)



## **Miss a payment notice at your peril! Continued...**

If no "payment notice" has been issued the adjudicator will assess what that should have been and if no withholding notice has been served the right to withhold may be lost. If any genuine withholding has not been aired it is likely to be outside the adjudicators jurisdiction and the paying party is likely to face a payment greater than that he considers due plus interest and the costs of the adjudication, just because a simple payment /withholding notice was not served. It is clear from our experience of adjudication that the lack of payment/withholding notices is punished severely with little mercy by adjudicators.

It is therefore of paramount importance that a "payment notice" be issued, even if it is of negative value, if not, the right to set off could be lost. This could have devastating results particularly if the work is at the completion stage as there is no right whatsoever to set off against an adjudicator's decision.

Arbicon ADR are able to carry out a "health check" and provide training or corrective measures if required to deal with payment procedure risks. It is imperative to ensure that payment procedures are managed properly otherwise there is a risk of commercial loss from adjudication.

## **Are you determined enough?**

In these tough times, which frankly don't appear to be easing, it is inevitable that disputes and confrontation will arise and lead to the

parting of ways through determination, or termination as its more dramatically referred to in the latest JCT 2005 suite of contracts.

A further consequence of the time we now live in is the likelihood of insolvency of one of the contracting parties, which requires a number of actions by both parties leading to determination or termination.

The necessary notices are a potential minefield given the consequences of a wrongful determination and care must be taken to ensure that the wording and timing complies fully with whichever contract or sub-contract is used and more importantly, any amendments to the standard forms or bespoke forms of contract. Determination procedure is littered with requirements concerning notice receipt dates, issue dates, notices in writing, methods of delivery and prescribed received dates and requirements that they shall not be given either unreasonably or vexatiously. They can be linked to consents (or failure to obtain same) to sub-letting, assignments (or failure to obtain consent for) and CDM Regulations (or failure to comply with).

Even corruption is generally covered with any offence under the Prevention of Corruption Acts 1889 to 1916 or Local Government Act 1972, potentially giving rise to the termination of employment by an employer.

Difficulties also arise where a funder or warranty holder is able to exercise "step in" rights through the warranty or the Third Party Rights Schedule. This will usually be entirely dependent on the exact wording used in the schedule or warranty and should be treated with extreme caution, prior to instigating any determination or termination procedures. It is clearly advisable to seek assistance when

contemplating the determination or termination procedures on a contract and similarly if you are faced by a determination or termination and wish to verify the validity of this complex area of contract law. Arbicon ADR have assisted in many cases and would be pleased to help anyone who encounters determination or termination in the future. Arbicon ADR can be contacted on 01480 426560 or via email on [advice@arbicon.co.uk](mailto:advice@arbicon.co.uk)

## **Is the recession biting you?**

As the money belts tighten due to the recession the risks of dispute and cash flow problems increase, thus it is more important to pay heed to the commercial risks to beat the recession and survive insolvency.

As the good times fade away it is time to take care by adopting preventative risk measures or pursuing outstanding money debts such as old final accounts or retentions which are still not resolved or un-claimed. Time to open up the filing cabinet! Arbicon ADR can provide recession busting services that will assist in the pursuit of outstanding monies and by prevention, manage your risks in contracting so as to avoid undesirable commercial problems. If you have issues for example relating to non-payment, delays, contra charges, suspension/determination, insolvency, defects including design or you need a health check report and need for contractual training please call a director of Arbicon ADR for an initial no obligation discussion on 01480 426560.

## Arbicon ADR is now regulated by the Royal Institution of Chartered Surveyors (RICS)

Arbicon is a leading provider of Professional Quantity Surveying and Cost Management Services and Alternative Dispute Resolution Services including the following:

### Pre-Contract Services

- Cost planning
- Estimating & tendering (including audits)
- Bills of quantities preparation and production
- Commercial audits and reports
- Budget and cash flow forecasts
- Quantity and procurement checks
- Material scheduling
- Contract procurement
- Drafting of Employer's Requirements

### Post-Contract Services

- Preparation of final accounts
- Contractual procedures advice
- Re-measurement
- Cost reconciliation reports
- Sub-contract account management
- Valuations for interim payments
- Variation and day work account valuation and control
- Extension of time claims
- Loss and expense claims
- Dispute resolution, mediation, adjudication and arbitration
- Support in litigation
- Risk management and dispute prevention
- Expert witness

## CURRENT OPPORTUNITIES

## Arbicon ADR - Seminars

**Contact us if you would be interested in any of our future seminars on managing your risks. Many have benefitted from these informative seminars since we started running them 3 years ago. Contact [advice@arbicon.co.uk](mailto:advice@arbicon.co.uk) or call 01480 426560.**

Arbicon ADR are always seeking to recruit high caliber staff to join their expanding team. If you are a quantity surveyor and would like to be considered for any of our up and coming projects please send a copy of your latest CV to us at [advice@arbicon.co.uk](mailto:advice@arbicon.co.uk), or for more information please call the Directors on 01480 426560.

**CALL US NOW ON 01480 426560 or email us at [advice@arbicon.co.uk](mailto:advice@arbicon.co.uk)**

**TO SEE HOW WE CAN HELP YOU**



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