



Important Construction Act Changes Seminar

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Payment: How Will the Changes Affect Entitlement to Payment?

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Construction SMEs, which comprise the overwhelming majority of firms in the construction contracting sector, lose millions of pounds every year as a result of non-payment. Given that it is estimated that the construction sector has been hit harder by the recession than any other industry in the country, many consider that the Government should do all it can to assist the industry.

Housing Grants, Construction and Regeneration Act 1996

The Housing Grants, Construction and Regeneration Act 1996 (often referred to as the "Construction Act") was designed to provide the construction sector with effective and fair payment practices to ensure prompt payment and, thus, effective cash flow.

The 1996 Act, however, has arguably failed to achieve its aim. Some consider that the payment provisions under the 1996 Act "never worked entirely as expected"¹: there are loopholes in the Act, which stop the flow of money through the supply chain².

The Government acknowledged the necessity of change to the 1996 Act back in 2004 when, against a background of continuing payment problems, Gordon Brown, as Chancellor of the Exchequer, announced that a review of the Act (as regards England and Wales) was to take place. Consultations followed in 2005 and 2007³ and, in July 2008, the draft Construction Contracts Bill, together with explanatory notes, was published for consultation. Amendments were then introduced and the Bill received its first reading in the House of Lords on the 4th December 2008, in the form of Part 8 of the Local Democracy, Economic Development and Construction Bill. There followed a Report Stage and the Bill received its third reading in the House of Commons on 13 October 2009. The Bill will then revert to the House of Lords on the 9th November 2009.

¹ Rich, Marion and Klein, Rudi, *Reform from the specialist's position*, Construction

² See footnote 3.

³ Improving Payment Practices in the Construction Industry – Proposals to amend Part II of the Housing Grants, Construction and Regeneration Act 1996 and Scheme for Construction Contracts (England and Wales) Regulations 1998 (March 2005) and (June 2007); and Improving Payment Practices in the Construction Industry – Consultation on proposals to amend Part II of the Housing Grants Construction and Regeneration Act 1996 and the Scheme for Construction Contracts (Scotland) Regulations 1998

When It Will Be Implemented?

It appears that the Bill will be enacted by the end of this year, or by early 2010. However, it is not expected to be in operation for at least a further 18 months, as the government anticipates that a further consultation period will be required, "to ensure that everyone is satisfied with how the legislation will operate when it is introduced"⁴.

The Bill will apply to Scotland, England and Wales. Although this is a devolved matter, the Scottish Ministers requested that the legislation include Scotland, in the interests of maintaining a consistent and coherent system of legislation within the construction industry. A parallel timescale for enactment will be required across Scotland and England and Wales to ensure that the legislation remains consistent across Great Britain.

No amendments to the Scheme for Construction Contracts are contained in the Bill. As the Scheme applies where construction contracts do not include a statutory provision, the Scheme will presumably have to be revised, and the necessary amendments put in place, before the new provisions can take effect.

The new Act will not be retrospective and will not apply to any contract entered into before the Act comes into force. Therefore, we can only speculate as to how long it will take for the effects of the Bill on the construction industry to really become known.

Aim of the Bill

The overriding aim in amending the 1996 Act is to tighten up and fix the failings of the existing statutory payment framework⁵. The amendments have been heralded by some to be at least a partial solution to the unreasonable delays in payment which continue to plague the construction industry. The changes are intended to encourage transparency and clarity in the exchange of information relating to payments to enable the better management of cash flow⁶ and, in general, to create greater certainty and clarity of cash flow for all in the construction supply chain.

There is, however, doubt as to whether the changes will actually serve their purpose. Although its intentions are positive, some view the new "simplified" payment provisions contained in the Bill as

⁴ <http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/90422-0011.htm>

⁵ <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm091013/debtext/91013-0005.htm>

⁶ Communities and Local Government, Amendments to Part 2 of the Housing Grants, Construction and Regeneration Act 1996, Impact Assessment, December 2008.

"unspeakable"⁷, and "incomprehensible"⁸, as they fail to put otherwise good ideas into plain English. The payment changes are also said to "please neither side"⁹.

We shall concentrate solely on the changes which affect entitlement to payment under the Act.

Entitlement To Stage Payments

Section 109 of the Act is unamended by the Bill. Contractors are still entitled to payment by instalments, stage payments or other periodic payments for work under the contract, where the duration of the contract is specified or agreed to be 45 days or more. The parties still have the freedom to agree the amount of the payments and the intervals at which they become due.

Removal Of 'Pay When Certified' Clauses

Section 110 of the Act (Dates for Payment) maintains the requirement under every construction contract for parties to provide for an adequate mechanism for determining what payments become due under the contract and when, and for a final date for payment to be provided.

The Bill specifically removes the opportunity for payers to rely on "pay when certified" clauses. The Bill introduces section 110(1A), which specifies that payment cannot be conditional upon the performance of obligations under another contract. Similarly, payment cannot be conditional upon "a decision by any person as to whether obligations under another contract have been performed", e.g. in a sub-contract, payment cannot be determined by reference to a decision made by the Contract Administrator under the Main Contract. In addition, under section 110(1D), the due date cannot be determined simply by the date which is stated in a notice issued by the payer to be the due date (since otherwise the payer could try to avoid payment by not notifying a due date at all).

Broadly speaking, therefore, under the amended 1996 Act, mechanisms for payment cannot be conditional on (i) payments being made under other contracts; or (ii) decisions by other parties as to whether contractual obligations have been performed under other contracts. Under the Bill, management contracts, where payments in a superior contract may be reliant on the work carried out in a sub-contract, are still intended to be lawful under section 110(1C).

⁷ Bingham, Tony, Construction Act payment rules: Unspeakable, *Building*, 26th September 2008.

⁸ Bingham Tony, A message to Parliament about being paid – Pure and simple: Construction Act changes, *Building*, 20 February 2009.

⁹ "Payment changes please neither side", *Construction News*, 22 October 2009.

While the removal of pay when certified clauses should benefit subcontractors, who should see less delay in payments reaching them, it could potentially result in contractors having to fund more payments to sub-contractors. This could have the effect of contractors seeking to extend payment periods for sub-contractors, in order to allow more time for payments from employers to reach them. (Importantly, parties are still free to agree how long will be the gap between the date on which payment becomes due and the final date for payment.)

Payment Notices

Perhaps the most significant change under the Bill applies to the provisions for payment notices.

Section 110(2) of the 1996 Act currently provides that parties must include terms in every construction contract which require the payer to give the payee a notice specifying:

- (i) the amount (if any) proposed to be paid; and
- (ii) the basis on which that sum was calculated.

This notice must be given not later than 5 days after such payment becomes due.

The Bill retains the need for the above and a notice for payment must still be given, even if the amount due is considered to be zero, for example, due to a set-off or abatement. Such notice is still required to state how the sum was calculated and, in effect, must provide reasons why the notice giver considers that no sum is payable.

The main changes under the Bill lie in section 110A and 110B. Under section 110A, it is no longer just the payer who can serve a payment notice; the payee or a specified person will now also be able to give payment notices. A specified person is defined as "a person specified in or determined in accordance with the provisions of the contract", i.e., generally someone who is qualified to value construction work, such as an architect or an engineer.

Once the Bill comes into force, parties will be required to include provisions as to who will issue payment notices. Should a construction contract fail to include such terms, the appropriate provisions of the relevant Scheme for Construction Contracts will apply.

Payment notices: Payee's notice in default of payer's notice

New section 110B applies to contracts where the payer, or a specified person, is required to provide a payment notice. If the payer/specified person fails to do so (and is thus in default) the payee is entitled to serve a payment notice on the payer and make up for the payer's default.

While there is no specific statutory provision that states that the payee is required to issue a default notice, it may affect the payee's position if the payee does not do so. In particular, if the payee wishes to suspend performance for non-payment in terms of section 112, a payment notice must have been served, either by the payer or the payee, since section 112 now cross-refers to non-compliance with section 111(1) (as amended).

It should also be noted that the final date for payment is postponed under section 110B(3) where the payee serves a notice in default. In effect, if the payee does not serve its own payment notice until significantly after the date when the payer should have issued its own payment notice, the final date for payment will then be postponed by the number of days after that date by which the payee delayed in serving its own default notice to the payer. For example, if a sum became payable on the 1st of the month and was required to be paid, at the latest, by the 15th, it appears that the effect of a payee's notice in default being served on the 25th would be to postpone the date by which such the sum must finally be paid by 10 days.

Section 110B will apply to each construction contract, whether it is an express term of the contract, or whether it is implied by operation of the Scheme for Construction Contracts.

If it is agreed under the contract that the payee is responsible for issuing payment notices, section 110B(4) will apply. In such a case, if the payee does issue a payment notice, there is then no need or entitlement for the payee to issue a further payment notice such as a default notice. This is intended to prevent unnecessary duplication of payment notices.

In summary, for a subcontractor to be entitled to payment, the payer, i.e. the contractor, must if so required by the contract issue a payment notice which specifies the amount which is considered to be payable and which outlines how this figure was reached. This notice must be served no later than 5 days after the date on which payment becomes due under the contract.

If the contractor fails to do so, the subcontractor may then issue a payment notice to the contractor. This must be done after the date on which the contractor was required to issue its own notice. (If no

payment notice is issued by any party, then it appears that no right to suspend will arise under section 112.)

If the subcontractor is slow in issuing this notice, the final date for payment will be pushed back by the number of days that the payee took to issue such notice after the date when the contractor should have issued its payment notice. Therefore, it seems that the responsibility, and indeed the penalty, effectively lies with the subcontractor, rather than the payee.

In general, the new provisions are highly complex and it is likely that contractors and subcontractors alike will be confused by the provisions when administering contracts, which could ultimately lead to additional payment disputes.

Requirement to pay notified sum

Another change under the Bill is the replacement of section 111, "notice of intention to withhold payment", with the new section 111, "requirement to pay notified sum". Under the new section 111, the payer cannot withhold payment, unless a notice of intention to do so has been given to the payee. "Withholding notices" are effectively replaced by "pay less" notices.

Section 111 is intended to facilitate cash flow by determining the sum which is provisionally payable, as the payer is obliged to pay the notified sum on or before the final date for payment. This requirement is said to create greater certainty of what will be paid and has the effect of "crystallising debt".

However, this certainty is not necessarily achieved, as the sum can be challenged if the payer gives a counter-notice in the form of a notice of his intention to pay less than the notified sum. This can be done if the payment notice was given by the payee or if the payer seeks to amend the payment due, for example, on the ground that the work carried out was subsequently discovered to be unsound.

Under section 111(4), the "pay less" notice must specify

- (i) the sum that the payer considers to be due on the date the notice is served; and
- (ii) the basis on which the sum is calculated.

The notice must be given by the time provided for under the contract or if not specified in the contract, within the time specified by the Scheme for Construction Contracts (currently seven days before the final date for payment).

One disadvantage of the amended section 111 for the payer, however, lies in the fact that the payer is obliged to pay the notified sum. If the payer fails to issue a payment notice and the payee issues one, the payee effectively stipulates the sum that will be due. If the payer then fails to respond and no notice of the payer's intention to pay less than the notified sum is issued, this will become the notified sum which is required to be paid on or before the final date for payment. This will be the case even if the payer is not strictly entitled to the amount claimed. Accordingly, Employers and Contractors alike must be aware of the potentially serious consequences of failing to issue or respond to payment notices, as the sum claimed by the payee could then become the sum due.

Referring payment disputes to adjudication

The Bill now expressly mentions the referral of disputes as to the amount to be paid to adjudication. If the notice provisions have been complied with, but a dispute over the amount owed remains, under section 111(8) and (9), such a dispute can be decided by an adjudicator. If the adjudicator decides that more than the sum specified in the notice is due, payment of the additional sum will be required on the later of 7 days from the date of the decision, or the final date for. This essentially repeats the old section 111(4).

Protection from Insolvency

When considering the amendments to the Act, many in the construction industry, and the Specialist Engineering Contractors' Group in particular, expressed concern over the lack of protection against contractors' insolvency, particularly in the current economic climate.

Although the Bill retains the prohibition of 'pay when paid' and has now extended this prohibition to 'pay when certified' clauses, it fails to remove the insolvency exception of pay when paid clauses, which, in reality, means that payees are not provided with any insolvency protection where a pay when paid clause is in the contract. The new (improved?) payment provisions will be academic where the payer does not have the means to discharge the payment. In the current economic climate, many people consider there is a need to take any measure which will stop the 'domino effect' which has a major impact on small businesses, where they fail because people up the line who owe them substantial sums have gone into insolvency. The effect of the precedent established by the decision of the House of Lords in *Melville Dundas Limited (in receivership) v George Wimpey UK Limited* was considered when

the Bill was being drafted. This case essentially established that under the contract in question, the payer could avoid its obligations to make payment, even if the final date for payment had passed, notwithstanding that no “withholding notice” under section 111 of the 1996 Act had been given, on the ground that the payee had become insolvent.

This decision raised concerns within the construction industry, as it was seen to encourage businesses to go against the provisions set out in the 1996 Act and to encourage the withholding of payment in order to hedge against the risk of insolvency. The Bill purportedly intends to limit its effect on the construction industry, by ensuring that the *Melville Dundas* decision remains confined to insolvency situations alone. In the context of new section 111, the Bill provides that the requirement to pay the notified sum does not apply where the contract allows the payer to withhold monies upon the payee’s insolvency and where the payee becomes insolvent after the expiry of the period for giving a notice of intention to pay less than this sum.

Therefore, the insolvency exception to pay-when-paid clauses is protected; the decision in the *Melville Dundas* case preserved; and the wishes of certain parties involved in the construction industry to protect and guarantee entitlement to payment irrespective of insolvency have been rejected.

Suspension of performance for non-payment

One aspect of the Bill which seems to have been widely welcomed, particularly by subcontractors, is its effect on section 112 of the 1996 Act. The section has been amended in the hope of making the right to suspend performance for non-payment a more effective tool for contractors. The amendments clarify that a payee can suspend all or part of the work when payment has not been made. The party in default, i.e. who failed to pay, will then be liable to give the payee a reasonable amount by way of the costs and expenses incurred when exercising the right to suspend work (for instance, the payee's costs incurred in redeploying staff or removing plant and equipment).

Under section 112(4), any period during which the payee stops work in pursuance of this right is then disregarded in calculating any time period prescribed in the contract. However, the Bill takes this further by stating that any period in which the payee stops work “in consequence of the exercise of” this right will also be disregarded.

At least seven days' notice of intention to suspend performance must be given to the party in default, which must state the ground(s) on which it is intended to suspend performance. If the party in default pays the full sum, the right to suspend performance will cease.

It is hoped that the enhancement of the payee's ability to suspend performance for non-payment will encourage quick payment and will act as an incentive for payers to administer payment in a fair way, thus securing payees' entitlement to payment.

Under the amended 1996 Act, however, this enhanced entitlement of the payee is partially offset by a point which leans towards the payer. Under the 1996 Act at present, a payee has the right to suspend performance of his obligations if the payer has failed to pay by the final date for payment and if no notice to withhold payment has been given. Once enacted, however, the Bill will require an added stage in the process of suspending performance. By virtue of the new cross-reference in section 112 to section 111(1), there must have been a failure to pay the notified sum, where no notice of intention to pay less than the notified sum has been issued. A notified sum requires a payment notice to have been issued. Thus, if the payer has failed to do so, the payee will have to issue the notice, so that a notified sum can be established. Only after such notice has been given can the notice of intention to suspend performance be served.

In practice, subcontractors will have to keep a strict eye on deadlines to protect their position.

Problems with the Bill

In general, the Bill seems to display good intentions on the part of the Business Enterprise and Regulatory Reform (BERR) to improve payment provisions under the 1996 Act in order to enable the better management of cash flow. However, it can be argued that the Act still fails to go far enough in protecting subcontractors' entitlement to payment – the provisions still lean towards the payer in certain respects. There is a concern that, despite efforts being made, the views of the small businesses have not been properly heard or reflected in the Bill. In addition, the new payment provisions may have the effect of extending payment periods for sub-contractors, in order to allow for the removal of pay when certified clauses.

A substantial criticism of the Act is its complex nature. It is hard to read and understand and will be difficult for employers, contractors and sub-contractors alike to get to grips with. The provisions of the Bill are also open to interpretation in a number of respects.

Finally, it is worth noting that great time and expense will be involved in redrafting all of the contract forms to include the amendments. When the Bill is enacted, there will be an interim period where the original 1996 Act applies to some contracts and the amended Act will apply to new contracts. This too may be difficult for many parties in the construction industry to keep up with.

Adjudication: How Will The Changes Affect The Adjudication Process?

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It is fair to say that the proposed changes to adjudication are limited. There are, indeed, only three direct changes, although the proposed changes to the payment regime, are likely to give rise to substantive disputes that will be resolved by adjudication.

The three changes are:-

- The abolition of the requirement for construction contracts to be in, or evidenced by, writing;
- The introduction of a slip rule; and
- The effective outlawing of contractual terms in relation to costs in adjudication

Contract In Writing No Longer Required

As the law presently stands, by virtue of s.107 of the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act"), the provisions of Part 2 of the 1996 Act (which include the right to adjudicate) only apply where the construction contract is made in writing, made by exchange of communications in writing or is evidenced in writing.

This requirement will be swept away by s.135(1) of the Local Democracy, Economic Development and Construction Act 2009.

The rationale underlying this change is that s.107 has been interpreted restrictively by the courts, such that all of the non-trivial terms of construction contracts must be in writing, as that term is presently defined. Part 2 of the 1996 Act will now apply to all construction contracts – whether wholly in writing, partly in writing or wholly oral.

In practice, this opens up the possibility of large amounts of time (and money) being spent determining what, exactly the parties' contract provides, prior to moving on to the dispute itself.

There are certain minor changes to s.108 of the 1996 Act. The adjudication requirements in ss.108 (2) – (4) must be in writing; if they are not, the relevant provisions of the Scheme will apply.

Introduction of a Slip Rule

The absence of an express power to correct errors (or “slips”) has always been of more significance in Scotland, than in England where the existence of a “slip rule” in adjudication has long been accepted, see ***Bloor Construction (UK) Ltd v. Bowmer & Kirkland (London) Ltd*** (2000).

The basis for that decision was that, in the absence of any specific agreement to the contrary, a term can and should be implied into the contract referring the dispute to adjudication that the adjudicator may, on his own initiative or on the application of a party, correct an error arising from accidental error or omission or to clarify or remove any ambiguity in the decision which he has reached, provided this is done within a reasonable time and without prejudicing the other party.

A new s.108(3A) will require that construction contracts include a provision in writing permitting the adjudicator to correct his decision so as to remove a clerical or typographical error arising by accident or omission.

Certain issues will arise with this.

Firstly, the new provision contains no time limit. Whilst the amended Scheme may do so, that may not apply and so, in the absence of a time limit, how long does a party have to highlight a relevant error?

In ***Bloor Construction (UK) Ltd***, His Honour Judge Toumlin declined to say that the time limit in s.57(3) of the Arbitration Act 1996, namely 28 days, was “necessarily appropriate” for adjudication.

Secondly, what, exactly, is a “clerical or typographical error”? Does it include errors of arithmetic?

Whilst there may be something in these questions, in reality, the courts are only likely to determine the answer if a correction is made (i.e. the power given by s.108(3A) is used) and the party who does not benefit from the correction challenges that correction.

Adjudication Costs

At the time the 1996 Act came in to force, a number of main contractors spent a lot of time (and money with lawyers) devising contractual provisions that meant sub-contractors were required to bear all the costs of an adjudication (including the main contractor's legal costs) if they had the temerity to refer a dispute to adjudication.

Such clauses remain to this day. The validity of such a provision was considered by the courts in ***Bridgeway Construction Ltd v. Tolent Construction Ltd*** (2000), His Honour Judge Mackay determining that such a provision was valid.

A new s.108A of the 1996 Act will provide that any contractual provision which concerns the allocation as between parties of costs relating to the adjudication of a dispute will be ineffective unless it is made in writing **after** a notice of intention to refer the dispute to adjudication has been served.

The provision will cover both the adjudicator's fees and expenses and the costs incurred by the parties themselves.

It is not difficult to suggest that the likelihood of such agreements being entered in to is, to say the least, remote!

Disclaimer

The material contained in this handout is of the nature of general comment only and does not give advice on any particular matter. Readers should not act on the basis of the information in this handout without taking appropriate professional advice upon their own particular circumstances.

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CHANGES TO THE CONSTRUCTION ACT - where have we got to and how have we got there?

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11 November 2009



REFORM OF CONSTRUCTION ACT

Why was it necessary?

- **Scope**
- **Payment**
- **Adjudication**



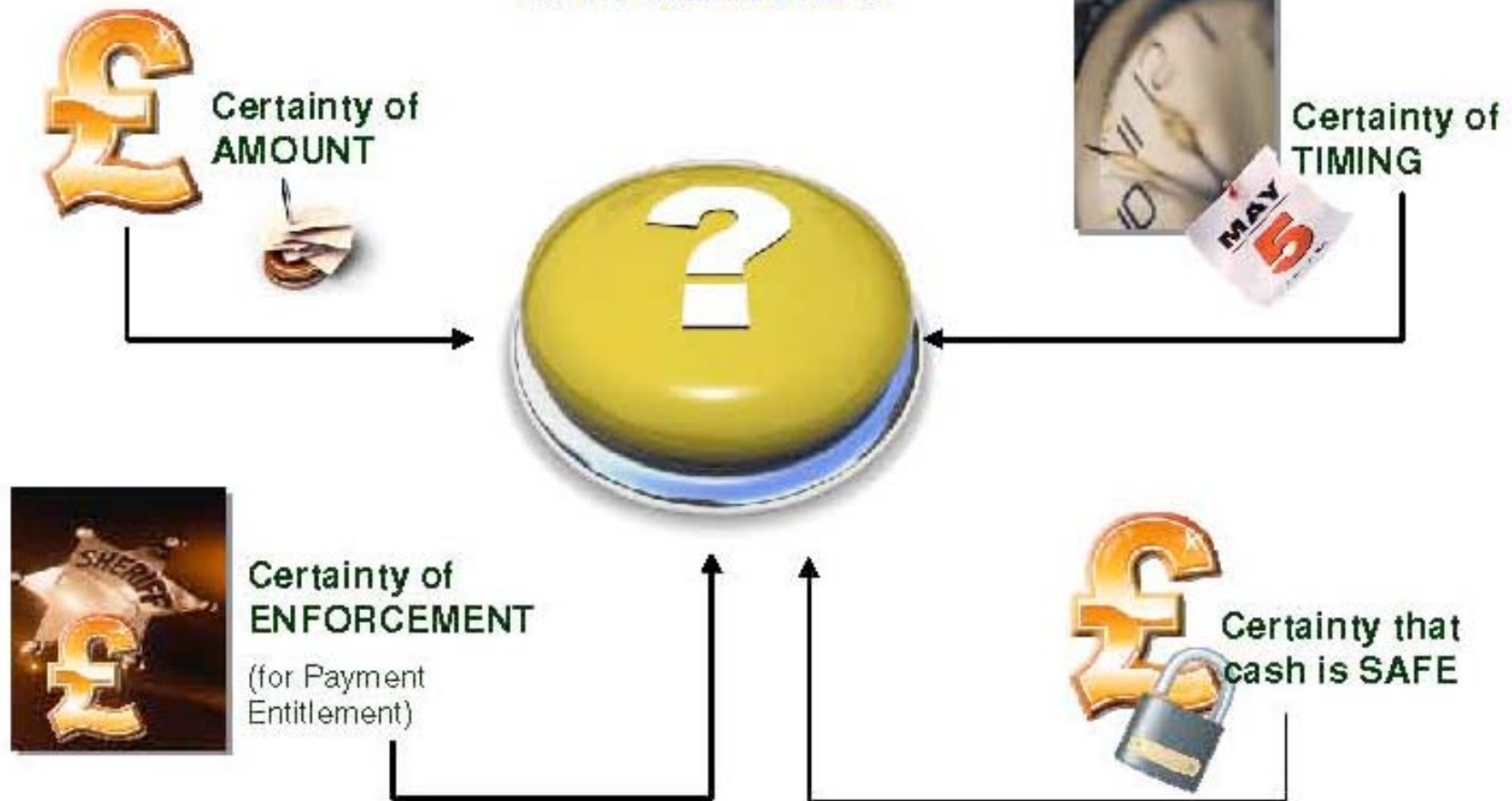
WEAKNESSES IN THE ACT

SCOPE

- Includes only Contracts “wholly” in Writing.
- Excludes Process Plant.

PAYMENT

The Four Payment Certainties





WEAKNESSES IN THE ACT PAYMENT

Adequate Mechanism

- Payer Notice – *Intention to Pay*; *not* what is *Due*. No sanction for not issuing.
- *Adequate Mechanism for Payment in Contract (quantum and timing of amount due)* not provided in contracts. Fallback Scheme not effective.



WEAKNESS IN THE ACT

PAYMENT

Withholding Notices

s.111: Requires notice of withholding where payer withholds from “*sum due*”.

How and where is this ascertained?




WEAKNESSES IN THE ACT

PAYMENT

Withholding Notices

- Possibility of withholding in respect of claims under other contracts
- Withholding notices can be issued up to the final date for payment
- Information in notice can be meagre.



“[Section 111] clearly, in my view, envisages a notice given under it being a ***considered response*** to the ***application*** for payment”.

Lord Hamilton in Strathmore Building Services Ltd v Greig t/a Hestia Fireside Design (2001) 17 Constr. L.J. 72



WEAKNESSES IN THE ACT

PAYMENT

Conditional Payment Provisions; Insolvency Protection

- Pay when/what certified and similar clauses
- Insolvency Exemption in s.113
- No insolvency protection (nb. Sir Michael Latham's recommendation in favour of statutory trust funds)



WEAKNESSES IN THE ACT PAYMENT

Suspension

- No compensation for period of suspension
- Assumption that payee must perform all his obligations under the contract



WEAKNESSES IN THE ACT

ADJUDICATION

- Increasing costs of adjudication – too many jurisdictional challenges
- Bespoke Schemes – Act has mandatory requirements but amendments to frustrate the process (Tolent clauses)
- Problem of which elements of non-compliant contractual procedure still valid



REFORM OF CONSTRUCTION ACT


How did we get here?

- March 2004: Gordon Brown (as Chancellor) announces review of Construction Act against background of continuing payment problems.
- Original proposal – Regulatory Reform Order.
- Formal consultations in 2005 & 2007 + extensive “lobbying”.
- Legislation: The Local Democracy, Economic Development and Construction Bill.



THE BILL

- Draft published for consultation July 2008
- Revised Bill - 1st Reading, House of Lords 4 December 2008 (some changes from original draft).
- Report Stage and 3rd Reading in House of Commons: 13 October 2009
- House of Lords – 9 November 2009 (“ping-pong”)
- Royal Assent ?



“Our amendments....will create greater certainty and clarity of cash flow for **all** in the construction supply chain” (*emphasis added*)

Baroness Andrews in 2nd Reading debate in House of Lords on 17.12.2008



THE BILL

What has it changed ?

Scope

- Oral contracts included (which also reduces challenges to adjudicators' jurisdiction).

Payment

- Amount due defined
- Conditional arrangements removed, except insolvency.
- Cross-contracts claims (possibly) outlawed.
- Reduction notices from payer must set out "basic calculation"
- Suspension costs included and payee can suspend any/all of his obligations.

Adjudication

- Tolent-type clauses outlawed.



THE BILL

What hasn't it changed?

Scope

- Process Plant

Payment

- Timing of reduction notice
- Pay when paid; insolvency exception
- Insolvency protection

Adjudication

- Jurisdiction of adjudicators
- Bespoke schemes



IMPLICATIONS OF THE CHANGES

“Contractors and sub-contractors will undoubtedly require legal assistance as they grapple with the meaning of these amendments, the consequential changes to their standard form documentation and the implication for their business practices. As with the Act itself, the amendments.....may become the subject of considerable litigation”.

(from an article in International Construction Law Review)



IMPLICATIONS OF THE CHANGES PAYMENT (1)

- There will be greater certainty of amount to be paid at final date for payment.
- **BUT**
 - (a) Process likely to be payer driven
 - (b) An initial notice from payer is likely to may be worthless; the reduction notice will be more important
 - (c) Payee will have to go to adjudication to assert correct entitlement
- Default provisions will help payer though final date for payment could be extended



IMPLICATIONS OF THE CHANGES PAYMENT (2)

- No requirement to pay notice of due payment where payee gone into insolvency; could encourage payer not to pay on final date for payment
- Continued lack of insolvency protection could make new rights academic



IMPLICATIONS OF THE CHANGES PAYMENT (3)

- Process of adjudication could become rather more complex since adjudicator will have to consider amount that should have been in initial payer notice (when issued) as well as validity of reduction notice
- **BUT** opportunity for adjudicator to step in and quickly decide validity of initial payer notices.



IMPLICATIONS OF THE CHANGES ADJUDICATION

- Concern that there will be pressure on weaker parties to accept Tolent-type arrangements after notice of adjudication served.
- Statutory legitimisation of agreements on party and party costs could undermine adjudication



OVERALL VERDICT

Will Amendments Enhance Cash Flow?

- Yes
- Any butts? Yes.

Much will depend on how the industry responds to the new payment notice provisions



CHANGES TO THE CONSTRUCTION ACT

**- where have we got to and how
have we got there?**

Professor Rudi Klein, Barrister
Chief Executive
Specialist Engineering
Contractors' Group