

### **Big changes in the way you get paid...the new Construction Act!**

An amended Construction Act is planned to be in place in October and it will have an impact on every contract in the construction industry. The key changes that everyone in the industry needs to know about are the drastically changed payment provisions, the extension of the adjudication provisions and the new rules around suspension.

Just as we were all starting to get used to the idea of 'withholding notices' they have been scrapped. There is a new notice regime and you need to get it exactly right or there could be dire consequences whether you are the party paying; lets call them the Employer (but it could of course be the Contractor in a sub-contract), or the one being paid; lets call them the Contractor.

The basics are that the Employer must issue a 'payment notice' within five days of the 'payment due date'. If he does not, then the Contractor can issue a payment notice themselves and then (and this is the important point) the amount stated in that notice becomes the sum that must be paid by the Employer on the final date for payment.

The only escape for the Employer is the 'pay-less notice'. This is what it says; a statement by the Employer that he does not owe all of the amounts claimed in the payees notice. If he does not get the notice in within the correct period then he will have to pay the amount claimed.

The time periods are complex and are likely to be a source of huge confusion and many disputes. The payment notice must be issued by the Employer within five days of the 'payment due date' in the contract. If no payment notice is issued by the Employer and the Contractor decides to issue one, then the final date for payment is deferred by the same number of days as the notice is issued after the end of the five day period when the Employer should have done so.

The pay-less notice (if one is to be served) must be issued by the Employer either in accordance with the contract or, if no period is stated, then seven days before the final date for payment. If the Employer drafts his contract cleverly then this period can be as little as one day before the final date.

All of these notices, whether served by the Employer or Contractor must clearly provide the basis on which the sum in them has been calculated and, even if the amount to be paid is zero, there must still be a notice.

There have also been important changes around the adjudication rules. One of the main points of the previous adjudication rules was that all the main terms of the agreement between the parties had to be in writing. In other words if there was no written contract then there was no adjudication effectively.

This has been dramatically changed in the new Act because construction contracts made verbally will now be included. This effectively means that a contract that you have agreed between the parties in a pub over a drink can now be the subject of an adjudication if a dispute arises. The problem with this of course, is that there are likely to be wildly different interpretations of what was said in the pub. This is likely to mean that, not only will there be an increase in the number of adjudications, but also an increase in disputes concerning the terms of the contract between the parties.

Witness evidence concerning those terms is likely to be much more crucial. This makes it even more vital than before that any contracts you enter into are clearly evidenced in writing and everyone understands exactly what the terms mean. The other likely outcome of this provision is that there will be more oral meetings in front of adjudicators to enable them to decide whose evidence they prefer on the terms of the contract and this may increase the cost of a typical adjudication. There may also be disputes arising over written contracts which are "amended by oral discussions".

The other major change made by the Act concerning adjudication is the attempt to stop clauses in a contract which try to allocate in advance the costs incurred in an adjudication. There have been a number of contracts drafted which state that, regardless of who wins or loses the adjudication, the party starting it has to pay the cost and this has been recognised as unjust. Unfortunately, the drafting of this clause is not very clear and there is some debate amongst lawyers as to whether it will effectively outlaw these clauses.

Away from adjudication, another important change is that if a contractor is not receiving payment in accordance with the contract then he has the option to suspend any or all of his contractual obligations. He will then receive an extension of time for his suspended period plus the consequential time necessary to restart the work. Under the new Act he can now recover his costs and expenses reasonably incurred during the period of suspension. Another of the unfair practices that the new Act seeks to stop is the attempt by the employer to make payment conditional upon an event in another contract. For example, in a sub-contract this can mean that release of retention to a sub-contractor is made contingent upon the issue of a making good to defects certificate under the main contract. This has now been stopped under the new Act and the release of the retention will have to be made in relation to the sub-contract whatever the circumstances in the main contract.

Changes have been made in the provisions regarding the circumstance where the contractor becomes insolvent after the date when money should have been paid by the employer. Following a House of Lords case known as "the Melville Dundas Case" the employer will no longer have to make payment in these circumstances.

The overall impact of these changes should not be underestimated. All of the standard contracts are in the process of being amended and you should look carefully at your own contracts and payment provisions to ensure they are compliant. The parties who will benefit from the inevitable early confusion following the implementation of the Act are those who have prepared in advance.

Stephen Clarke  
[Stephen.clarke@clarkewillmott.com](mailto:Stephen.clarke@clarkewillmott.com)  
+44 (0) 845 209 1303