

A Christmas present from the Government

Our present is the draft Construction Contracts Bill - at least “draft” now but it may be law by Christmas. How jolly!

The Housing Grants Construction and Regeneration Act 1996 (HGCRA, the Construction Act or, just “the Act”) has been with us in operation since 1998 and Gordon B decided to review it four years ago, so I guess its proposed amended form merits some comment in these pages.

In essence the draft Bill proposes legislation to replace the adjudication and payment clauses of the HGCRA - hence its construction oriented title. It effects a number of changes and manages to be quite complicated in true civil service Bill speak! I’ll comment on the aspects I see as significant but, I’m afraid, you’ll have to read the new provisions to grasp their full import sooner or later!

Until now, under s107 of the Act, contracts have had to be in writing for Part 2 of the Act to apply. S107 has been interpreted restrictively by the courts such that all of the non-trivial terms of construction contracts must be “in writing” for Part 2 to apply. The draft Bill removes this general requirement, whilst prescribing that various matters must nonetheless be in writing. This means that Part 2 of the Act will apply to all construction contracts - those which are wholly in writing, partly in writing or wholly oral. However, certain provisions of a construction contract, relating to adjudication, must be “in writing”. A contract is “in writing” if it is: made in writing; made by an exchange in writing; made by reference to terms which are in writing; “evidenced” in writing. Something is “evidenced” in writing where it is recorded by a by a party to the contract or by a third party with the authority of a party to the contract. Something is “in writing” if it is recorded in any way.

Adjudicators are only human (really!) and have been known to make the odd ‘slip’. It is established law in arbitration that arbitrators can correct minor errors - typically arithmetic or typographical - after the

completion of the arbitration, when the arbitrator is “functus officio” (no longer has a role or jurisdiction). This has been a bone of contention at times in adjudication and the notes to the draft Bill are helpful in clarifying the right of adjudicators to amend slips (citing *Bloor Construction (UK) Ltd-v-Bowmer & Kirkland (London) Ltd* (2000)). Whilst the law is now established on this in England and Wales, the Bill specifically includes the provision in respect of Scotland, necessitated by Scots law.

Hitherto, parties to an adjudication have born their own costs, unless they have agreed (very rare) that the adjudicator should award costs. The Bill provides for parties, after the commencement of the adjudication, to agree an allocation of costs but also for the adjudicator to decide whether any, or all, of the costs are unreasonable rendering the parties’ agreement ineffective. A further important feature of this part of the Bill is that it outlaws the idea that whoever brings the adjudication has to pay all the costs - a not unknown provision in some contracts.

Adjudicators often have to decide matters concerning interim payments. Sometimes it is argued that a decision by a third party (eg. the contract administrator!) is binding and cannot be opened up by the adjudicator. The Bill renders ineffective any contract term making third party decisions binding. As a consequence, an adjudicator will be able to open up such decisions and consider payments arising under contracts even where they contain terms making such decisions binding.

The most complex amendment, occupying four dense pages of explanatory notes, is apparently small yet important. It concerns payments, or “Notices relating to payments” and “Requirements to pay the notified sum”. The original principles in the Act for notices



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Rob, author of the SCALA and LGTF ‘*Guide to Standard Forms of Construction Contracts*’, has offered to share his experience and expertise with you and looks forward to hearing from readers.

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of what will be paid and withholding notices, if the payer doesn't want to pay the full amount, with associated timescales, remain but names have been changed to confuse the innocent! Under the draft Bill notices can be given by payee as well as payer, by contractor as well as employer, by sub-contractor as well as contractor. The draft specifies the contents of the notices. It also provides for deferring payment where a payee issues a notice in default of a payer's notice - presumably to off-set the “ambush” effect of issuing such notice just before the date payment is due.

The Bill proposes that no longer will there be “withholding” notices which are to be replaced with a system of other notices to achieve, seemingly,

the same effect - names changed to confuse the innocent! The Bill clarifies that withholding can only occur without a notice in the context of insolvency - following *Melville Dundas Ltd (in receivership) and others-v-George Wimpey UK Ltd* and others (2007).

The proposed new payment rules need careful reading and I cannot go into more detail in the confines of this page. I also hear the gentle snoring of SCALA members replete with Christmas lunch and their Bill present from the government. Time to stop, wish you all a merry Christmas and prepare for a New Year of happy disputes over the new terms of the new Bill.

Seasons greetings!

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