

A lot of effort, but little to show for it

Construction legislation is set to change next year subject to a change of government. An underwhelmed *John Starr* discusses the revisions

Part II of the Housing Grants, Construction and Regeneration Act 1996, which introduced adjudication and the concept of withholding notices, is facing fundamental changes. It will be necessary for all those who work in the construction industry to have a working knowledge of them. The changes have come about following a long process of consultation with the industry.

The Local Democracy, Economic Development and Construction Act 2009 received royal assent on 12 November 2009. Part 8 of the Act, which amends the adjudication and payment provisions set out in Part II of the 1996 Act, is not yet in force, but is likely to come into effect as soon as the construction industry has been consulted on corresponding amendments to the secondary legislation, the Scheme for Construction Contracts (England and Wales) Regulations 1998. These set out the fall-back provisions that will apply in the event that a construction contract does not contain adequate adjudication or payment mechanisms.

Adjudication issues

The key amendments to the adjudication provisions of the 1996 Act are:

- **Contracts in writing:** The 1996 Act requires a construction contract to be in writing before the adjudication provisions will apply. Section 139(1) of the 2009 Act will mean that Part II of the 1996 Act will apply to all construction contracts, whether wholly in writing, partly in writing or wholly oral.

This should end the speculation as to whether certain partly written contracts are covered, but it will undoubtedly open up further speculation on whether a contract exists at all. However, the adjudication provisions of a contract will still have to be in writing if the provisions of the 1998 Regulations are not to apply.

- **The slip rule:** Section 140 of the 2009 Act introduces a new requirement for construction contracts to include the power for an adjudicator to correct clerical errors in his decision arising by accident or omission. This clarifies the law and confirms the decisions of the courts.

- **Adjudication costs:** Section 141 of the 2009 Act prohibits parties from agreeing, in a construction contract, to allocate liability for their costs of the adjudication. This aims to circumvent the practice whereby parties

that find themselves in a poor bargaining position are forced to accept provisions making them responsible for the other party's adjudication costs, whether they win or lose. Parties will still be able to agree the allocation of liability for costs after notice of adjudication has been given, but this is unlikely to happen in practice.

Payment mechanisms

The key amendments to the payment provisions of the 1996 Act are:

- **Pay when certified clauses:** The 1996 Act already outlaws pay when paid clauses, except where the payer is itself not paid because of another's insolvency (so-called upstream insolvency). Section 142 of the 2009 Act extends this prohibition to payment mechanisms that are linked to obligations under another contract (namely pay when certified clauses).

The changes introduced by the 2009 Act are not as far-reaching as might have been expected, and one might even ask if they have been worth all the years of consultation

For example, a payment clause in a subcontract might state that payment for works carried out under that contract becomes due only when the main contractor's application to be paid for those works is certified under the main building contract. This type of clause will no longer be allowed.

However, it is expressly stated not to outlaw management contracting, which uses a similar payment mechanism.

- **Payment and withholding notices:** The 1996 Act requires the paying party under a construction contract to serve two notices: a payment notice and a withholding notice. If the payer withholds payment of a sum due under the contract without giving a valid withholding notice, the payee can suspend performance of its obligations and can expect an adjudicator to decide that it should be paid the sum due. As things stand, a failure to serve a payment notice is of no consequence.

Sections 143 and 144 of the 2009 Act replace both notices. The new payment notice can be given by either the payer or

the payee. If the contract requires the payer to give the payment notice and it fails to do so, the payee can serve a default payment notice. Until the payee provides a payment notice (or a default payment notice), it cannot validly suspend performance or receive payment.

The new withholding notice (known as a counternotice) requires the payer to specify if a sum different to that in the payment notice is to be paid and the basis on which that different sum is calculated. If a valid counternotice is not given, the sum specified in the payment notice will be the amount due.

- **The right to suspend:** The 1996 Act allows a party to a construction contract to suspend the performance of its obligations where it has not been paid and no valid withholding notice has been given.

This is very much an all-or-nothing remedy, which does not entitle the suspending party to an extension of time or any loss and expense for the period of suspension. As a result, it has not been popular among unpaid parties, except as a last resort.

Section 145 of the 2009 Act will enable an unpaid party to suspend all or part of its obligations. This means that it can suspend, for example, only that part of its involvement on the project that relates directly to the non-payment. This avoids the need for an all-out suspension.

The new provisions also allow an extension of time and loss and expense for the period of the suspension and any further period of delay arising from the suspension. This will make suspension for non-payment a more attractive option.

A little disappointing

The changes introduced by the 2009 Act are not as far-reaching as might have been expected, and one might even ask if they have been worth all the years of consultation and all the effort that were spent on them. Although they should be in force early next year, the election of a new government may overshadow them, and who can say whether that government will implement them.

The important thing, however, is to be aware that changes are afoot and remember to keep an eye on developments.

John Starr is a solicitor and head of construction at Boyes Turner