

Is there a distinction between a "valid" and an "effective" withholding notice?

It is trite law that the respondent to an adjudication under the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA") is unable to rely by way of defence to an adjudication on a cross-claim which should have been the subject of a withholding notice under section 111 of the HGCRA unless a valid withholding notice has been served, but is there a distinction between a "valid" and an "effective" withholding notice?

The HGCRA requires a paying party who seeks to pay less than the sum due under the contract to give written notice to the payee of its intention to withhold payment. If that party fails to do so, it must pay the full sum without deduction. Section 111(2) of the HGCRA provides that to be effective the notice must specify the amount to be withheld and the ground for withholding. If there is more than one ground, each ground must be stated and the amount attributed to each must be identified.

In Windglass Windows Ltd -v- Capital Skyline Construction Ltd (2009) the High Court rejected the validity of a withholding notice which did not set out "valid" grounds for withholding payment of money otherwise due. In doing so, the court provided useful guidance on what amounts to an effective withholding notice.

Capital engaged Windglass to supply and install glazed windows, doors and screens to a site in London. Windglass applied for payment. Capital responded to the requests for payment by letter, within the timescales required for the service of a withholding notice, stating that its financial director would not process the applications for payment because they were not in Capital's standard format, had insufficient supporting information, and had to be authorised by the site manager before the applications could be processed. There was no dispute that the windows, doors and screens had been delivered and installed.

Windglass referred its claims to adjudication. One of the issues for the adjudicator was whether Windglass had agreed to make its applications for payment in a particular form. Capital raised by way of defence a cross-claim for defects and delay. The adjudicator found that there had been no agreement to make applications for payments in a particular form and that Capital had not issued effective withholding notices because its notices did not set out any valid grounds for withholding.

Capital refused to pay the amount of the adjudicator's award and Windglass applied to the court to enforce the adjudicator's decision. Capital argued that the adjudicator had exceeded his

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jurisdiction when he decided that the withholding notices were invalid, and argued that in order to be valid a withholding notice does not need to be an effective withholding notice. The key issue was whether it is possible for a withholding notice to be effective even though the ground for withholding has no substance.

The judge did not accept the suggestion that section 111 of the HGCRA does not require a withholding notice to set out valid grounds for withholding money otherwise due. In the course of rejecting Capital's defence, the judge held that there was no meaningful distinction between a "valid" or an "effective" notice. The judge held that the HGCRA does not permit a party to issue an ineffective withholding notice and then rely on different grounds in a subsequent adjudication. The absence of an effective withholding notice is fatal to the bringing of a cross-claim so that the adjudicator's decision must be enforced.

The judge held that there is no meaningful distinction between a "valid" and an "effective" notice of withholding: a proper basis for withholding a payment is required for a withholding notice to be effective and one must look to the substance of the withholding and not just its form.

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