

**Much ado about nothing**  
**Rachel Barnes, July 2009**

A few weeks ago, we were informed that the RIBA had made a “dramatic U-turn” over a key clause in its “contentious” Standard Form of Agreement. Apparently, following “months of protests” from the Association of Consultant Architects, the institute agreed to include a “no set off” clause when it redrafts its “dangerous” (sic) client agreement forms.

In fact, it is understood that the RIBA is still considering this point and that no decision has finally been made. If the clause is retained, however, it might not be as dramatic a decision as has been suggested.

The RIBA Standard Conditions of Appointment, published in 2007, contain a no set-off clause, as did its 1999 edition. This clause came under review when the 2007 conditions were considered. The possibility that the current clause would not be retained seems to have given rise to the campaign for which victory was claimed.

Clause B1.1 of the RIBA conditions contains a standard statement, in compliance with the Construction Act, providing for the client to give a notice of any amount that it proposes to withhold from the consultant. Clause B1.2 then follows. It then says all rights of set-off at common law or in equity that the client would otherwise be entitled to are expressly excluded.

The word *otherwise* suggests that the intention of the clause is to exclude the right to set off any sum apart from the one that has been the subject of a notice of withholding payment in accordance with the previous clause. Even if that word had not been included, this would be a natural interpretation of clause B1.2, because what then would be the purpose of the notice of withholding payment in clause B1.1?

Where the consultant is a party to a construction contract, within the meaning of the Construction Act, as most commercial engagements are (at least for architects), clause B1.2 would then be redundant. The clause would achieve only what the act, and indeed clause B1.1, already provide – that payment must be made with no sum being withheld unless it has been the subject of a notice of withholding payment, given in due time in the proper form.

The campaigners for the no set-off clause claim (apparently) that the absence of such a clause means that clients can delay or refuse to pay on “potentially spurious” grounds. However, in the case of a construction contract, the intention of the Act (and of clause B1.1) is to prevent this, or at least make it much more difficult. The notice of withholding payment has to set out the ground for doing so (which may include a claim for negligence), or each separate ground if there is more than one, and the notice has to be given within a fixed time of an invoice being rendered. Notices that do not comply should be swiftly rejected by adjudicators and courts.

Of course, it may still be possible for potentially spurious claims to comply with the requirements of the notice. However, realistically there is nothing that can be done about that except to challenge the notice. If the purpose of a no set-off clause is in fact to exclude all rights of set-off in a construction contract, even of amounts that have been the subject of a valid withholding notice, this would not be consistent with the intention of the act. The main purpose of the withholding notice is to protect the payee, by making the payer give proper details of the amount that it intends to withhold. However, it follows that the payer also has a right to give such a notice and then to withhold the amount in question. That right is conferred by the act, and any attempt to take it away would be ineffective.

So a no set-off clause such as B1.2 may only be of any substance in a contract that is not covered by the Construction Act. In the commercial sector, such contracts would be rare for an architect.

Beale and Company Solicitors LLP

London: Garrick House · 27-32 King Street · Covent Garden · London · WC2E 8JB · T: +44 (0)20 7240 3474

Bristol: Venturers House · King Street · Bristol · BS1 4PB · T: 0117 915 4021

Dublin: 92/93 St Stephen's Green · Dublin 2 · Republic of Ireland · T: +00 353 (0) 1428 3450

The RIBA has a special agreement for domestic projects, which does not contain a no set-off clause. Indeed, if the aim were to prevent residential clients from having a right of set-off, the RIBA would need to bear another piece of legislation in mind – the Unfair Terms in Consumer Contracts Regulations – which could mean the clause was struck down.

If the RIBA were to retain the no set-off clause, it could be missing a trick. Although it could be, as I have argued, meaningless in most commercial contracts, it is just the sort of thing that irritates clients. It follows that the RIBA could win some plaudits from the client side of the industry at little or no cost to their members if it were removed.

For further information contact Rachel Barnes on 020 7420 8702 or [r.barnes@beale-law.com](mailto:r.barnes@beale-law.com).

Published in Building Magazine 10 July 2009.