The New Construction Act 2009[1]

The New Act and What You Need To Know

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1 Part 8 of The Local Democracy, Economic Development and Construction Act 2009

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Who Should Read This...

This White Paper should be read by all UK and Internationally based Funders, Developers, Clients, Design Teams, Contractors and Specialist Sub-Contractors who want to minimise risk, have better commercial relationships and have a real desire to conduct their business **without** unnecessary conflict and the waste it produces.

It is also useful for parties interested in advising or supplying certain services to construction and those studying in the field of construction or building.

About the Author

Yosof Ewing[2] is the author of the internationally acclaimed White Paper series **The 10 Commandments**[3]. He is the Managing Director of CPUK a private practice of Professional Alternative Dispute Practitioners, Dispute Resolvers, Expert Witnesses, Quantity Surveyors and Project Managers based in the UK with global reach. He is a qualified Mediator and acts as Expert Witness, as well as advising on disputes, contracts and procurement in construction, property and renewable energy.

Yosof is a Fellow of the Institute of Commercial Management, Fellow of the Chartered Management Institute, Member of the Association of Project Management, Member of the Chartered Institute of Civil Engineering Surveyors, Member of the Chartered Institute of Arbitration, Practicing Associate of the Academy of Experts, Member of the Association of Project Safety, Member of the Institute of Engineering and Technology, Member of the Society of Construction Law and is a listed Party Representative by the Association of Independent Construction Adjudicators.

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Introduction...

In late 2011[4] the Housing Grants, Construction & Regeneration Act 1996 received an upgrade.

Enter **The Local Democracy, Economic Development and Construction Act 2009**[5], in particular Part 8 which seeks to amend (not replace) the Housing Grants, Construction and Regeneration Act 1996 Part II and improve payment practices and dispute resolution in the construction industry.

Okay this was what the first one was supposed to do...Right? Well, yes. Unfortunately there were issues with much of the Act. Whilst the idea was sound, in practice many holes appeared during its various tests in court and it was widely agreed that, although largely successful, changes were needed.

Background - History...

In March 2004 the Chancellor of the Exchequer announced in his Budget Report a review of the Act after much lobbying from sub-contractors, aggrieved at the sharp practices they were being subjected to, due to various tactics employed by a misguided section of the industry.

"Following concerns raised by the construction industry about unreasonable delays in payment, the government will review the adjudication and payment provisions of the Housing Grants, Construction and Regeneration Act in order to identify what improvement can be made."

Sir Michael Latham was requested by the Construction Minister to chair a review into how Part II of the Construction Act had worked in practice. On 17 September 2004 the review was completed and issued back to Parliament[6]. It was concluded that the industry had come a long way since the Construction Act was introduced in 1996 and that it was generally working well. However, the report identified some areas where further progress was desirable.

There followed a period of consultation with the industry and other relevant parties.

This led to the Local Democracy, Economic Development and Construction Act 2009 receiving Royal Assent on 12 November 2009. Part 8 of the Act amends the Housing Grants, Construction and Regeneration Act 1996 to improve payment practices and dispute resolution in the construction industry.

The aim of Part II of the original 1996 Act was to secure the flow of monies down the supply chain. Part 8 of the new Construction Act's aims are:

4 October 2011 for England & Wales, November 2011 for Scotland.

5 http://www.legislation.gov.uk/ukpga/2009/20/part/8

6 http://www.bis.gov.uk/files/file30327.pdf

"to intervene where the legislation has shown to not have delivered its original objective"; and to adopt "proportionate amendments to the existing framework".

So what has changed and how does it affect our industry?

Good question and one I will explore in more detail here. One important point to remember is that although the Act is now in place there are still some lingering concerns, particularly with a perceived drafting error that could see Tolent Clauses[7] pop up in future. Having said that, many of the changes will come as a welcome boost to supply chain members tired of abuse and provide some much needed clarity for those contractors who do wish to play by the rules.

The biggest changes will affect payment and suspension for non-payment which will come as a shot in the arm to an industry with little cash around. The current rules relating to payment notices will be upgraded by a new payment notice system.

The biggest changes will affect payment and suspension for non-payment which will come as a shot in the arm to an industry with little cash around.

It will now be incumbent on payers to give payees the correct notices on time to steer clear of having to pay the amount claimed in an application or indeed a new payee's 'default' payment notice.

It was a cornerstone of the first Construction Act that a payee had a statutory right to suspend performance for nonpayment. The New Construction Act significantly bolsters this right. Under the new legislation a payee may suspend just some of his operations rather than the whole project and is entitled to reimbursement of their reasonable costs and expenses. This selective right of suspension could (and most likely will) be used as a bargaining mechanism by suspending a project critical item of work.

As with Part II the first Construction Act[8] Part 8 of the New Construction Act is aimed at improving cash flow within the industry. To achieve these rather noble aims the introduction of mandatory payment rules and rights to adjudicate are required in every construction contract.

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Changes to the Act...

The main changes to the Act are as follows:

Contracts In Writing

7 Bridgeway Construction Ltd v Tolent Construction Ltd

8 Housing Grants, Construction and Regeneration Act 1996

One of the biggest changes and one that I think will prove to be very interesting in relation to the future of Alternative Dispute Resolution and indeed litigation.

It is now no longer necessary for a construction contract to be in writing in order for the payment provisions of the Act to apply. This means that oral contracts now come under the Act, albeit they must be evidenced in writing. However, any provisions as to adjudication must be in writing to be effective. If not, then as with the 1996 Act, the adjudication provisions of the Scheme for Construction Contracts[9] apply. Many standard form contracts already go for adjudication under the Scheme as it is widely acknowledged as being fair to both parties.

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Notices Relating to Payment

The biggest change in the 2009 Act, and for many the most welcome, is the changes to the payment provisions in Section 110A. The existing provisions of an adequate payment mechanism and final date for payment stay as they are. The existing provisions in respect of payment notices is replaced with all new notice requirements with the regime of withholding notices being abolished and replaced with Pay Less Notices.

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Say Hello to the New Payment Notice

So what this means now is that for **every payment** made under a construction contract, a payment notice must be issued no later than 5 days after the "payment due date" (as stated in the contract). This payment notice must state the sum the payer considers to be due and the basis from which it is calculated. This bears a resemblance to the current provisions but with some very important distinctions.

- Before the 2009 Act payment notices had to be given by the payer. They can now be given (subject to what the contract says) either by the payer or a "specified person" (for example an architect, engineer or employer's agent) or very importantly **the payee themselves**. It is very likely, therefore, that Payers will seek to hold onto this right and give payment notices themselves or for their specified person to have it. Either way it is something to consider before signing the contract.

- Payment notices will need to be issued even where the amount due is believed to be nil. Payers will have to be careful that payment notices are always issued on contractual due dates regardless even if there is nothing due to the payee.

Where the payer's / specified person's notice isn't given on time as dictated by the contract, then a payee now has a right to issue their own payment notice instead, stating what they consider is due.

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9 Scheme for Scotland and Scheme for England & Wales

Where a contract permits the payee to make an application for payment before a Payment Notice is issued by the Payer, such application would be treated as the payee's notice and the payee would not then be permitted to submit a further notice. The theory behind this is that payees could take unfair advantage of the fact that a payer had failed to give a payment notice on time, by issuing a second payment notice for a larger sum than was stated in the payee's original payment application.

A very important issue and one that cannot be over-stressed for all parties in this new era. The sum notified in a payment notice, **whoever** issues it, becomes payable before the final date for payment (unless a "Pay Less Notice" has been issued in time).

Under the new Act the current regime of "withholding notices" has been abolished and in its place is a new right for a payee to receive a "Pay Less Notice". This Pay Less Notice must detail:

- any sum the payer considers to be due (even if nil) on the date it is served; and

- the basis on which the sum considered due has been calculated.

A Pay Less Notice must be issued no later than the number of days as stated in the contract before the final date for payment. Where the contract does not state this period, then as with the old Act the Scheme kicks in (it must be served 7 days before the final date for payment).

The sum considered due as stated in the Pay Less Notice becomes the "notified sum" which the payer must pay.

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Payment Notices & Insolvency

Where the contract provides that a payer does not need to pay any sum due in respect of payment if a payee becomes insolvent and a payee becomes insolvent after the time limit for issuing a Pay Less Notice has expired, **the payer can in this case still withhold payment**.

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So to sum up on the new Payment Regime....

The new regime, whilst giving more power to subcontractors, can and most certainly will prove to be dangerous for employers, main contractors or their specified persons who fail to issue the relevant payment notices on time. A nightmare situation could see an employer / main contractor consider one month that no payment is due (zero). Regardless of the reasons, no payment notice is given as provisioned in the contract and Scheme. The subcontractor bangs in his "default payment notice" for an exaggerated sum. This exaggerated sum now takes pole position and becomes the "notified sum", which is the amount that the employer / main contractor will have no choice but to pay if they do not act. The employer / main contractor still has an opportunity to issue a Pay Less Notice against the exaggerated sum claimed and in those circumstances it will be crucial for him to do so and to do so on time.

Updated inserted December 2014 - Following the decision in ISG plc vs Seevic. Read my article on LinkedIn Pulse or get in touch to discuss.

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Conditional payment provisions prohibited

The dreaded "Pay-when-paid" clauses were outlawed in the 1996 Act (except where there was an insolvency situation upstream). Changes under the 2009 Act state that contractual terms making payment conditional on performance of the payers obligations under another contract, for example "pay-when-certified" or "pay-what-certified" provisions, are now thankfully banned.

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Improved rights of suspension

If a sum considered due **is not paid in full** by the final date for payment stipulated in the contract and a Pay Less Notice has not been given, the contractor may suspend his performance. Under the 2009 Act, this automatic right will be beefed up so that:

- the contractor can now choose to suspend performance of some of his obligations rather than all of them as before. This will of course in practice be much easier to do and will give them a very powerful bargaining chip if, for example, they chose to suspend performance at a very mission critical part of the works.

- in addition to the above, the contractor is now entitled to a "reasonable amount in respect of his costs and expenses incurred" as a result of exercising this right to suspend. For example demobilisation, the period of suspension and remobilisation.

- if that wasn't enough beefing up, the contractor is still entitled to an extension of time for the period during which they suspend. In addition, they are now entitled to an automatic extension of time for any delays caused as a result of the suspension, e.g. remobilisation.

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Changes to Adjudication Provisions

These are less substantive but are by no means less game changing.

- Contractual provisions allocating the costs of an adjudication, regardless of the decision, are now ineffective unless **they are made in writing after the notice of adjudication is served**. Contracts can, however, give an adjudicator the right to decide which party pays his fees and expenses. If there is no provision in the contract, then the Scheme applies to adjudications under that particular contract. The adjudicator now has the power to apportion payment of his fees and expenses but, regardless of that apportionment, if any amount remains unpaid, both parties are jointly and severally liable for the unpaid amount (as they always have been).

- There is now a 'slip rule' which will give adjudicators new powers to correct or remove clerical or typographical errors in decisions.

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So to Summarise...

Although generally accepted as a major step in the right direction, the Construction Act 1996 ultimately failed to live up to the aspirations of an industry mired in conflict. This new Act, although designed to address the shortcomings of its predecessor, does not in many commentators eyes go far enough.

It will be very interesting to see how the courts deal with the various tests that will arise for sure. It is to be hoped that they will continue (in most part) to support the so called "Spirit of the Act", and deal out commercially astute justice. In an ideal world of course there would be no need for testing or disputes. Read my article following the decision in ISG plc vs Seevic College December 2014

So, now we have a very new and very interesting dynamic. Sub and Main contractors could, in theory, hold the upper hand over the Main Contractor / Employer respectively, with the new payment and suspension rights. I, for one hope that this doesn't become the case, as it will only lead to a future of further conflict, as opposed to a period of much needed liquidity within the supply chain. **Conflict costs money**. The best and cheapest way to deal with a dispute is to try to avoid it.

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