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Webinar on the Construction Contracts Act 2013

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Introductions

- + Cathie Shannon, Associate
- + Tom Pemberton, Partner
- + John Henderson, Partner

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Overview of the Construction Contracts Act 2013

Cathie Shannon, Associate

Overview

- + Legislation driven by the plight of the sub-contractor;
- + Introduction of strict payment regime;
- + Outlawing of paid when paid provisions;
- + Introduction of adjudication for disputes relating to payment- quick and temporarily binding;
- + Act cannot be contracted out of.

Construction Operations

- + The Act contains a lengthy definition of “Construction Operations”;
- + Irish definition almost identical to that of the UK legislation;
- + Section 1 (1) (g) unique to Ireland: *“Making, installing and repairing of sculptures, murals and other artistic works that are attached to real property”*.
- + *“part of the land”* – in order to form part of the land, the building / structure / fixture / fitting does not necessarily need to be fastened to it. This will be a question of fact and intention.
- + Contracts for supply only are not Construction Operations.

Construction Contracts

- + What is a construction contract? – an agreement between an executing party and another party, whether oral or written, for the carrying out of construction operations by an executing party;
- + Executing party – the party carrying out the works;
- + Construction contracts include agreements to provide work and services that are ancillary to construction contracts;
- + Includes the contracts of consultants and sub consultants– engineers, architects, surveyors etc.

Exclusions

- + Where the value of the contract is less than €10,000;
- + Domestic dwelling exception: contracts for dwellings with floor area < 200 metres squared and where one of the parties occupies / intends to occupy dwelling as residence;
- + A contract of employment is not a construction contract;
- + State Authorities and their partners in PPP arrangement.

The role of the minister and panel appointments

- + Chair and Panel are now in place;
- + Panel appointments limited as to profession and experience;
- + Minister may remove member from the Panel for “good and sufficient reason”;
- + A Code of Practice governing the conduct of Adjudications has still not been signed into law, but thought to be in its final form.



Outstanding issues

- + Code of Conduct for Adjudicators: it is not yet known what this will include;
- + Rules of the Superior Courts: have yet to be amended to take account of the introduction of Adjudication;
- + How would an Adjudicator's decision be enforced? Not yet clear;
- + Possible need for Insurers to amend Construction PI Policies to account for Adjudication.

Constitutional considerations

- + Articles 40.3.1 and 40.3.2 of the Constitution: State to vindicate the personal and property rights of citizens;
- + Adjudication “suspect” from a constitutional point of view;
- + In the UK, decisions of adjudicators in general are upheld where adjudicator has acted fairly, impartially and within their jurisdiction;
- + It remains to be seen whether the robust UK approach will be adopted.

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Schedule – Provisions Concerning Payment & Suspension for Non-Payment

Tom Pemberton, Partner

Requirements for payment certainty

- + Sections 3 (1) and 3(2) of the Act require construction contracts to provide
 - certainty as to the dates by which payment must be claimed and paid, and
 - an adequate mechanism for determining the amounts of interim and final payments (where these are not provided by the contract)
- + Schedule applies to the extent of any non-compliance
- + Different effect on a subcontract to that on a main contract

The Schedule

Payment event	Payment claim date	Payment due date
Interim payments	30 days after commencement and every thirty days thereafter	No later than 30 days after the payment claim date
Final payment	30 days after the “ <i>date of final completion</i> ”	No later than 30 days after the payment claim date

The end of “pay-when-paid”?

- + Section 3 (5) provides that a pay-when-paid provision will be ineffective, except in the circumstances provided by Section 3 (6), as described below.
- + A pay-when-paid provision *in a subcontract* will be given effect where payment under the upstream contract is withheld because the contractor’s employer has become subject to an insolvency event (liquidation/examinership/receivership/bankruptcy).
- + “Pay when certified” provisions are not expressly excluded by Section 3(5).
- + Position reflects position under UK Construction Act before it was amended in 2009.
- + Unclear whether Irish courts will take a similar view as English Court in Midland Expressway case on pre-2009 UK Construction Act in which a “pay when certified” clause was held to be ineffective as being tantamount to a “pay when paid” clause.
- + Express provision one way or the other in the Act dealing with “Pay when certified” would have promoted certainty.

Payment Claim Notices

- + Section 4 provides for service of payment claim notices not later than five days after the payment claim date, specifying
 - the amount claimed;
 - the period, stage of work or activity to which the payment claim relates;
 - the subject matter of the payment claim; and
 - the basis of the calculation of the amount claimed.
- + Consultants and contractors should agree with employer at outset that their invoices / applications for payment are to constitute payment claim notices.
- + Best practice: ensure you are aware of payment cycle and serve payment claim notices neither early nor late.

Response to Payment Claim Notice

- + Sections 4(3) and 4(4) provide that if the paying party contests the amount claimed it must deliver a response within twenty-one days specifying:
 - the amount proposed to be paid;
 - the reasons for the difference (giving particulars of any loss or damage claimed where a breach of an obligation is alleged); and
 - the basis on which the amount to be paid is calculated.
- + If matter not settled by the due date, paying party must pay the undisputed amount not later than the payment due date.
- + Failure to serve a response: executing party would be entitled to the amount due under the contract (which is not necessarily the same as the amount claimed).

Suspension

- + Suspension entitlements are set out in Sections 5 and 7.
- + Suspension cannot continue if notice of intention to refer a payment dispute for adjudication under Section 5 (or to arbitration or legal proceedings under Section 7) is served.
- + Provision is regressive – many standard contracts allow the contractor to suspend the work and continue the suspension until payment or termination.
- + Because the executing party's entitlement is to payment of the value of the work executed under the contract, and not the amount claimed, the suspension may prove to be in breach if an adjudicator later decides that there is no sum due.
- + Effect of suspension on obligation to complete within contractual time-limit.
- + Protection afforded to sub-contractors by Sections 5(5) and 5(6).

Conclusion

- + Understand route to payment at the outset.
- + Ensure that your T&C are updated to comply with the Act as necessary.
- + Keep good records of all contracts to which the Act applies.
- + Ensure that that that your payment claim notices (or responses as relevant) are served within the required timescales.
- + Flag up behaviour by the other party that does not comply with the Act.

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Construction Adjudication – Lessons from Practical Experience

John Henderson, Partner

What can be adjudicated?

- + *“Any dispute relating to payment”*
- + Crystallisation of dispute
- + *“... relating to payment ...”*

Context and strategy

- + Your contract
- + The project
- + The Act

The start of an adjudication

- + Notice of Intention to Refer
- + Appointment of the Adjudicator
- + Referral Notice
- + Timetable

The conduct of the adjudication

- + Jurisdictional
- + Procedural fairness

Conclusion

- + Use it
- + Good luck!

Beale & Company Webinars:



- + We plan to hold a webinar on this subject once the Act has bedded in and we are in a position to draw some conclusions as to whether it has had the desired effects.
- + Details of the webinar will be circulated at a later date.
- + Recordings of some of our previous webinars which may also be of interest can be found on our website on the events page.
- + www.beale-law.com/events.php

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