AMENDMENTS TO THE CONSTRUCTION ACT
AND SCHEME FOR CONSTRUCTION CONTRACTS

June 2011

This is our fourth update on the legislative process for amending the Construction Act\(^1\) and Scheme\(^2\).

To recap: the Amending Act\(^3\) was given Royal Assent in November 2009. However, Part 8 – which amends the Construction Act – has not yet come into force and will only do so on a date to be specified by the Secretary of State. This is to allow time for a consultation process for amending the Scheme, which began in March 2010.

Construction Act

Please see our previous updates\(^4\) for a summary of the changes to be introduced by the Amending Act, which will affect adjudications, exclusion orders, payment and suspension.

1 October 2011 has been floated as the date when Part 8 of the Amending Act will come into force. However, there is a very real possibility that this will be postponed further.

One reason for the potential delay is that there is concern about the new section 108A in relation to adjudication costs (ie the parties’ own costs and the adjudicator’s fees and expenses). Parliament had intended to outlaw Tolent clauses – under which a referring party is contractually required to pay both their own costs and those of the other party regardless of the outcome – by seeking to provide that neither party could in their contract allocate adjudication costs in advance of any adjudication. However, last minute changes by the House of Commons combined with some unfortunate drafting may have inadvertently achieved the opposite result.

Tolent clauses take their name from an unloved case in 2000\(^5\) where the Court concluded that they are valid and do not contravene the Construction Act. A 2010 case\(^6\) has cast considerable doubt on the correctness of that decision, but this only underscores the need for legislative clarity. Tolent clauses have been widely seen as an unwelcome fetter on a party’s ability to refer disputes to adjudication and particularly for sub-consultants and sub-contractors. They are usually included where there is a significant imbalance of commercial power.

Section 108A states that any agreement about the allocation of adjudication costs is ineffective unless (a) in writing, in the construction contract and confers power on the adjudicator to allocate his or her fees/expenses between the parties or (b) made after the dispute has been referred to adjudication. The problem lies with the first of those exceptions. As it stands, section 108A may fail to achieve Parliament’s intention because, on a literal reading, Tolent clauses could be permissible if the construction contract gives the adjudicator the power to allocate his or her own fees/expenses. It is arguable that this would leave the parties open to agree that the referring party shall pay both parties’ costs, win or lose. Many lawyers, the CIC and at least one judge share that view, or are at least concerned that there will be a great deal of ambiguity.

There is a good chance that the High Court would construe 108A the way Parliament intended. However, leaving it to the courts is far from ideal and relies on there being a decision in a suitable case. The better solution is to ring fence and amend section 108A before it comes into force, and that is precisely what Parliament is currently being lobbied to do. The revised drafting must make clear that parties cannot reach agreement about their own costs before a dispute has been referred to

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\(^1\) Housing, Grants, Construction and Regeneration Act 1996  
\(^2\) Scheme for Construction Contracts (England and Wales) Regulations 1998  
\(^3\) Local Democracy, Economic Development and Construction Act 2009  
\(^4\) December 2008, January 2009 and March 2010  
\(^5\) Bridgeway Corporation Ltd v Tolent Construction Ltd [2000] 11/04 TCC Liverpool  
\(^6\) Youanda (UK) Co Ltd v WW Gear Construction Ltd [2010] EWHC 720 (TCC)
adjudication; although it is difficult to see why the parties should wish, in practice, to make such a decision after a dispute has been referred.

**Scheme for Construction Contracts**

Sections 108 – 111 and 113 of the Construction Act set out requirements in relation to adjudication and payment that every construction contract must meet. If not, then, in the case of any non-conformity with the adjudication sections, the *entire* adjudication provisions in the Scheme will apply. In the case of non-conformity in the payment sections, the *relevant provision* of the Scheme will replace the non-conforming section.

On 25 March 2010 the Department for Business, Innovation and Skills ("BIS") published a consultation document for amending the Scheme. The deadline for submissions closed last year and the results are still to be published. However, it is clear that there will be (a) consequential amendments arising from the changes to the Construction Act and (b) other supplementary proposals, some of which we discuss below.

**Consequential amendments**

**Adjudication costs**

BIS propose allowing adjudicators to allocate payment of their own fees/expenses, subject to any valid prior agreement between the parties under the new section 108A. The extent to which prior agreements will be permitted depends on whether section 108A is amended (or how it is interpreted by the Courts – see above). Save for this, we expect the proposal to be implemented.

**Slip rule**

The Amending Act will require parties to provide in their construction contract that an adjudicator has the power to correct clerical or typographical errors in his or her decision, otherwise the Scheme will apply. The existing Scheme does not contain a ‘slip rule’, so one needs to be added.

The BIS proposal is that adjudicators can correct errors within seven days and that an eight day compliance period is introduced (rather than ‘immediately’, as is the current position). Seven days for correcting basic errors is considered too long in the context of a 28 day process and we expect this will be reduced to four or five days.

**Payment notices**

The Amending Act replaces the current ‘withholding notice’ regime with a ‘pay less notice’ regime. Broadly, under the Amending Act, payment notices must be issued within five days after the due date for payment stating the amount that is due (which can be less than the amount claimed or zero) and the basis on which that sum has been calculated. Once issued, the payer must pay the amount specified in the notice (the ‘notified sum’), unless he serves a counter notice within the prescribed period saying he is going to pay less and the basis on which that lesser sum has been calculated.

The Scheme needs to be amended to reflect this new regime and BIS propose that it should be a payer-led process (which makes sense). There is some debate as to whether the period for issuing a payment notice under the Scheme should be five or seven days after the due date for payment.

**Supplementary proposals**

**Referral period**

The existing Scheme requires a referring party to refer a dispute “not later than seven days from the date of the notice of adjudication” (paragraph 7(1)). To improve clarity, BIS propose changing this to
receipt of the notice by the adjudicator or the responding party or the appointment of the adjudicator.

**Multiple disputes**

The existing Scheme does not allow an adjudicator to adjudicate more than one dispute under a construction contract at the same time or related disputes on different contracts at the same time unless the parties agree. We expect this prohibition to be removed.

**Confidentiality**

The existing Scheme deals with confidentiality selectively: information shall not be disclosed to any third party where a party to the dispute indicates that it is to be treated as confidential. BIS has floated blanket confidentiality – of the fact of adjudication and the matters arising therein, except as required to implement, enforce or challenge the decision – as the default position. There is some industry support for this.

**‘Final and conclusive’ certificates**

BIS have asked whether adjudicators should have the power to open up, revise and review any decision or certificate that is deemed ‘final and conclusive’ under the contract. This has polarised views, so it is difficult to predict which way BIS will turn. On balance, we favour leaving the Scheme as it is. If parties do not like the Scheme they can agree an alternative adjudication regime provided it complies with the Construction Act.

**Interest**

The existing Scheme does not give adjudicators an inherent right to award interest. Instead, the award of interest has to be referred as an issue, the parties must agree that it is within the scope of the adjudication or it must be necessarily connected with the dispute. An inherent right is simpler and arguably more just. We note that the CIC Model Adjudication Procedure makes provision for the adjudicator to award interest “as he sees fit”.

We will report again once the results of the consultation for the Scheme have been published and a date has been confirmed for the Amending Act to come into force (with or without clause 108A).

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