THE TCC CONSIDERED WHETHER A LIMIT OF LIABILITY WOULD HAVE PROVIDED AN ADEQUATE REMEDY IN DAMAGES

Undoubtedly one of the most significant recent technological developments in construction has been building information modelling (BIM). Unlike RIS, some aspects of the construction industry are not so new to us. What happens when new technology collides with an old age problem: what to do when there has been non-payment of fees?

To paraphrase the saying, information is power. With nearly 20 years of experience, it may be unsurprising that clients are prepared for some of the seismic changes to come about early next year.

It has been interesting to discover the extent to which various aspects of adjudication and prompt payment that we take for granted are surprising and a little unfamiliar with them.

Over the past five months, we have been exploring these concepts — and the teething problems that the UK’s experience — to members of the Canadian construction industry, so that they are prepared for some of the seismic changes to come about early next year.

So, they ask, what happens when you only have 10 days to prepare an application for adjudication and only four weeks to rehearse the entire dispute (not forgetting the fact that enforcing the adjudicator’s decision and any arbitration proceedings). They also ask: will there be robust support of the courts? We have had plenty of debates over the years about whether a dispute has crystallised, whether more than one dispute can be referred to adjudication and the relevance of natural justice. But the courts have consistently sought to give effect to the intention of Parliament — whoever possible adjudication decisions are enforced. We will have to wait and see whether the courts of Ontario do the same.

Requiring construction contracts to provide an adequate mechanism for payment and partial/staged payments has undoubtedly helped the UK construction industry — it has largely been successful in stopping epidemic poor payment practices that forced contractors to wait months or even years to be paid for their work or to go insolvent while waiting. The desire to adopt a similar system for Ontario is, therefore, understandable.

One of the key practical issues is that employees, consultants, contractors and subcontractors in Ontario do not currently have the internal systems in place to deal with payment in these circumstances. There has been a dearth of realisation, however, that valuation and payment processes can no longer be a lengthy or comprehensive. Large and small businesses alike will need to invest time and money in this new regime, or run the risk of overpaying or being underpaid.

Doug Wass and Mark Lawrence
Ontario in Canada is getting used to adjudication and prompt payment

CONSTRUCTION ACTS OFF TO CANADA

With nearly 20 years of experience, it may be surprising for some of us to remember how novel and innovative adjudication and prompt payment were when they were introduced to the UK. But this has recently been undermined by the response from the construction industry in Ontario, Canada, which is about to introduce similar measures of its own.

Recently, we have been providing plenty of examples of parties who have exercised the UK’s suspension rights and, at worst, are used to ignoring invoices for a long time with relative impunity.

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With the introduction of adjudication and prompt payment, it will be interesting to see how the construction industry and the courts of Ontario grapple with this new issue. We have experienced the UK’s construction industry and the courts for the past two decades.

Our path may diverge, but for now Ontario has given a glowing imitation of the UK’s payment — imitation is, after all, the sincerest form of flattery.

Doug Wass is a partner and Mark Lawrence is a senior counsel in the construction team at Beale & Company Solicitors.