Local Democracy, Economic Development and Construction Act 2009

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Construction Contract – Housing Grants Construction and Regeneration Act 1998

107 Provisions applicable only to agreements in writing

(1) The provisions of this Part apply only where the construction contract is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing.

The expressions "agreement", "agree" and "agreed" shall be construed accordingly.

(2) There is an agreement in writing--

(a) if the agreement is made in writing (whether or not it is signed by the parties),

(b) if the agreement is made by exchange of communications in writing, or

(c) if the agreement is evidenced in writing.

(3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.

(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.

(5) An exchange of written submissions in adjudication proceedings, or in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.

(6) References in this Part to anything being written or in writing include its being recorded by any means.
“… writing is still important and writing is important because it provides certainty. Certainty is all the more important when adjudication is envisaged to take place under a demanding timetable. The adjudicator has to start with some certainty as to what the terms of the contract are”.

“On the point of construction of Section 107 what has to be evidenced in writing is, literally, the agreement, which means all of it, not part of it”.
Section 139 Local Democracy Act

139 Requirement for construction contracts to be in writing

(1) In the Housing Grants, Construction and Regeneration Act 1996, section 107 (provisions applicable only to contracts in writing) is repealed.

(2) In section 108 of that Act (right to refer disputes to adjudication)—

(a) in subsection (2), after “The contract shall” insert “include provision in writing so as to”;

(b) in subsections (3) and (4), after “provide” insert “in writing”.

Possible impacts

- More challenges to Adjudication Awards
- More complex/lengthy Adjudications
Section 140 Local Democracy Act

140 Adjudicator’s power to make corrections

In the Housing Grants, Construction and Regeneration Act 1996 (c 53), in section 108 (right to refer disputes to adjudication), after subsection (3) insert—
“(3A) The contract shall include provision in writing permitting the adjudicator to correct his decision so as to remove a clerical or typographical error arising by accident or omission.”

Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd - 2000
Section 141 Local Democracy Act

141 Adjudication costs

In the Housing Grants, Construction and Regeneration Act 1996, after section 108 insert—

“108A Adjudication costs: effectiveness of provision

(1) This section applies in relation to any contractual provision made between the parties to a construction contract which concerns the allocation as between those parties of costs relating to the adjudication of a dispute arising under the construction contract.

(2) The contractual provision referred to in subsection (1) is ineffective unless—

(a) it is made in writing, is contained in the construction contract and confers power on the adjudicator to allocate his fees and expenses as between the parties, or

(b) it is made in writing after the giving of notice of intention to refer the dispute to adjudication.”
Possible impacts

Current Law
- Act silent on costs
- Cannot award parties costs unless by agreement.
- Yuanda -v- Gear (2000). No reason why agreement cannot provide for costs unless effect to discourage parties going to adjudication.
Possible Impacts

New Law
- Some consider can draft compliant clause and still predetermine costs.
- Commercial issues and power to award costs?
Payment Provisions – Current Law

Contracts should provide an adequate mechanism for determining what payments become due and when (“the due date”) – Section 110.

The payer should give notice five days after payment becomes due specifying the amount of payment to be made and the basis on which it is calculated (“payment notice”) – Section 110.

Payer can’t withhold payment after final date for payment unless given effective notice of intention to withhold payment (“withholding notice”) – Section 111.

Withholding notice must be given not later than the prescribed period before the final date for payment.
Section 142 – 144 Local Democracy Act

142 Determination of payments due
143 Notices relating to payment
144 Requirement to pay notified sum

Payment notices still have to be given for every payment under the contract, not later than five days after payment due date BUT

(a) A party other than the payer can issue the payment notice.
(b) Payer who fails to issue payment notice can face a sanction.

Current law – payment notice can only be issued by party due to pay.
New law – payment notice can be issued by payer, specified person, or payee.
If payment notice not given, payee can issue instead once deadline for original notice expires. That postpones final date for payment by any period of delay.

Payment notice must include sum considered due for payment and basis of calculation. Thus obligation to say what is to be paid.
Amendments preserve parties rights to withhold payment but terminology changes. The new notice is called a “notice of payers intention to pay less than the notified sum”.

Withholding notice stated sums to be withheld. The new notice states the sum to be paid with calculations.

New notice reduces potential impact of payees notice in default.
142 Determination of payments due

(1) In the Housing Grants, Construction and Regeneration Act 1996, section 110 (dates for payment) is amended as follows.

(2) After subsection (1) insert—

“(1A) The requirement in subsection (1)(a) to provide an adequate mechanism for determining what payments become due under the contract, or when, is not satisfied where a construction contract makes payment conditional on—

(a) the performance of obligations under another contract, or

(b) a decision by any person as to whether obligations under another contract have been performed.”
(1B) In subsection (1A)(a) and (b) the references to obligations do not include obligations to make payments (but see section 113).

(1C) Subsection (1A) does not apply where—

(a) the construction contract is an agreement between the parties for the carrying out of construction operations by another person, whether under sub-contract or otherwise,

and

(b) the obligations referred to in that subsection are obligations on that other person to carry out those operations.”

(3) After subsection (1C) (as inserted by subsection (2) above) insert—

“(1D) The requirement in subsection (1)(a) to provide an adequate mechanism for determining when payments become due under the contract is not satisfied where a construction contract provides for the date on which a payment becomes due to be determined by reference to the giving to the person to whom the payment is due of a notice which relates to what payments are due under the contract”
143 Notices relating to payment

(1) In the Housing Grants, Construction and Regeneration Act 1996 (c 53), in section 109 (entitlement to stage payments), in subsection (4), for “under the contract” substitute “provided for by the contract”.

(2) In section 110 of that Act (dates for payment), omit the following—

(a) subsection (2), and

(b) in subsection (3), “or (2)”.  

(3) After section 110 of that Act insert—

“110A Payment notices: contractual requirements

(1) A construction contract shall, in relation to every payment provided for by the contract—

(a) require the payer or a specified person to give a notice complying with subsection (2) to the payee not later than five days after the payment due date, or

(b) require the payee to give a notice complying with subsection (3) to the payer or a specified person not later than five days after the payment due date.
(2) A notice complies with this subsection if it specifies—

(a) in a case where the notice is given by the payer—

(i) the sum that the payer considers to be or to have been due at the payment due date in respect of the payment, and

(ii) the basis on which that sum is calculated;

(b) in a case where the notice is given by a specified person—

(i) the sum that the payer or the specified person considers to be or to have been due at the payment due date in respect of the payment, and

(ii) the basis on which that sum is calculated.

(3) A notice complies with this subsection if it specifies—

(a) the sum that the payee considers to be or to have been due at the payment due date in respect of the payment, and

(b) the basis on which that sum is calculated.

(4) For the purposes of this section, it is immaterial that the sum referred to in subsection (2)(a) or (b) or (3)(a) may be zero.
(5) If or to the extent that a contract does not comply with subsection (1), the relevant provisions of the Scheme for Construction Contracts apply.

(6) In this and the following sections, in relation to any payment provided for by a construction contract—

– “payee” means the person to whom the payment is due;
– “payer” means the person from whom the payment is due;
– “payment due date” means the date provided for by the contract as the date on which the payment is due;
– “specified person” means a person specified in or determined in accordance with the provisions of the contract.

110B Payment notices: payee’s notice in default of payer’s notice

(1) This section applies in a case where, in relation to any payment provided for by a construction contract—

– (a) the contract requires the payer or a specified person to give the payee a notice complying with section 110A(2) not later than five days after the payment due date,
– but
– (b) notice is not given as so required.

(2) Subject to subsection (4), the payee may give to the payer a notice complying with section 110A(3) at any time after the date on which the notice referred to in subsection (1)(a) was required by the contract to be given.
(3) Where pursuant to subsection (2) the payee gives a notice complying with section 110A(3), the final date for payment of the sum specified in the notice shall for all purposes be regarded as postponed by the same number of days as the number of days after the date referred to in subsection (2) that the notice was given.

(4) If—
(a) the contract permits or requires the payee, before the date on which the notice referred to in subsection (1)(a) is required by the contract to be given, to notify the payer or a specified person of—
(i) the sum that the payee considers will become due on the payment due date in respect of the payment, and
(ii) the basis on which that sum is calculated, and
(b) the payee gives such notification in accordance with the contract, that notification is to be regarded as a notice complying with section 110A(3) given pursuant to subsection (2) (and the payee may not give another such notice pursuant to that subsection).”
144 Requirement to pay notified sum

(1) In the Housing Grants, Construction and Regeneration Act 1996 (c 53), for section 111 (notice of intention to withhold payment) substitute—

“111 Requirement to pay notified sum

(1) Subject as follows, where a payment is provided for by a construction contract, the payer must pay the notified sum (to the extent not already paid) on or before the final date for payment.

(2) For the purposes of this section, the “notified sum” in relation to any payment provided for by a construction contract means—

(a) in a case where a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;

(b) in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;

(c) in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with section 110B(2), the amount specified in that notice.
(3) The payer or a specified person may in accordance with this section give to the payee a notice of the payer’s intention to pay less than the notified sum.

(4) A notice under subsection (3) must specify—
   (a) the sum that the payer considers to be due on the date the notice is served, and
   (b) the basis on which that sum is calculated.
   It is immaterial for the purposes of this subsection that the sum referred to in paragraph (a) or (b) may be zero.

(5) A notice under subsection (3)—
   (a) must be given not later than the prescribed period before the final date for payment, and
   (b) in a case referred to in subsection (2)(b) or (c), may not be given before the notice by reference to which the notified sum is determined.
(6) Where a notice is given under subsection (3), subsection (1) applies only in respect of the sum specified pursuant to subsection (4)(a).

(7) In subsection (5), “prescribed period” means—
(a) such period as the parties may agree, or
(b) in the absence of such agreement, the period provided by the Scheme for Construction Contracts.

(8) Subsection (9) applies where in respect of a payment—
(a) a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract (and no notice under subsection (3) is given), or
(b) a notice under subsection (3) is given in accordance with this section,
but on the matter being referred to adjudication the adjudicator decides that more than the sum specified in the notice should be paid.

(9) In a case where this subsection applies, the decision of the adjudicator referred to in subsection (8) shall be construed as requiring payment of the additional amount not later than—
(a) seven days from the date of the decision, or 
(b) the date which apart from the notice would have been the final 
date for payment, 
whichever is the later.

(10) Subsection (1) does not apply in relation to a payment provided for 
by a construction contract where—
(a) the contract provides that, if the payee becomes insolvent the 
payer need not pay any sum due in respect of the payment, and 
(b) the payee has become insolvent after the prescribed period 
referred to in subsection (5)(a).

(11) Subsections (2) to (5) of section 113 apply for the purposes of 
subsection (10) of this section as they apply for the purposes of that 
section.”

(12) In section 112 of that Act (right to suspend performance for non-
payment)—
(a) in subsection (1), for the words from “Where” to “given” 
substitute “Where the requirement in section 111(1) applies in 
relation to any sum but is not complied with,”;
(b) in subsection (3), for “the amount due” substitute “the sum 
referred to in subsection (1)”
Section 145 Local Democracy Act

145 Suspension of performance for non-payment
(1) In the Housing Grants, Construction and Regeneration Act 1996 (c 53), section 112 (right to suspend performance for non-payment) is amended as follows.
(2) In subsection (1), after “performance of” insert “any or all of”.
(3) After subsection (3) insert—
“(3A) Where the right conferred by this section is exercised, the party in default shall be liable
+ to pay to the party exercising the right a reasonable amount in respect of costs and expenses
+ reasonably incurred by that party as a result of the exercise of the right.”
(4) In subsection (4), after “pursuance of” insert “, or in consequence of the exercise of,”.