Adjudication update by Jan Grimshaw and Simon Pressdee

In the pipeline since 2009, and finally into operation for contracts made on or after 1 October 2011, here’s our summary of the changes to the Housing Grants, Construction and Regeneration Act 1996 made by the Local Democracy, Economic Development and Construction Act 2009:

- The Act now applies to all construction related contracts (excluding certain sectors and contracts with residential occupiers) made on or after 1 October 2011, whether made verbally or in writing or a mixture of the two.

- The Act requires every construction contract to provide an adequate mechanism for the determination of payments due under that contract.

- The construction contract for works over 44 days should require the payer or a specified person to give the payee, or vice versa, a ‘payment notice’ no later than 5 days after the payment due date. Assume for the purpose of this note that it is the payer who is obliged by the contract to give the payment notice. If the payer does not issue a payment notice then the payee may give the payment notice in default of the payer’s notice. The payee will want to act swiftly as the payee notice extends the final date for payment. However, if the contract requires or permits the payee to notify the payer of the sum the payee considers due before the date for the payment notice, then the payee need not give a notice if the payer fails to issue a payment notice. In other words the payee contractor’s application for payment might be regarded as the payment notice, preserving the original final date for payment.

- If the payer wishes to pay less than the notified sum, it must serve a “pay less” notice within a timescale agreed under the contract, or if no timescale has been agreed, as per the amended Scheme for Construction Contracts, not later than 7 days before the final date for payment. The Act gives effect to the House of Lords decision in Melville Dundas Ltd v George Wimpy UK Ltd in relation to the old withholding notice regime. In essence, a pay less notice is not required on the payee’s insolvency where the contract provides that if the payee becomes insolvent the payer need not pay any sum due in respect of the payment.

- Where a contractor suspends performance as a result of non-payment, the Act makes clear that suspension of part of the works is permissible. Suspension is on

1 As amended by The Scheme for Construction Contracts (England and Wales) 1998 (Amendment) (England) Regulations 2011
notice of at least 7 days. The defaulting party becomes liable for reasonable costs and expenses incurred as a result of the suspension of works.

- Construction contracts should include a written provision to allow the adjudicator to correct any typographical or clerical error in the decision. If not included in the contract, this will be implied.

- There is a new provision relating to adjudication costs. Any agreement between the parties relating to the allocation of the costs relating to the adjudication is unenforceable unless:
  a) the agreement is reached after the giving of the notice of referral of the dispute;
  b) made in writing, is contained in the construction contract and confers powers on the adjudicator to allocate his fees and expenses between the parties.

For further information, please contact Jan Grimshaw or Simon Pressdee on 01454 619619 or email jan.grimshaw@daviesandpartners.com and simon.pressdee@daviesandpartners.com

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