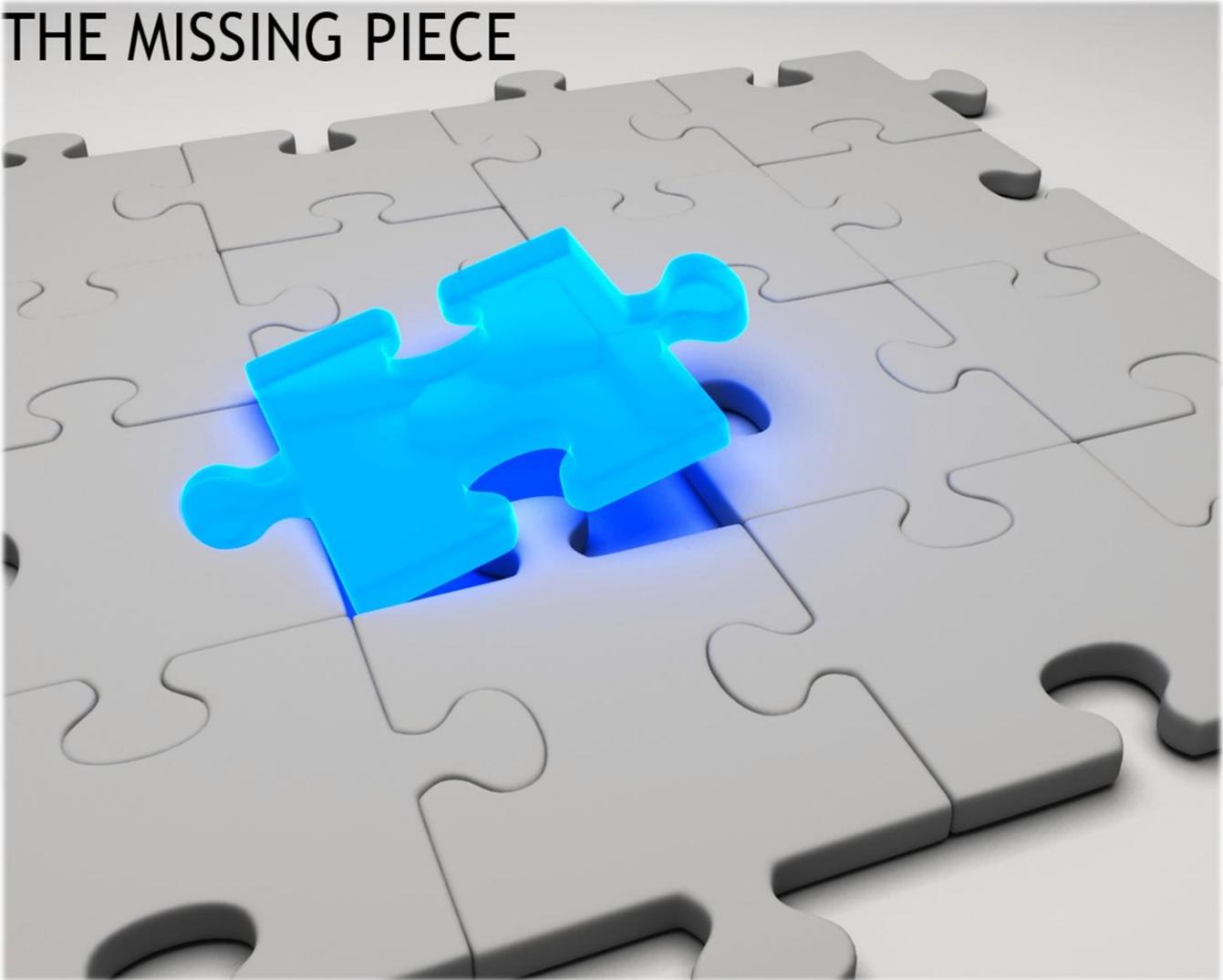


# THE MISSING PIECE



Welcome....

to the first edition of *The Missing Piece*, the monthly legal bulletin from *In House Lawyer*.

*In House Lawyer* is my individual and exclusive legal service with strong ideals and a bespoke approach.

In this January issue I suggest a few resolutions to avoid wasting money.

I start with the simple matter of signing of documents, then the risks of the cheque being in the post and lastly the potential peril of a large dividend.

For more bulletins and information on *In House Lawyer*, go to [www.inhouselawyer.uk.com](http://www.inhouselawyer.uk.com).



## WHO ARE YOU SIGNING FOR?

The case of Dr. Hamid v Francis Bradshaw Partnership highlighted the importance of ensuring the signatory of a document states the context in which he is signing, for example, whether as an individual, on behalf of a partnership or for a limited company.

In this case, the signatory signed his name above and below the trading name, Moon Furniture. The other party (to the contract) interpreted this as meaning that Dr Hamid was signing as an individual, with the trading name Moon Furniture, however, this was not the case. Moon Furniture was actually the trading name of Chad Furniture Store Limited (“Chad”).

As no reference had been made to the fact Moon Furniture was in fact a trading name of a limited company and Dr Hamid did not qualify his signature or make it clear that the contract did not bind him personally, Dr Hamid was personally held to be a party to the contract.

Alternatively, had Dr Hamid been found to have signed on behalf of Chad, rather than as an individual, the company could have faced fines for failing to comply with the Companies Act 2006 as the company’s registered name and address were not present on the document, as is required by the Companies Act.



It is therefore important to ensure you make the capacity in which you are signing clear. If you don’t you could find that inadvertently you personally become a contracting party.



If you have several trading companies then make it clear which of the companies is sending the letter. Don’t just refer to it coming from the holding company or a brand name as the wrong company could be liable under the contract.

## THE CHEQUE IS IN THE POST




---

Does your credit control department cash cheques first and then read the letter that came with it second? Where the covering letter refers to the cheque being paid in ‘full and final settlement’ cashing the cheque could lose you money.

---

The general law is that where a cheque is sent in full and final settlement of a debt by a debtor and that cheque is cashed by the creditor the creditor will be viewed as having accepted the cheque in full and final settlement unless they have qualified their acceptance of the offer. The question of whether the settlement of a debt has in fact been reached by the cheque being cashed is a question of fact depending on the circumstances of each individual case.

Whilst the courts are not willing to draw "hard and fast" rules between cases, it is clear that they are willing to look at the overall circumstances of each case and the conduct and intentions of both parties in (a) offering a sum in full and final settlement and (b) accepting the same. It has emerged from the case law that doing the following will ensure that a cheque tendered in full and final settlement can be banked as part payment (rather than full settlement) of a larger debt.



Immediately upon receipt of the offer and cheque you must notify the debtor in writing that the presentation of the cheque is not to be construed as acceptance of the offer of full and final settlement terms.



In that letter expressly tell them that the cheque has been banked “on account of indebtedness only” or “in partial satisfaction only”. Only present the cheque after that rejection has been communicated to the debtor.

Given the potential implications in unwittingly accepting a reduced sum in settlement, you should review your processes for receiving cheques and responding to cheques offered in full and final settlement.

### DIVIDENDS...HAVE YOU CONSIDERED EVERYTHING?



It is important to note that when examining dividend payments HMRC regularly ask to see copies of board and shareholder minutes and dividend waivers where appropriate.

As you know, a company may only make a dividend distribution out of ‘profits available for that purpose’ i.e. accumulated realised profits less accumulated realised losses (s.380 of the Companies Act 2006).

Don’t forget that...



To pay a dividend in excess of available profits is unlawful and could result in the shareholders being forced to pay back the amounts received and or result in the directors becoming personally liable to contribute any amount that is unrecoverable from the shareholders.



The articles of association of a company usually provide for dividends to be declared by the company in general meeting by ordinary resolution and that the amount of such dividend should not exceed that recommended by the directors.



The wording used when deciding to make a dividend payment is extremely important. A dividend that is ‘declared’ immediately creates a debt and thus a binding obligation on the company to pay whereas the decision to ‘pay’ a dividend does not create a debt and can be rescinded by the directors.



The recording of a decision to either ‘pay’ or declare a ‘dividend’ can have a direct effect on a shareholder’s decision to waive his right to a dividend. For a waiver to be effective for income tax purposes it must be executed as a deed and delivered to the company before the dividend becomes due i.e. before the dividend is either declared or payment received by the shareholder. A waiver executed after a dividend is declared or payment received will still be valid but the shareholder would still be liable to pay any tax due on the dividend.

### THAT'S ALL FOR THIS MONTH...

Next month I'll be tackling standard terms and conditions and contract negotiations. If you have any queries, comments or request for future bulletins then get in touch, I would be delighted to talk to you or meet at your convenience.



+44 (0) 7525 810 444



+44 (0) 1244 318 470



[edelgado@inhouselawyer.uk.com](mailto:edelgado@inhouselawyer.uk.com)



[www.inhouselawyer.uk.com](http://www.inhouselawyer.uk.com)

The Missing Piece is not intended to constitute a definitive or complete statement of the law on any subject, nor is any part of it intended to constitute legal advice for any specific situation. In House Lawyer Limited does not accept any responsibility for action taken as a result of information provided by in The Missing Piece. You should take specific advice when dealing with specific situations. The Missing Piece is general and educational in nature, may not reflect all recent legal developments and may not apply to the specific facts and circumstances of individual transactions and cases. In House Lawyer Limited is registered in England & Wales with number 07808015 with its registered office at 84 Clare Avenue, Chester, CH2 3HP. © 2015 In House Lawyer Limited.