Beware of Cheques given in "Full and Final Settlement"

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It is common in final account negotiations for one party to attempt to dispose of the matter by sending the other party a cheque stating that it is '*in full and final settlement of all matters in respect of the contract*'.

Contractors and sub-contractors traditionally handle such an approach by firstly putting the money in the bank and secondly going back to argue for more money at a later stage.

However this would appear to be a dangerous approach following the case in **England of Newton Moor Construction Limited v. Charlton (Court of Appeal 1981) Con LJ 1997 Vol 13 No. 4**.

In this case Newton Moor did some building work for Mr. Charlton. The tender price was £11,020. After completion, and as a result of some changes, Newton Moor sent a bill for £18,612. Mr. Charlton claimed he was entitled to a set-off an amount for the fact that completion had been delayed, and recalculated the sum partly on agreed prices and partly on what he thought was a reasonable basis for various additions, deductions and the delay, arriving at a figure of £8,847.

His solicitors then sent a cheque for that sum to Newton Moor's solicitors, together with a letter stating:

"*In these circumstances Mr. Charlton has handed to me for despatch to you a cheque for £8,847.00 in full and final settlement of your account concerning work on the property at 44 West End, Sedgefield.*
If you are not prepared to accept this payment we have instructions to accept service of any proceedings concerning same. Will you please acknowledge receipt of this letter and cheque".

That letter and cheque were received by Newton Moor's solicitors, and the cheque was paid into Newton Moor's bank. However five days later Newton Moor's solicitors wrote acknowledging receipt of the letter, saying:

"*With regard to the cheque for £8,847.00 our Clients are accepting this cheque in part payment.*"

Having accepted the cheque, Newton Moor issued a writ claiming the balance. In response, Mr. Charlton claimed that Newton Moor's acceptance of the cheque constituted accord and satisfaction.

Notwithstanding the relatively small amount of money concerned the matter ended up in the Court of Appeal, where it was held that Newton Moor Construction was not prevented from seeking recovery of the sums which it considered due over and above the £8,847 which it had received from Mr Charlton.

However the reasons given by the two judges were different.

Sir David Cairns considered that there was never an agreement that Newton Moor would accept £8,847 rather than the £18,612 which it considered due, because such an agreement (like any agreement not under seal) would have to be backed by consideration. The judge considered that there was no consideration on the part of Newton Moor because the statement in the letter sent by Charlton's solicitors constituted an admission that the sum of £8,847 was due. Accordingly if Charlton admitted that this sum was due Newton Moor was entitled to receive such a sum, and its subsequent receipt of the cheque could therefore not amount to consideration.

It should be noted that if, as in many similar cases, Charlton had offered the sum in full and final settlement but *'without any admission of liability*' Sir David Cairns may well have found that Newton Moor's actions of paying the cheque into its bank constituted an agreement backed by consideration.

The other judge, Eveleigh L.J whilst not commenting on whether the figure of £8,847 constituted consideration, felt that the answer lay in whether the letter, and the acceptance of the cheque indicated that an agreement had been reached. He considered that this was a situation where there may be accord and satisfaction, i.e. a situation where one party is offered and accepts a lower figure in settlement of a higher one claimed, but that on examination of the facts of this matter there was in fact no accord and satisfaction, because the parties were not ad idem. The cheque was not accepted on the basis that it was offered, and this was evidenced by the letter from Newton Moor's solicitors stating that the cheque had been accepted in part payment. Again it should be noted that had Newton Moor's solicitor's not written stating that the cheque had been accepted in part payment there would have been no evidence of the basis upon which Newton Moor had accepted the cheque and in such circumstances Eveleigh L. may well have found that Newton Moor's actions of paying the cheque into its bank constituted acceptance of £8,847 rather the £18,612 claimed.

This case clearly indicates the dangers of accepting cheques sent 'in full and final settlement', particularly if the sender makes it clear that it is sent without admission of liability. Contractors and sub-contractors receiving such cheques should make it entirely clear in writing that their acceptance of the cheque is an acceptance of a part of the payment to which they maintain they are due.

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