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The new draft Construction Contracts Bill: changes to the HGCRA finally announced

Introduction

The Housing Grants, Construction & Regeneration Act ("HGCRA") came into force in May 1998. Now, ten years on, after many seeming false starts, the Government has finally published its draft Construction Contracts Bill, the purpose of which is to amend key provisions of the HGCRA. This Bill follows the draft proposals revealed by the Government in June of last year. Many had questioned whether these proposals were ever going to be put into action. However, the Government has now said that it intends to put the Bill before Parliament in December of this year and has asked for comments on the draft by 12 September 2008.

The Government has said the reason for the Bill was that:

> "Extensive consultation with the construction industry has identified that while the Construction Act has improved cash flow and dispute resolution under construction contracts it is ineffective in certain key regards."

The key policy objectives are to improve the existing regulatory framework in order to:

(i) Increase transparency and clarity in the exchange of information relating to payments to enable the better management of cash flow;

(ii) Encourage the parties to resolve disputes by adjudication, where it is appropriate, rather than by resorting to more costly and time consuming solutions such as litigation; and

(iii) Improve the right to suspend performance under the contract.

Accordingly, the draft Construction Contract Bill proposes the following:

Contracts in writing

As widely anticipated, the first part of the draft Bill repeals section 107 of the HGCRA which required that for the purposes of the HGCRA contracts had to be in writing or evidenced in writing. This means that adjudication will apply to all construction contracts which are either agreed in writing or orally. In order to encourage parties to resolve disputes by adjudication, the Government has acknowledged the difficulties caused by the Court of Appeal decision in the *RJT* case as noted by, amongst others, HHJ Wilcox who in the case of *Bennett (Electrical) Services Ltd v Inviron Ltd* [2007] EWHC 49 (TCC) decided that a letter of intent failed to comply with the requirements of section 107. In commenting on the difference of opinion of the Court of Appeal in the *RJT* case he noted that:

> "…The reasoning of Auld LJ is attractive because at the subcontractor level and where cash flow difficulties are likely to be encountered in the smaller projects, the paperwork is rarely comprehensive. The extent of the requirement for recording contractual terms for an agreement to qualify under section 107 laid down by majority could have the effect of excluding from the scheme a significant number of those whom the Act was perhaps intended to assist."

The new proposals are intended to limit the number who are excluded from the right to adjudicate by ensuring the right to adjudicate applies to contracts which are oral, partly oral and not just those which are evidenced in writing.

The writing requirement has not however totally disappeared. Any contractual provisions relating to adjudication must be "in writing" as defined by a new section 115A. Presumably if they are not, then the Scheme will apply.

Adjudication costs

With a similar eye on making adjudication more accessible to everyone, the draft Construction Contracts Bill sets out certain controls on adjudication costs. A new clause, section 108A makes it clear that any attempt to allocate the costs of adjudication between for the parties, will be invalid unless that agreement is made in writing after the adjudicator is appointed. This would include, for example, agreements that one party should pay the whole or part of the costs of the adjudication or agreements that the adjudicator may make a decision that a party should pay the whole or part of the costs of the adjudication

Further, the adjudicator is given the new power, by virtue of section 108B, to determine that any agreed allocation, made in accordance with section 108A, of any part of the costs which a party is required to pay is unreasonable.

Finally, in section 108C the draft Construction Contracts Bill expressly states that parties are jointly and severally liable to pay an adjudicator's reasonable fees and expenses.

Adjudicator's power to make corrections

The draft bill includes a new clause which has the effect of requiring the parties to a Scots law construction contract to provide in their contract that the adjudicator has the power to correct a clerical or typographical error in his decision arising by accident or omission. The provision concerned must be in writing.

There is no need for such a provision in England & Wales as the judgment in *Bloor Construction (UK) Limited v Bowmer & Kirkland (London) Limited* [2000] B.L.R 314 meant that adjudicators here already have the power to correct mistakes in their decisions.

Interim Payment Decisions

Under section 109 of the HGCRA contractors are entitled to periodic payments. Concern has been expressed about clauses which make specific payments subject to "interim payment provisions". A new clause has been introduced to render ineffective any contractual provision which provides that a decision taken by a third party as to the amount of any periodic payment is "binding". It is considered likely that although the draft bill uses the phrase "binding", this will be replaced by "final and conclusive". For example if payments arising in contracts containing such a term could be considered by an adjudicator.

Withholding notices

The old payment and withholding notice system has been abandoned and is to be replaced with a new payment structure. Given the Government's stated aim of achieving an increase in transparency and clarity, this is not surprising.

The new system, as per section 110A requires "payment notices" to set out the sum the payer considers to be due and the basis upon which that sum is calculated. It also provides for "payee notices", under section 110B, which can be given in default of the payment notice. If the payer does nothing, the payee can serve their own "payee notice" which will set out the sum the payee considers to be due and the basis upon which that sum has been calculated.

The sum set out in the "payment notice" or the "payee notice" will become the "notified sum". And a party can only withhold payment from the notified sum in accordance with the new section 111. This new section 111 states that the payer must pay the notified sum unless the payee is given a notice of the payer's intention to pay less than the notified sum. That notice must specify the sum the payer considers to be due and the basis upon which that sum has been calculated.

Although this might not seem new, a paying party is now required to include details of any set-off or abatement in the notice, something which is currently not always thought to be necessary. This should bring an end to the series of cases, for example *Rupert Morgan Building Services (LLC) Ltd v David Jervis and Harriet Jervis* [2003] EWCA Civ 1563, about the meaning of the "sum due".

Payment notices are seen by the government as an important tool in achieving transparency and in communicating details of payments which are made or are proposed to be made.

The government's message is clear. By simplifying the payment provisions, it is now unlikely for there to be any recourse for a failure to serve a section 111 notice. As the Government has made clear, this requirement to pay the "notified sum" is intended further to facilitate "cash flow" by determining what is provisionally payable. What is properly due and ultimately payable, as a matter of the parties' contract, is of course unaffected.

The new section 111 at subsection (10) makes reference to the House of Lords' decision in *Melville Dundas Limited (in receivership) and Others v George Wimpey UK Limited and Others* [2007] UKHL 18. Here the House of Lords decided that the payer could legitimately withhold monies, notwithstanding that no "withholding notice" under current section 111 of the HGCRA had been given. The reason was because the contract had provided that moneys need not be paid in the event of the payee's insolvency. As the insolvency had occurred *after* the period for giving a "withholding notice" had expired, it was simply not possible for the payer to have given such a notice beforehand. Sub-section 10 confirms that the *Melville Dundas* decision remains but is confined to insolvency situations alone.

Conditional payment clauses

A new subsection 1A, in section 110, extends the ban on pay-when-paid clauses include requirements which make payment conditional:

(i) "*on the performance of obligations under another contract*", or

(ii) "*a decision by any person as to whether obligations under another contract have been performed*".

The right to suspend

The problem with the right to suspend under section 112 of the HGCRA is that, in the event of a legitimate suspension, the compensation to which the suspending party is entitled under the legislation is not generous. The suspending party was merely entitled to an extension of time for completion of

the works covering the period during which performance is suspended. That extension would not necessarily extend to the 7-day notice period prior to the right to suspend becoming operative, nor would it apply to the time which it takes to re-mobilise following the suspension. This is important since the right to suspend ceases on payment of the amount "due" in full.

There is nothing to prevent the parties from conferring more extensive rights through the terms of the contract than the legislation provides. By way of example, clauses 25.4.17 and 26.2.9 of the JCT With Contractor's Design '98 entitle the contractor to apply for extensions of time in respect of *"delay arising from a suspension…"* and *"loss and expense where appropriate, provided the suspension was not frivolous or vexatious."* However there was nothing to insist that the parties did this.

The new draft section 112(3A) clarifies this by making the defaulting payer liable to pay the suspending party *"a reasonable amount in respect of costs and expenses reasonably incurred"* as a result of suspending.

This should help the Government to achieve its aim of making the right to suspend performance a more effective remedy.

Conclusion

As can be seen from the very short review period, the Government does not intend for there to be a full blown consultation of the draft Bill. They are seeking comments on the technical aspects of the drafting and are not looking for any further discussion on a range of policy options. This should mean that there is every chance that these changes will find their way onto the statue books sometime next year.

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