DAMP SQUIB OR BIG CHANGE? THE CONSTRUCTION ACT AMENDMENTS

A paper presented to the Society of Construction Law at a meeting in Southampton on 11th January 2012

Paul Newman

April 2012

D135

www.scl.org.uk

DAMP SQUIB OR BIG CHANGE? THE CONSTRUCTION ACT AMENDMENTS

Paul Newman

Introduction

On 1st October 2011 a number of changes to Part ll of the Housing Grants, Construction and Regeneration Act 1996 (the '1996 Act') finally took effect. The changes are set out in Part 8 of the Local Democracy, Economic Development and Construction Act 2009 (the 'LDEDC Act 2009'). The changes followed a lengthy consultation process and seemingly endless pundit contributions to *Construction News*, *Contract Journal* and *Building*.

Implementation

For England, the changes were implemented under the Local Democracy, Economic Development and Construction Act 2009 (Commencement No 2) (England) Order 2011.[1]

For those conducting business in Wales it should be noted that, because of devolved government, Wales is subject to the Local Democracy, Economic Development and Construction Act 2009 (Commencement No 2) (Wales) Order 2011.[2] In Wales the commencement date remained 1st October 2011 (unlike Scotland, where the chosen date was 1st November 2011[3]).

Further, Wales is subject to the Local Democracy, Economic Development and Construction Act 2009 (Commencement No 1) (Wales) Order 2011,[4] which allows ministers to dis-apply part or all of Part II of the 1996 Act, under section 138 of the LDEDC Act 2009.

Because of the LDEDC Act 2009 changes, consequential changes to the Scheme for Construction Contracts (the 'Scheme') have been necessary.[5] For England, these are contained in the Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations

1 Local Democracy, Economic Development and Construction Act 2009 (Commencement No 2) (England) Order 2011 (SI 2011/1582).
2 Local Democracy, Economic Development and Construction Act 2009 (Commencement No 2) (Wales) Order 2011 (SI 2011/1597).
3 Local Democracy, Economic Development and Construction Act 2009 (Commencement No 2) (Scotland) Order 2011 (Scottish SI 2011/291).
4 Local Democracy, Economic Development and Construction Act 2009 (Commencement No 1) (Wales) Order 2011 (SI 2011/1514).
5 Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998/649).

2011[6] and for Wales in the Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (Wales) Regulations 2011.[7]

The distinctions between the English and Welsh legislation are insignificant and minor typographical ones.

The changes apply to construction contracts that are entered into on or after 1st October 2011. So, a main contract that came into effect before 1st October 2011 is governed by the 1996 Act whereas the LDEDC Act 2009 governs any subcontract entered into on or after 1st October 2011.

In Scotland, as explained the relevant date is 1st November 2011. The Scottish Scheme was amended by the Scheme for Construction Contracts (Scotland) Amendments Regulations.[8]

The changes

The test of what constitutes a construction contract (see sections 104 and 105 of the 1996 Act) remains unchanged. Similarly, the domestic householder remains outside the ambit of the LDEDC Act 2009.[9]

The changes are not a fundamental revision of the 1996 Act but nonetheless they must be properly read and understood. In truth, the impact of the changes, other than during the initial stage of familiarisation, is likely to be largely negligible.

For the average contractor or QS, the most significant changes are those relating to payment and the provision of particular notices. For lawyers, adjudicators and contract advisers the most difficult change is that placing oral contracts under the LDEDC Act 2009.

Oral contracts

Many years ago one of the leading legal columnists of his day adopted the strap-line for one of his articles: 'Oral contracts can be a bit of a bind.' Contract advisers know the truth inherent in this remark. Often client instructions devolve into the delivery of a number of lever arch files (not always neatly ordered and seldom complete) and contract advisers start their favorite game – hunt the contract. The self-contained executed JCT contract[10] is a rare commodity. The tussle over the contract terms is usually more significant than the proverbial fight of two bald men for ownership of a comb. To avoid the contract (or at least the other side's version) may mean the difference between payment under a schedule of rates and 'cost plus', or time

6 Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011 (SI 2011/2333).
7 Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (Wales) Regulations 2011 (SI 2011/1715).
8 Scheme for Construction Contracts (Scotland) Amendments Regulations (Scottish SI 2011/371).
9 See the 1996 Act, section 106.
10 Building contracts published by the Joint Contracts Tribunal Ltd.

being at large rather than the period to complete being subject to the constraints of an extension of time regime.

The difficulties caused by section 107 of the 1996 Act are familiar: that is, that a contract needed to be in writing, albeit in the artificial sense understood by the 1996 Act, a borrowing from section 5 of the Arbitration Act 1996.

The construction industry is famed for its inability to reduce all its working terms to writing. Often this is not a sign of consultant torpor, but rather comes from the practical reality of the construction process. Variations may need to be implemented immediately or a contractor design solution formulated now and not tomorrow.

Emboldened by the Court of Appeal decision in *RJT Consulting v DM Engineering*, it was always tempting for the responding party in adjudication to look for any later informal additional agreements and to argue that the adjudicator was not empowered to deal with them. In *RJT* Ward LJ held that:

> '… what has to be evidenced in writing is, literally, the agreement, which means all of it, not part of it. A record of the agreement also suggests a complete agreement, not a partial one.'[11]

However, at grass roots construction judges fought back to achieve a practical outcome, more responsive to construction contracts: see the judgment of Ramsey J in *Brown v Crosby Homes*.[12] In *Treasure v Dawes* another highly experienced construction lawyer and judge, Akenhead J, held that where there were express adjudication provisions, *RJT* did not apply.[13] A dispute concerning an oral variation was one under the contract. The retreat from the strict implementation of *RJT* allowed Birmingham TCC judge HHJ Grant to conclude in *Naylor v Acoustafoam*:

> 'There was a distinction between an amendment or alteration to the material terms of a contract and variations to the works instructed pursuant to the contractual machinery or regime …'[14]

If the LDEDC Act 2009 had contented itself with giving statutory effect to what the judiciary was already doing then that would have been unobjectionable for most observers. However, a more fundamental problem in construction cases is the 'what contract / any contract' argument, oft times centred on the status of a so-called letter of intent.

Though important for the parties, the scenario in *Skanska Rasleigh Weatherfoil v Somerfield Stores* was a routine example of what frequently occurs. There, the employer sent a letter of intent to the maintenance contractor (the 'August 2000 Contract'). This stated:

---

11 *RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd* [2002] EWCA Civ 27, para [19]; also [2002] 1 WLR 234, [2002] CLC 905, [2002] BLR 217, [2002] TCLR 21, 83 Con LR 99, (2002) 18 Const LJ 425, [2002] CILL 1841.

12 *L Brown & Sons Ltd v Crosby Homes (North West) Ltd* [2005] EWHC 3503 (TCC).

13 *Treasure & Son Ltd v Dawes* [2007] EWHC 2420 (TCC), [2008] BLR 24, [2007] CILL 2533.

14 *Naylor Construction Services Ltd v Acoustafoam Ltd* [2010] BLR 183 (TCC).

> '... whilst we are negotiating the terms of the Agreement, you will provide the Services under the terms of the Contract from 28th August 2000 ... until 27th October 2000 ('the Initial Period') ...'[15]

The letter ignored what would happen at the end of the Initial Period. On 27th October 2000 the Initial Period expired. It was later extended retrospectively to 26th November 2000. On 26th November 2000 the Initial Period again expired though later extended to 21st January 2001. After each expiry of the Initial Period, the contractor continued to carry out works and was paid. After 21st January 2001, there were no further extensions although the contractor continued to carry out work and was paid on the same basis as before. The parties failed to reach agreement on the terms of the Agreement. Did the August 2000 Contract continue in force after 21st January 2001? Yes, it did.

In *Plastering Magic v Dare*, Dare (having provided Plastering Magic with a letter of intent) later argued that the letter of intent did not satisfy section 107 of the 1996 Act or the *RJT* test, in that it was predicated upon the parties' intention to enter into a formal contract.[16] The existence of an 'intent' did not negative the potential existence of a contract, based on exactly the same terms as the letter of intent. It was for the adjudicator to form his view.

Establishing the status of a letter of intent can be a lengthy process for a court or arbitrator. Obviously there was always a chance that a letter of intent might be a qualifying contract under the 1996 Act and adjudicators have been tuned in to making the necessary enquiries.

However, the removal of section 107 of the 1996 Act demands that adjudicators go further and investigate fully-fledged oral contracts. Is this fair or sensible? By their nature 'I said, he didn't say' arguments cannot be decided on documents. They require witness evidence, some cross-examination / review of witness evidence and tribunal analysis of that evidence.

So what might a suitable procedure be? An adjudicator cannot luxuriate in initial hearings with prior exchange of witness statements. Instead, he may need to convene a meeting and interview the witnesses in the manner a district judge sometimes adopts in a small claims hearing. So, what happens if it all goes wrong and the adjudicator misunderstands the nature of the contract? An adjudicator can probably derive some comfort from the possibility of invoking the *Bouygues* defence, ie 'I answered the right question albeit in the wrong way',[17] but his decision will remain vulnerable to attack on enforcement on the basis of breaches of natural justice being alleged.

---

15 *Skanska Rasleigh Weatherfoil Ltd v Somerfield Stores Ltd* [2006] EWHC 947 (TCC), [2007] CILL 2449.

16 *Plastering Magic Ltd v Dare (Northern) Ltd* [2010] EWHC 2569 (TCC) unreported but see Anthony Edwards, 'When does a term become a regime?' Cons Law 2011 22(8), pages 14-16.

17 *Bouygues (UK) Ltd v Dahl-Jensen UK Ltd* [2001] 1 All ER (Comm) 1041, [2001] CLC 92, [2000] BLR 522, (2001) 3 TCLR, 73 Con LR 13 (CA).

If an oral contract is found to exist, then it will, of course, not include a written adjudication procedure and under section 108 (2) of the 1996 Act (as amended) the provisions of the Scheme will apply.

Payment

The LDEDC Act 2009 contains revised payment provisions, but subject to the continuing requirement for all construction contracts to have an 'adequate mechanism for payment' (section 110 of the 1996 Act, as amended).

Key changes include:

- pay-when certified clauses are outlawed.[18]
- the House of Lords' decision in *Melville Dundas v George Wimpey* has been given statutory effect.[19] The House of Lords held that a contractual provision that payment need not be made in the event of payee insolvency took primacy over the statutory provision that a withholding notice was necessary prior to any withholding.

There are four components to the payment regime: a due date for payment; a payment notice; a final date for payment and allowing the payer to give notice that he is not going to pay all that is requested.

Under the LDEDC Act 2009 (section 110A of the 1996 Act as amended):

1. **A due date for payment** – the contract must have a requirement for:
   - a notice to be issued within five days of the due date; and
   - the notice to specify the amount due at the due date *and* the basis on which that amount is calculated.

2. **A payment notice –**
   - the contract can require (a) the payer, (b) a third party or (c) the payee to give this notice; and
   - the notice must be given even if the amount due is zero.

3. **A final date for payment** – under section 110B of the 1996 Act as amended:
   - if the contract requires the payer or some other person to give the payment notice and he fails to do so by the required date, then the payee can give the notice;
   - any delay in providing the payee notice will cause the final date for payment to be postponed.

18 The 1996 Act as amended, section 110(1A).

19 *Melville Dundas Ltd (In Receivership) v George Wimpey UK Ltd* [2007] UKHL 18, [2007] 1 WLR 1136, [2007] 3 All ER 889, 2007 SC (HL) 116, [2007] BLR 257, 112 Con LR 1, [2007] CILL 2469.

4. **Allowing the payer to give notice that he is not going to pay all that is requested** – under section 111 in the 1996 Act as amended:

   - the payer must pay the notified amount by the final date for payment unless before then he gives notice to the payee of his intention to pay less;
   - the notice must state the amount the payer intends to pay and the basis on which that amount is calculated. The wording is potentially more lax than that in the 1996 Act, which specifically required the notice to specify the reasons for withholding each amount that was not going to be paid;
   - the period within which the pay less notice is to be given should be specified in the contract.

Suspension

Though the decision to suspend performance remains one not to be taken lightly (who is likely to risk an unlawful suspension or general 'upstream' hostility?), under section 112 of the 1996 Act as amended, a contractor enjoys a greater right than under the earlier legislation in that he:

- may (subject to provision of a default notice) suspend *some or all* of his obligations;
- can recover the reasonable costs and expenses resulting from the suspension (though presumably excluding the cost of seeking a lawyer's opinion); and
- will get an extension of time for the period of suspension plus any consequential delay.

As the wish to suspend may result from an underlying dispute it would often be unattractive to suspend in those circumstances, rather than to seek adjudication. Further, a contractor may be fearful of getting it wrong. What if he should be found to have suspended unlawfully?

On occasions it has been debated whether or not the old power to suspend merely related to the party undertaking the work, rather than to all sums due. For one, I treated this as a non-argument. According to Coulson J in *Balfour Beatty Construction Northern v Modus Corovest*:

> 'Section 112 allows the contractor carrying out the work to suspend work if the sums are not paid. Moreover, section 112 (4) says that the period of suspension has to be discounted in considering questions of delay. I accept, therefore, the submission [of counsel] that that can only make sense if it is the contractor, the person doing the work and being paid for doing the work, who is the party suspending the work if he is not paid for doing it. It is impossible to read that section of the Act as applying to payments and suspensions on the part of the employer.'[20]

20 *Balfour Beatty Construction Northern Ltd v Modus Corovest (Blackpool) Ltd* [2008] EWHC 3029 (TCC), para [107]; also [2009] CILL 2660.

In *Mayhaven Healthcare v Bothman*, Bothma, appointed under an IFC 84 form of contract,[21] suspended performance of its obligations on account of alleged non-payment. In fact, Bothma had been paid the outstanding sums. Mayhaven treated the suspension as a repudiatory breach of contract. The matter came before Ramsey J as an arbitration appeal. He concluded:

> 'A wrongful suspension which gives rise to a failure to proceed regularly and diligently will vary in seriousness, depending on the circumstances. I do not accept that every wrongful suspension which leads to a breach of Clause 2.1 will automatically be a repudiatory breach. Rather, whether such a suspension and a consequential breach does amount to a repudiation depends on the breach and the facts and circumstances of the case.'[22]

Adjudication procedure

The LDEDC Act 2009 has sought (successfully or not, time will tell) to tidy up several perceived loose ends of adjudication procedure. In truth, most (if not all) were matters to which the judiciary had already brought a practical touch.

Tolent clauses

From early on after the coming into force of the 1996 Act many main contractors sought to weaken the impact of the then new adjudication procedures. Section 108 (1) of the 1996 Act might suggest an unfettered right to refer a dispute under a qualifying contract to adjudication. However, a clause was slipped into many subcontracts requiring a subcontractor to pay the main contractor's legal costs, should the subcontractor have the audacity to refer his dispute to adjudication, the so-called 'Tolent clause', named after the decision in *Bridgeway Construction v Tolent Construction*.[23]

In *Yuanda v Gear Construction*, a trade contractor successfully challenged the legitimacy of a particularly stringent Tolent clause, arguing that it was contrary to the1996 Act and that the Scheme should apply.[24] According to Edwards-Stuart J, to require a contractor to offset his employer's costs of defending the adjudication would deny the contractor his remedy and be contrary to the spirit of the 1996 Act. The contractor would not know the likely costs in advance and the responding party would have no incentive to moderate his costs. This would rule out referrals in many lower value claims. By implication, that would run contrary to the right to refer a dispute under section 108 (1) of the 1996 Act.

---

21 Intermediate Form of Building Contract, Joint Contracts Tribunal (1998 edition).

22 *Mayhaven Healthcare Ltd v Bothma* [2009] EWHC 2634 (TCC), para [23]; also [2010] BLR 154, 127 Con LR 1.

23 *Bridgeway Construction Ltd v Tolent Construction Ltd* [2000] CILL 1662 (Liverpool District Registry).

24 *Yuanda (UK) Co Ltd v WW Gear Construction Ltd* [2010] EWHC 720 (TCC), [2011] 1 All ER (Comm) 550, [2010] 1 CLC 491, [2010] BLR 435, [2010] TCLR 5, 130 Con LR 133; [2010] CILL 2849.

The Scottish courts pitched in with the pithy comment that had Parliament intended to outlaw such clauses it would have expressly done so under the terms of the 1996 Act: *Profile Projects v Elmswood*.[25]

Section 108A

The debate currently amongst legal pundits is what Parliament achieved under the curiously worded section 108A of the 1996 Act as amended. Do you construe the words literally or invest them with the meaning Parliament presumably intended? In a Society of Construction Law talk in Bristol (on 3rd November 2011) Ramsey J – though adopting an appropriate degree of circumspection in that the judiciary is yet to sail forth – gave a heavy hint that Tolent clauses may be given a difficult passage.

Now it is unlawful for a contract to specify how the costs of an adjudication are to be allocated between the parties *unless*:

- The contract empowers the adjudicator power to allocate his fees and expenses between the parties; *or*
- It is agreed in writing after an adjudication notice has been given by one of the parties.

Slip rule

Under section 1083A of the 1996 Act as amended, a contract should contain a provision allowing an adjudicator to correct a clerical or typographical error in his decision, failing which the default position under the Scheme will apply.

There are two unanswered questions:

- what timescales did the legislation anticipate? and
- what is a 'clerical' error?

As to the first of these, does paragraph 22A of the amended Scheme assist? Under (2) it states: 'Any correction of a decision must be made within five days of the delivery of the decision to the parties'. A decision may arrive initially by email or fax, rarely by post. Lawyers will immediately dive into their textbooks to pluck out a definition for 'delivery' across a number of scenarios.

As to the second point, the revision powers are limited. Though the wording does not replicate that in section 57 of the Arbitration Act 1996 this presumably (and its case law) will be the starting point for many. What the adjudication slip rule seems to preclude is the adjudicator having second thoughts that materially alter his earlier decision. It must be an error of transposition, no more.

Was the new slip rule necessary? Judges had already invented one: see *Bloor Construction v Bowmer & Kirkland*[26] and *Nuttall v Sevenoaks DC*.[27] In the

25 *Profile Projects Ltd v Elmswood (Glasgow) Ltd* [2011] CSOH 64, 2011 SLT 975, 2011 SCLR 611.

first case (endorsed by Dyson J, as he then was, in the second), HHJ Toulmin CMG QC concluded that, in the absence of any specific agreement to the contrary, a term could be implied into the contract that an adjudicator might correct a mistake arising from an accidental error or omission and that, although there had to be a time limit within which such corrections were made, the issue of a corrected decision within three hours of an erroneous decision was within any acceptable time limit. Dyson J was perhaps a little less fulsome in concluding that: '… putting the matter at its lowest, it is at least arguable that it [the decision in *Bloor*] is right.'[28]

Conclusion

In considering the latest changes under the LDEDC 2009 the old adage: 'If it ain't broke, don't fix it' comes to mind. The consultation process behind the changes was lengthy but what seems to have resulted is a tinkerer's muddle. Nothing that obviously needed fixing has been fixed. Rather, sufficient ambiguity has resulted to provide a mini short-lived feast day for lawyers and other contract advisers before the judiciary firmly grips the beast and leads it back to calmer pastures.

Paul Newman is a barrister practising at 3 Paper Buildings, London.

26 *Bloor Construction (UK) Ltd v Bowmer & Kirkland (London) Ltd* [2000] BLR 314, (2000) 2 TCLR 914.

27 *Edmund Nuttall Ltd v Sevenoaks DC* (TCC, unreported 14th April 2000).

28 *Nuttall v Sevenoaks DC*: note 27.

'The object of the Society
is to promote the study and understanding of
construction law amongst all those involved
in the construction industry'

MEMBERSHIP/ADMINISTRATION ENQUIRIES

Jill Ward
The Cottage, Bullfurlong Lane
Burbage, Leics LE10 2HQ
tel: 07730 474074
e-mail: admin@scl.org.uk

website: www.scl.org.uk