



Payment Notices: What tips the balance between a valid and an invalid payment notice?

David Sears QC

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“There’s an error in my bill. You accidentally sent it to someone who has no money.”

2009 Act



Payment notices:

A construction contract shall require, in relation to every payment provided for by the contract:

- The payer/specified person to give payment notice or a payee to give a payee notice not later than 5 days after the payment due date [110A(1)]
- The payer's notice must specify the sum the payer or specified person considers to be or to have been due at the payment due date and the basis on which that sum is calculated [110A(2)]

2009 Act



If no payer/specified person notice is given, section 110B will be triggered, enabling the payee to give a payment notice complying with 110A(3)

Pay less notices

- Payer or specified person may give notice of the payer's intention to pay less than the modified sum [111(3)]
- Payer must specify (a) the sum the payer considers due and (b) the basis on which it is calculated
- The PLN must be given not later than the prescribed period before the final date for payment

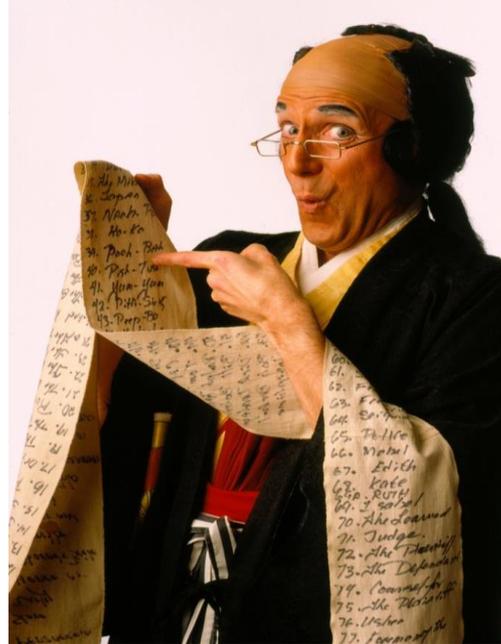
Caledonian Modular v Mar City Developments



Coulson J:

“...if contractors want the benefit of these provisions, they are obliged, in return, to set out the interim payment claims with proper clarity. If the employer is to be put at risk that a failure to serve a payless notice at the appropriate time during the payment period will render him liable in full for the amount claimed, he must be given reasonable notice that the payment period has been triggered in the first place.”

A Little List



- Proper clarity giving reasonable notice

Henia Investments v Beck Interiors



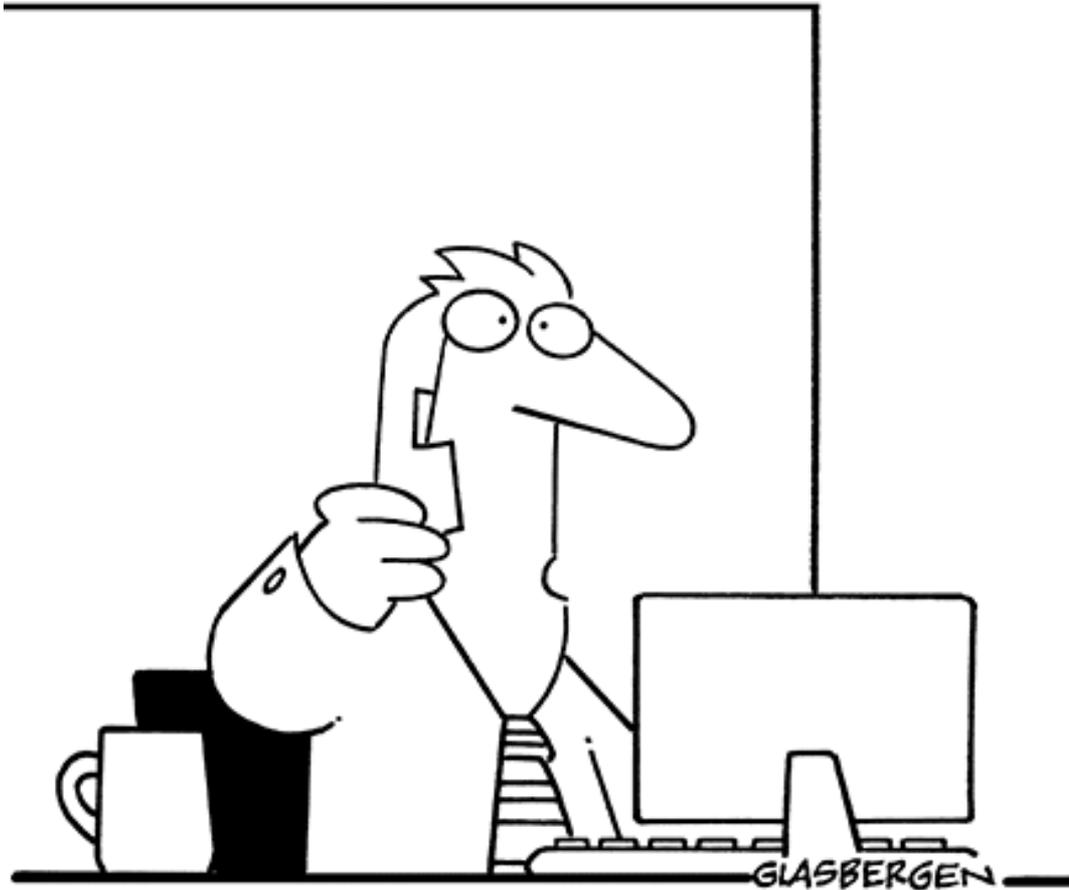
Akenhead J:

“Although it is not apt to talk in terms of conditions precedent, I consider that the document relied upon as an Interim Application under clause 4.11.1 must be in substance, form and intent an Interim Application stating the sum considered by the Contractor as due at the relevant due date and it must be free from ambiguity.”



A Little List

- Proper clarity giving reasonable notice
- Must be in substance, form and intent a payment notice
- Free from ambiguity
- Must state the sum said to be due at the due date



“If you pay your invoice on time, it will mess up our accounting system, so it’s better if you keep paying late.”

Jawaby Property Ltd v Interiors Group Ltd



Carr J:

“There is no, nor could there be, any suggestion that the mere statement by a contractor of what he considered might be due to him is sufficient for clause 4.8.1 purposes. The reasonable recipient of the Valuation would not have regarded it as unambiguously informing it that this was an interim application for the purposes of clause 4.8.1”



A Little List

- Proper clarity giving reasonable notice
- Must be in substance, form and intent a payment notice
- Free from ambiguity - *and readily understandable*
- Must state the sum said to be due at the due date – *a mere statement of what is considered due is not enough*

Kersfield Developments Ltd v Bray and Slaughter Ltd



O'Farrell J:

“An interim application must be identifiable as such and it must set out, as a minimum, the sum claimed as due and the basis on which the sum is calculated...”

Not all irregularities or deficiencies will have the effect of invalidating an otherwise compliant application...

Kersfield Developments Ltd v Bray and Slaughter Ltd



O'Farrell J:

"...There is a distinction to be drawn between: (a) the validity of an application that must be issued in accordance with the requirements of the contract such that it is a valid application which falls to be considered and valued by the employer; and (b) the validity of the claims within an application, that may or may not be sufficiently substantiated so as to entitle the contractor to the sums claimed."



A Little List

- Proper clarity giving reasonable notice
- Must be in substance, form and intent a payment notice
- Free from ambiguity - and readily understandable
- Must state the sum said to be due at the due date – *and the basis on which the sum is calculated*
- Must be issued in accordance with the requirements of the contract – *but does not require supporting documentation*

Kersfield Developments Ltd v Bray and Slaughter Ltd



O'Farrell J:

"... There must be a shared assumption communicated between the parties in question. The party claiming the benefit of the convention must have relied on the assumption. It must be unconscionable or unjust to permit the other party to assert the true position. The estoppel by convention can come to an end and will not apply to future dealings once the common assumption is revealed to be erroneous..."

Surrey & Sussex Healthcare Trust v Logan Construction



Mr Alexander Nissen QC:

“There is a high threshold to be met by any contractor who seeks to take advantage of these provisions whereby a sum automatically becomes payable if a timely employer’s notice is not served...

...it is appropriate to construe the document relied on as a notice against both the contractual and factual setting in which it was issued.”

A Little List

- Proper clarity giving reasonable notice
- Must be in substance, form and intent a payment notice
- Free from ambiguity - and readily understandable
- Must state the sum said to be due at the due date – and the basis on which the sum is calculated
- Must be issued in accordance with the requirements of the contract – but does not require supporting documentation
- A high threshold applies
- It is permissible to construe the notice in context

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**“...if you have already sent us your payment,
please accept our apology for the death threat
and warm wishes for the holiday season.”**

Surrey & Sussex Healthcare Trust v Logan Construction



Mr Alexander Nissen QC:

- Said that the notice satisfied the contract requirement to specify the sum the Employer considered due and the basis upon which it was calculated
- The sender's intention is a matter to be assessed objectively taking into account the context
- What was important was the overall message and purpose which the email and attachments would have conveyed to the reasonably recipient

Basic requirements of clarity

- 1) States what it purports to be (e.g. *“Interim Payment Application No. []”*; *“Default Payment Notice pursuant to []”*)
- 2) Total amount due
- 3) Amount previously certified
- 4) Net payment due
- 5) Basis on which calculated
- 6) Date on which application made
- 7) Payment due date
- 8) Date on which payment notice is to be received
- 9) Date for final payment

Conclusions

- 1) The guidance from the court is clear
- 2) Any payment notice must be in substance, form and intent a payment notice
- 3) As a minimum, it must state what it is, what sum is said to be due and how it has been calculated
- 4) The grey cases will fail to do so
- 5) Those cases may be saved by (i) context and/or (ii) by course of dealing and/or (iii) by estoppel