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Housing Grants, Construction and Regeneration Act 1996

Construction Law Terms: A to Z

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H is for Housing Grants, Construction and Regeneration Act 1996

Introduction

In 1993, the Secretary of State of the Department of the Environment appointed Sir Michael Latham to undertake a review of procurement and contractual arrangements in the construction industry. Sir Michael Latham published his final report a year later, in July 1994. He made a number of recommendations as to provisions he considered should be inserted in construction contracts, including periods within which interim payments must be made, in respect of taking steps to avoid conflict and providing for speedy resolution of disputes. He also recommended that certain unfair practices should be made unlawful (for example, *"Any attempt to amend or delete the sections relating to times and conditions of payment, including the right of interest on late payment"*).

Following consultation on Sir Michael Latham's report and recommendations, Parliament passed the Housing Grants, Construction and Regeneration Act 1996.[1] It implements some, but not all, of Sir Michael Latham's recommendations. It applies to construction contracts in England, Wales and Scotland (Northern Ireland is covered by the Construction Contracts (Northern Ireland) Order 1997) and is an important part of the legislation affecting the construction industry. It is commonly referred to in the Construction Industry as the "Construction Act", although, in reality, at least in the legal profession, we are primarily concerned with only Part II of the Construction Act, which deals with Construction Contracts and came into force on 1 May 1998.[2]

Twelve years after the Construction Act came into force, it was amended by Part 8 of the Local Democracy, Economic Development and Construction Act 2009.[3] The Construction Act, as amended, applies to Construction Contracts entered into on or after 1 October 2011 in England and Wales, and 1 November 2011 in Scotland (Northern Ireland was again covered by a separate Order[4]). The remainder of this article addresses the Construction Act in its amended form.

At a high level, Part II of the Construction Act provides that Construction Contracts must include:

- a right for a party to a Construction Contract to refer a dispute to adjudication for determination of the issue (sections 108 and 108A); and
- a mechanism for payments within the course of the Construction Contract (sections 109 to 113).

1. Housing Grants, Construction and Regeneration Act 1996 (legislation.gov.uk)
2. As to the definition of a Construction Contract for the purposes of the Act, click here for the previous article: C is for Construction Contract.
3. Local Democracy, Economic Development and Construction Act 2009 (legislation.gov.uk)
4. Construction Contracts (Amendment) Act (Northern Ireland) 2011

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If a Construction Contract does not contain such provisions, then the relevant provisions of the Scheme for Construction Contracts (there is a separate Scheme for Scotland, and again for Northern Ireland), as amended, apply by default. In those circumstances, the provisions of the Scheme have effect as implied terms of the relevant Construction Contract, although the question arises as to whether the defective provisions of a Construction Contract are replaced in full by the Scheme, or only to the extent required to remedy the defective wording. The answer, as we explore below, depends on the subject-matter.

The right to adjudicate

Section 108 of the Construction Act provides that a party to a Construction Contract has the right to refer a dispute arising under the Construction Contract for adjudication at any time. It goes on to set out the requirements that the adjudication mechanism is required to meet.

Where a Construction Contract does not incorporate adjudication provisions complying with the Construction Act, then the Scheme has a ready-made adjudication mechanism that will be implied into the Construction Contract.

The question arises: if the Construction Contract doesn't comply with the Construction Act, to what extent do you imply the Scheme's adjudication mechanism? Do you replace only the provisions that don't comply, or do you replace the whole mechanism? In the case of *Yuanda (UK) Co Ltd -v- WW Gear Construction Ltd*[5], Mr Justice Edwards-Stuart considered that, in the event of non-compliance, the whole mechanism is replaced with the Scheme's adjudication mechanism. He said:

> *"Where non-compliance with the adjudication provisions arises, that is to say non-compliance with section 108 of HGCRA, the position seems to me to be reasonably clear. The words of the section should be taken to mean what they say, namely that if the contract does not comply – in any respect – with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme apply. As we have already seen, the adjudication provisions in the Scheme are those contained in Part I. So if there is any non-compliance, the adjudication provisions in Part I of the Scheme are brought in – lock, stock and barrel."*

He also referred to caselaw which was *"all one way"* and supported his view. In the case of *Bennett (Construction) Limited -v- CIMC MBS Limited*,[6] the Court of Appeal (Lord Justice Coulson) endorsed Mr Justice Edwards-Stuart's decision in Yuanda saying:

> *"that is because of s.108 of the Act and the straightforward provision in s.108(5) that, if the contract did not comply with the Act, 'the adjudication provisions of the Scheme for Construction Contracts apply'. There is nothing to say that such incorporation would only be to the extent necessary."*

Interestingly, the Scottish Courts have taken a different approach. In the case of *Profile Projects Ltd -v- Elmwood (Glasgow) Ltd*,[7] Lord Menzies decided that, because only part of the parties' contractual adjudication clause conflicted with section 108 of the Construction Act, only part of the Scottish Scheme for Construction Contracts should be implied into the contract.

The payment mechanism

Sections 109 to 113 of the Construction Act include provisions in respect of payment in construction contracts. The Construction Act requires that Construction Contracts include provisions dealing with the following issues:

5. [2010] EWHC 720 (TCC)
6. [2019] EWCA Civ 1515
7. [2011] CSOH 64

- an entitlement to payment by instalments, stage payments or other periodic payments (s109);
- an adequate mechanism for determining what payments become due under the contract, and when, along with a final date for payment for any sums which become due (s110);
- payment notices (s110A and s110B);
- payment of the notified sum including pay less notices (s111); and
- a right to suspend for non-payment of a sum that is due(s112).

Section 113 of the Construction Act also outlaws provisions making payment under a construction contract conditional on the payer receiving payment from a third person ('pay when paid' provisions).

Where a Construction Contract does not comply with the requirements of the Construction Act, then the Scheme has a ready-made payment mechanism that will be implied into the Construction Contract. Again the question arises – do you replace only the provisions that don't comply, or do you replace the whole payment mechanism? In the case of *Bennett (Construction) Limited -v- CIMC MBS Limited*,[8] the Court of Appeal (Lord Justice Coulson) said:

> *"the purpose of the Act was to provide for certain minimum, mandatory standards so as to achieve certainty and regular cash flow. Save in perhaps exceptional circumstances, it was not designed to delete a workable payment regime which the parties had agreed, and replace it with an entirely different payment regime based on a radically changed set of parameters. It seems to me that that could only happen where the regime which had been agreed was so deficient that wholesale replacement was the only viable option".*

So, unlike the position with non-compliant adjudication provisions (where the provisions of the scheme are implied *"lock, stock and barrel"*), if the payment provisions under a Construction Contract do not comply with the Construction Act, the Scheme's payment provisions will be implied only to the extent necessary to remedy the non-compliance. With regards to Scotland, whilst the courts adopted a different approach to England with regards to adjudication provisions, the courts have adopted the same approach with regards to payment provisions.[9]

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**Content in this article is not legal advice.*

8. [2019] EWCA Civ 1515
9. *Hills Electrical and Mechanical Plc -v- Dawn Construction Limited* [2003] ScotCS 107