



SOLICITORS TO THE CONSTRUCTION
AND ENGINEERING INDUSTRIES

ANNUAL REVIEW

Hawkswell Kilvington

HK

Hawkswell Kilvington Limited

17 Navigation Court
Calder Park
Wakefield
WF2 7BJ

90 Long Acre
Covent Garden
London
WC2E 9RZ



T: 0844 809 9566
E: enquiries@thkp.co.uk
W: www.thkp.co.uk



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Please contact Jonathan Hawkswell, David Kilvington or Daniel Silberstein for further information.

Introduction

As the difficult economic climate continues to affect the UK construction industry, it is important for those within the industry to remain up to date with recent legal events.

There were several key developments in construction law during 2011, the most significant of these being the amendments to the Construction Act, which has led to major changes in the way payment is made and resulted in almost every standard form construction contract being amended.

In this Annual Review, we have summarised some of the most important and interesting developments affecting the construction industry within the past year.

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The Changes to the Construction Act

Do you understand how the changes to the Construction Act affect your business?

On 1 October 2011, the Housing Grants, Construction and Regeneration Act 1996 was amended by the Local Democracy, Economic Development and Construction Act 2009. The amendments to the 1996 Act are significant and will have a huge impact on the construction industry in the coming months and years. Changes to the way payment is made under construction contracts have been particularly radical and it is essential for everyone involved in the construction industry to be aware of these changes.

Changes to Payment

Under the amended Act, there are two different payment procedures. One of these procedures must be incorporated into every construction contract, and companies will be able to choose which procedure they wish to use. Contracting parties are still free to choose the due date and final date for payment.

The “Payer-Led” Procedure

Under this procedure, the payer must issue a notice (a “Payer’s Notice”) not later than 5 days after the payment due date. The Payer’s Notice must specify the sum the payer considers to be or have been due at the payment due date and the basis on which that sum is calculated. Then, if the payer decides that the sum set out in its Payer’s Notice is too high, the payer can issue a further notice (a “Pay Less Notice”) prior to the final date for payment.

However, if the payer fails to issue a Payer’s Notice in accordance with the contract, the sum which becomes due for payment is dictated by the payee. If the payee has already submitted an application for payment which complies with the contract and specifies the sum the payee considers will become due on the payment due date and the basis on which that sum is calculated, the sum claimed in the payee’s application will become due automatically.

Alternatively, if no payee’s application has been submitted, or an application has been submitted but it does not comply with the contract, the payee is able to issue a “Payee’s Default Notice” setting out the sum it considers to have been due at the payment due date and the basis on which that sum is calculated. If a Payee’s Default Notice is issued, the final date for payment will then be postponed by the number of days which pass between the date the payer should have served its Payer’s Notice and the date the payee serves its Payee’s Default Notice.

If the payer has not issued a Payer’s Notice, it will be critical for the payer to issue a Pay Less Notice if it disagrees with the payee’s valuation of the works, as this is the payer’s only opportunity to specify what it intends to pay.

The amended Act allows Payer’s Notices to be issued on the payer’s behalf by a “specified person” who is specified or determined in accordance with the contract. This will usually be an architect, engineer or project manager.

The “Payee-Led” Procedure

Under this procedure, the payee issues a notice (a “Payee’s Notice”) specifying the sum it considers to be due on the payment due date and the basis on which that sum is calculated. The Payee’s Notice must be issued not later than 5 days after the payment due date. The payer is then not required to issue a Payer’s Notice. Instead, the sum set

out in the Payee's Notice becomes due for payment. If the payer disagrees with the payee's valuation of the works, it is critical for the payer to issue a Pay Less Notice if it wants to avoid paying the full sum claimed by the payee.

Pay Less Notices

The changes to the Act replace withholding notices with Pay Less Notices. Regardless of whether the payer-led or payee-led process is adopted, the payer is always able to issue a Pay Less Notice if it intends to withhold payment from the payee. The Pay Less Notice is therefore a vital line of defence for payers.

Pay Less Notices can be issued prior to the final date for payment and the contracting parties are free to agree the period during which a Pay Less Notice can be served. The Scheme states that Pay Less Notices must be issued not later than 7 days before the final date for payment, but it is possible to have a contractual provision permitting the service of a Pay Less Notice up to 1 day before the final date for payment, giving the payer as much time as possible to prepare the notice.

Pay Less Notices can also be served on the payer's behalf by a "specified person".

Insolvency

Under the amended Act, if a contract contains a provision allowing the payer to withhold payment of sums due following the payee's insolvency, and the payee becomes insolvent (within the meaning set out in section 113 of the Act) after the last day on which a Pay Less Notice could have been served, the payer need not make payment to the payee of any sum due, even if the payer has not served a Pay Less Notice. This provision gives important new protection to payers in situations where the payee has become insolvent. However, payers will only benefit from this protection if it is specifically drafted into the contract. All payers should therefore seek to include a clause in their contracts to this effect.

The amended Act still permits "pay when paid" clauses relating to insolvency situations only. However, to take advantage of this there must be an express clause in the contract. Any paying party should include a well drafted "pay when paid" clause in its contracts to protect its liability to payees in the event of the insolvency of a party 'up the line'.

Changes to Retention and Final Accounts

The amended Act provides that any clause in a contract which makes payment conditional on the performance of obligations under another contract is not an adequate mechanism for determining what payments become due, or when they become due. This provision will mean that "pay when certified" clauses in contracts largely become null and void.

More significantly, it will also change the way in which retention and final accounts are dealt with in sub-contracts. It will no longer be permissible to link the release of a sub-contractor's retention to the issue of the Certificate of Making Good Defects (or similar) under the main contract. Equally, main contractors will not be able to link the payment of a sub-contractor's final account to the payment of their own final account by the employer. Instead, payment must be linked to events occurring under the sub-contract itself. For example, retention will need to be released at practical completion of the sub-contract works and then after a specified period following completion of the sub-contract works.

Changes to Suspension

Under the original Construction Act, a payee could suspend performance of its obligations under the contract if it had not been paid a sum properly due. The changes to the Act expand the right to suspend by allowing payees to suspend any or all of their obligations under a contract if they have not been paid. This will allow payees to suspend a crucial part of their obligations (for example, attending site meetings) for maximum impact, and may result in the right of suspension being more widely used.

In addition, payees are now entitled to recover a reasonable amount in respect of costs and expenses reasonably incurred as a result of suspending the works.

Payees previously had a right to an extension of time if their works were delayed as a result of suspension. This right has now been extended so that payees may be given an extension of time for the period of suspension and any period of delay which is consequential to the suspension e.g. a period of re-mobilisation time.

Changes to Adjudication

The ban on “Tolent” clauses – will they be enforceable?

Section 108A of the amended Act was drafted to outlaw “Tolent” clauses. Tolent clauses, which take their name from the case of *Bridgeway v Tolent* (in which it was held that such clauses were enforceable), require the referring party in an adjudication to pay the responding party’s costs. They are intended to deter the financially weaker party to a contract from referring disputes to adjudication.

It has long been the view of many within the construction industry that Tolent clauses are unfair and should be prohibited. With this in mind, Parliament drafted section 108A in an attempt to prohibit the use of Tolent clauses in construction contracts. However, section 108A can be interpreted in two different ways.

One way of looking at section 108A is that it outlaws any clause which allocates costs between the parties (e.g. a Tolent clause), other than a clause that simply confers power on the adjudicator to allocate his fees between the parties.

The alternative view is that section 108A permits any contractual provision concerning the allocation of costs (as long as it is in writing, contained in the construction contract and confers power on the adjudicator to allocate his fees and expenses), regardless of whether that provision also contains a Tolent clause (i.e. a contract could still state that one party has to pay the legal and expert costs of the other party.)

The ambiguous drafting of section 108A means that the legal position on Tolent clauses is still unclear. Whilst it is quite clear that Parliament’s intention was to outlaw Tolent clauses, confusion will remain until the TCC clarifies the issue.

The Slip Rule

Section 108(3A) of the amended Act has been introduced to reflect the “slip rule” created by the Courts in the case of *Bloor Construction v Bowmer & Kirkland*. The “slip rule” allows adjudicators to correct accidental clerical or typographical errors in their decisions.

Changes to the adjudication procedure in the Scheme

The Scheme for Construction Contracts has been amended to incorporate the slip rule. It provides that adjudicators may correct clerical or typographical errors in their decisions arising by accident or omission. Such corrections must be made within 5 days of the delivery of the adjudicator's decision to the parties.

The Scheme has also been amended so that adjudicators may, in the absence of a specific contractual position, determine how their fees and expenses are apportioned between the parties.

Finally, the Scheme now requires the adjudicator to acknowledge receipt of the referral notice. The time limit for the adjudicator's decision will run from the date of receipt of the referral notice by the adjudicator.

What contracts are affected by the changes to the Construction Act?

One of the most significant changes which has been introduced is that the amended Act now applies to any construction contract entered into on or after 1 October 2011, whether the contract is in writing, partly oral and partly in writing or wholly oral. This will mean that companies with a contract which is not completely set out in writing will be able to refer disputes to adjudication. It is also likely to significantly reduce jurisdictional challenges in adjudications which are based on the fact that one or more terms of the contract are not set out in writing.

It remains to be seen whether adjudications will increase as a result of this change. Although parties will no longer be able to argue about whether the contract was in writing or not, it will be necessary to prove that a binding contract has been formed and establish what the terms of that contract are. Therefore, there will still be hurdles to overcome if you wish to refer a dispute about an oral contract to adjudication.

How do you know whether the amended Act applies?

Although the amended Act will apply to all new construction contracts entered into on or after 1 October 2011, the original Construction Act 1996 will still apply to contracts entered into before that date. For many companies, this will mean that some of their contracts are governed by the existing Act and some are governed by the amended Act for months or even years to come. It will be necessary to have safeguards in place to ensure the correct procedures are being followed for each contract.

The existence of the two Acts may be particularly problematic in a number of cases:

- *Sub-contracts entered into after 1 October under a main contract entered into before 1 October* – this may cause confusion for the main contractor, as its contract with the employer will be subject to the original 1996 Act, but it must pay its sub-contractors in accordance with the amended Act.
- *Novation agreements* – there is case law which suggests that if a contract which is entered into before 1 October is novated after 1 October, the amended Act will apply to the novated contract. It is unclear whether this case law will be upheld if the issue arises in the TCC again.
- *Call-off contracts let after 1 October under framework agreements entered into before 1 October* – if each call-off contract is a separate new contract, call-off contracts let after 1 October will be subject to the amended Act. This will depend on the terms of the framework agreement.

If you are uncertain as to which Act applies to your contract, you should seek legal advice. It will be necessary to look at the contract documents to determine the date the contract was entered into. In cases of real uncertainty, it may potentially be appropriate to comply with both Acts, for example by issuing both a ‘withholding notice’ and a ‘pay less notice’ when deducting payment.

Summary

The following table summarises some of the key differences between the two Acts.

	Original 1996 Construction Act	Amended Construction Act
Scope	<ul style="list-style-type: none"> • Only applies to construction contracts which are in writing. 	<ul style="list-style-type: none"> • Applies to all construction contracts, whether or not they are in writing (including oral contracts).
Payment	<ul style="list-style-type: none"> • The contract must specify a due date and a final date for payment. • The payer must give a notice not later than 5 days after the due date specifying the amount of the payment proposed to be made and the basis on which it was calculated. • The payer must issue a withholding notice prior to the final date for payment if it intends to deduct payment from the payee. 	<ul style="list-style-type: none"> • The contract must specify a due date and a final date for payment. • The contract must allow either the payer <u>or</u> the payee to give a notice not later than 5 days after the due date specifying the sum considered to be due and the basis on which that sum is calculated. • If the payer is supposed to give a payment notice and fails to do so, the payee is able to specify the sum which is due. • The payer must issue a pay less notice prior to the final date for payment if it intends to pay less than the sum which is due.
Suspension	<ul style="list-style-type: none"> • The payee may suspend performance of its contractual obligations if a sum properly due has not been paid in full. • At least 7 days’ notice of suspension must be given. • An extension of time can be given for the period of suspension. 	<ul style="list-style-type: none"> • The payee may suspend performance of <u>any or all of</u> its obligations. • At least 7 days’ notice must still be given. • The payee is entitled to recover the reasonable costs and expenses arising out of suspension. • An extension of time can be given for both the period of suspension and the period of re-mobilisation.
Adjudication	<ul style="list-style-type: none"> • The construction contract should include all the provisions set out in section 108 relating to adjudication. If it does not, the Scheme will apply. • There is an implied “slip rule” which allows adjudicators to correct errors in decisions. • Tolent clauses are allowed, but in light of recent case law, it is not clear whether they will be enforced. 	<p>As before, plus:</p> <ul style="list-style-type: none"> • The construction contract should contain a provision allowing the adjudicator to correct clerical or typographical errors in the decision. • The parties may include a provision which confers power on the adjudicator to allocate his fees and expenses. • It is unclear whether Tolent clauses will be enforceable, although the amended Act was intended to prohibit them.

What changes have been made to the standard forms of contract to incorporate the amendments to the Construction Act?

The Changes to the Construction Act – Amendments to Standard Form Contracts

The changes to the Construction Act have necessitated changes to the various standard form construction contracts used by the industry. Here, we outline the amendments which have been made to a number of different standard form contracts, focusing in particular on JCT and NEC3 contracts.

JCT Contracts

The JCT has released an entirely new 2011 suite of contracts to take into account the changes to the Construction Act. These changes are quite extensive, with the main payment clauses being almost completely re-written. Although it is necessary to read the amendments in detail to fully understand them, we have summarised some of the key points below.

The Payment Procedure – JCT Design and Build 2011

Payments become due on the date the Employer receives the Contractor's Interim Application, and the final date for payment is 14 days later. The Employer is required to give a Payment Notice not later than 5 days after the due date for payment.

If the Employer fails to serve a Payment Notice, the amount due to the Contractor is the amount claimed in the Contractor's Interim Application (subject to any Pay Less Notice served by the Employer).

If the Employer intends to deduct payment, it must issue a Pay Less Notice not later than 5 days before the final date for payment.

The Payment Procedure – JCT Standard Building Sub-Contract 2011

It is optional for the Sub-Contractor to make a Payment Application. The Contractor is required to serve a Payment Notice not later than 5 days after the due date for payment, regardless of whether the Sub-Contractor submits a Payment Application or not. The final date for payment is 21 days after the due date.

If the Contractor fails to serve a Payment Notice, the sum which becomes due to the Sub-Contractor will be decided in one of two ways:

1. If the Sub-Contractor has submitted a Payment Application, the sum claimed in the Payment Application becomes due automatically.
2. If the Sub-Contractor has not already submitted a Payment Application, the Sub-Contractor is required to submit a Payment Application setting out the sum it considers to be due and the basis on which that sum was calculated (effectively a "payee's default notice"). The final date for payment is then postponed by the number of days that pass between the date the Contractor should have served the Payment Notice and the date the Sub-Contractor makes the "default" Payment Application.

If the Contractor intends to deduct payment, it must issue a Pay Less Notice not later than 5 days before the final date for payment.

Changes to Retention – JCT Standard Building Sub-Contract 2011

The changes to the Act prohibit contractual provisions which link payment to an event occurring pursuant to an upstream contract. As a result, the JCT has had to make significant changes to the way retention is dealt with in its Sub-Contracts.

The release of the first half of the retention is still triggered by practical completion of the Sub-Contract Works, but the release of the balance of retention is now no longer triggered by the end of the Rectification Period under the Main Contract. Instead, the parties must agree a “Retention Release Date”. If all defects in the Sub-Contract Works are completed at the Retention Release Date, then the balance of the retention is released to the Sub-Contractor as part of the next interim payment (or, if there are still defects, retention is released once the defects are remedied by the Sub-Contractor).

NEC3 Contracts

In comparison with the extensive changes made by the JCT, the changes to NEC3 contracts are much less comprehensive. Changes have been made to the payment provisions of Option Y(UK)2 and to the adjudication provisions of Option W2 in the NEC3 Engineering and Construction Contract, Engineering and Construction Subcontract, Professional Service Contract and Term Service Contract (the “full” NEC3 contracts). In the NEC3 Engineering and Construction Short Contract, Engineering and Construction Short Subcontract and Term Service Short Contract (the “short” NEC3 contracts), amendments have been made using additional conditions.

Payment

In the “full” NEC3 contracts (except the Professional Services Contract), the payment certificate which is issued by the Project Manager (or Contractor or Service Manager, depending on which contract you are using) now constitutes the ‘payment notice’ for the purposes of the amended Act. It must specify the amount due at the payment due date and the basis on which that amount was calculated.

Unlike JCT 2011 contracts, the NEC3 amendments do not clarify what happens if the Project Manager (or Contractor or Service Manager) fails to issue a certificate. However, this is not strictly necessary because the provisions of the amended Construction Act will apply in such circumstances.

If the payer wishes to pay less than the sum set out in a certificate, the payer must notify the payee of the amount the payer considers to be due and the basis on which that amount is calculated. This notice must be issued not later than 7 days before the final date for payment.

In the Professional Services Contract, the ‘payee-led’ basis has been adopted. The Consultant’s invoice is classed as a ‘payee’s notice’ and must specify the sum the Consultant considers to be due and the basis on which that sum is calculated.

Under the “short” NEC3 contracts, the payee (e.g. the Contractor or Subcontractor) is expressly required to make an application for payment. The payee’s application is now classed as a ‘payee’s notice’ and must specify the sum the payee considers to be due and the basis on which that sum is calculated. If the payer (e.g. the Employer or Contractor) wishes to pay less than the sum set out in the application for payment, the payer must notify the payee of the amount the payer considers to be due and the basis on which that amount is calculated.

Adjudication

All NEC3 contracts have been amended as follows:

- The adjudicator is permitted to allocate his fees and expenses between the parties.
- The existing provision which allowed the adjudicator to correct his decision within 14 days has been amended so that the time limit for correcting decisions is now 5 days.

- There is a new provision that requires the sum awarded by the adjudicator to be paid within 7 days, or by the final date for payment (if the final date for payment of that sum has not already passed).

Suspension

In the “full” NEC3 contracts, exercising the statutory right to suspend performance due to non-payment is already treated as a compensation event. It was therefore not necessary to make any changes to reflect the expanded rights of suspension introduced by the amended Act. A new clause has been added to the “short” NEC3 contracts which confirms that if the right to suspend performance is exercised, this is classed as a compensation event.

ICE Conditions of Contract

The ICE Conditions of Contract were withdrawn from sale on 1 August 2011. Whilst it will be possible to use the ICE Conditions of Contract going forward, it will be necessary to significantly amend them to comply with the changes to the Construction Act.

The ICE Conditions of Contract have been re-branded as the Infrastructure Conditions of Contract and are published by the Association for Consultancy and Engineering (ACE) and Civil Engineering Contractors Association (CECA). The Infrastructure Conditions of Contract have been amended to comply with the changes to the Construction Act.

PPC2000

A set of amendments to PPC2000 has been published and can be downloaded from www.ppc2000.co.uk. The amendments will need to be incorporated into all contracts entered into after 1 October 2011.

RIBA Standard Agreements

The RIBA has published a set of amendments for each of its Standard Agreements, which can be downloaded from the RIBA Bookshops website.

ACE Agreements

The ACE has produced a Second Revision of the 2009 Edition of a number of its standard Agreements.

IChemE Forms of Contract

The IChemE has issued amendments to many of its contracts. These can be downloaded from the IChemE website and must be incorporated into all new contracts entered into after 1 October 2011.

A number of interesting adjudication cases have come before the Courts in 2011. Here, we summarise a few of the key decisions.

Adjudication Update

Shopping around – can you choose who acts as adjudicator? Lanes Group plc v Galliford Try Infrastructure Limited

Galliford, who was the main contractor for refurbishment works being carried out at Inverness Train Depot, engaged Lanes as a sub-contractor to carry out certain roofing and glazing works. During the course of the works, the parties got into dispute about the quality of Lanes' works and delays to the project. Lanes' sub-contract was terminated by Galliford in April 2009.

On 10 March 2011, Galliford commenced an adjudication seeking a declaration that it had lawfully terminated the sub-contract, or alternatively that Lanes had been in repudiatory breach of the sub-contract. Galliford sought damages of £2.7m. The sub-contract incorporated the ICE Adjudication Procedure and the ICE appointed a Mr Klein as adjudicator.

Galliford's solicitors believed that Mr Klein may be biased towards them as a result of a dispute that had arisen between them in relation to a past adjudication. To avoid having Mr Klein as adjudicator, Galliford's solicitors deliberately breached the ICE Adjudication Procedure by failing to issue the Referral within 2 days of Mr Klein's appointment.

On 21 March 2011, Galliford issued a new Notice of Adjudication and this time the ICE appointed a Mr Atkinson as adjudicator. Lanes issued legal proceedings to obtain an injunction to prevent Galliford from continuing with the adjudication or from referring the dispute to adjudication again. Lanes argued that Galliford were in repudiatory breach of the adjudication agreement in the sub-contract and had abused the adjudication process by failing to serve the Referral when Mr Klein was appointed.

A loophole in the Construction Act?

The Court found that although Galliford had breached the adjudication agreement in the sub-contract by refusing to serve the Referral following Mr Klein's appointment, this was not a repudiatory breach. The concept of repudiatory breach applies to the whole contract, not part of it, and it is therefore not possible to repudiate an adjudication agreement which forms part of a contract. Furthermore, the Court found that the concept of repudiation could not apply to an adjudication agreement because it would be inconsistent with the right to refer a dispute to adjudication at any time. The parties to a construction contract have a right to adjudicate and this right cannot be lost through repudiation of the adjudication agreement. Since the adjudication agreement had not been repudiated, Galliford was able to continue with the new adjudication.

The Court acknowledged that this case demonstrated a "lacuna" in the Construction Act which allows a referring party to withhold service of the Referral Notice again and again until an acceptable adjudicator is appointed.

Following the Court's judgment, the adjudication between Galliford and Lanes continued, with Mr Atkinson acting as adjudicator. Following the issue of Mr Atkinson's Decision, which ordered Lanes to pay £1.36m in damages to Galliford, Lanes issued legal proceedings challenging the validity of the Decision. This time,

Lanes argued that the Decision was void because Galliford had already referred this dispute to adjudication once (when Mr Klein was initially appointed) and was therefore not entitled to refer the same dispute to adjudication again. Furthermore, Lanes argued that the Decision was the product of apparent bias because Mr Atkinson had issued a “Preliminary Views” document which suggested he had made up his mind about the dispute before even seeing Lanes’ Response.

Forum Shopping

In relation to Lanes’ first argument, the Court held that there was nothing in the ICE Adjudication Procedure (or in the Scheme) which expressly prohibited a party from re-starting an adjudication where no decision had been made in the original adjudication. Previous case law indicated that there is a right to re-start an adjudication in cases where the Referral has not been served. Although the Court acknowledged that this could potentially allow “forum shopping” for the “right” adjudicator, it took the view that a complete ban on re-starting adjudications would be unfair, as there might be legitimate circumstances (such as illness) where the Referral could not be served on time and it would be necessary to recommence the adjudication.

It was the Court’s view that “forum shopping” is not a major problem in practice, as it has rarely, if ever, come before the Courts. This is because the parties can notify the adjudicator nominating body at the outset of any concerns or requirements regarding the appointment of an adjudicator. Further, it is always open to a responding party such as Lanes to prevent “forum shopping” by issuing its own Notice of Adjudication.

Accordingly, Galliford was entitled to re-start the adjudication and Mr Atkinson did have jurisdiction to deal with the dispute.

Apparent Bias

During the adjudication, Lanes had initially refused to serve a Response, but later changed its mind and requested additional time in which to do so. This led to negotiations between the parties about the timetable for conducting the adjudication. On 13 April 2011, Mr Atkinson proposed a timetable and asked the parties to consent to it by return.

Early the next morning, before both parties had responded to his email of 13 April, Mr Atkinson issued a “Preliminary Views” document to the parties. In a covering letter, Mr Atkinson explained that:

- he had issued the “Preliminary Views” document because Lanes had not made any submissions.
- the document was intended to assist him in examining the issues in the Referral.
- the document was not binding and was simply a step in making his Decision.

However, the “Preliminary Views” document, which found in Galliford’s favour, was written as if it was a draft Decision and used language like “I find” and “I hold”. When Mr Atkinson’s Decision was issued on 17 May 2011, it re-produced much of the findings and content of the “Preliminary Views” document.

The test for apparent bias is whether a fair minded and informed observer, having considered all the circumstances, would conclude that there was a real possibility that

the adjudicator was biased. The Court found that the test for apparent bias had been satisfied in this case because:

- it was incorrect to state that Lanes had not made any submissions when Mr Atkinson knew that they intended to do so.
- it was unfair to issue the document when Lanes had not yet put forward their case.
- it was unusual that the document had been issued without warning when the parties were in the midst of discussing the timetable for conduct of the adjudication.
- the Decision was essentially the same as the “Preliminary Views” document.
- the overall impression given by the “Preliminary Views” document was that Mr Atkinson had already made up his mind.

As a result of this apparent bias, Mr Atkinson’s Decision was not binding.

The Court of Appeal Decision

Both Lanes and Galliford recently challenged the TCC’s decisions in the Court of Appeal. The Court of Appeal agreed with the TCC’s judgment on “forum-shopping”, confirming that Galliford’s conduct in refusing to serve the Referral in the second adjudication was permissible.

However, the Court of Appeal found that Mr Atkinson had not been biased, stating that there is nothing objectionable about a judge or adjudicator setting out his preliminary view at an early stage in the proceedings. It was the Court of Appeal’s view that the “Preliminary Views” document was simply a provisional opinion disclosed to assist the parties. The Court pointed out that adjudication is a “rough and ready” process which is not final and binding, and it is for the adjudicator to choose a suitable procedure for determining the dispute.

Accordingly, the Court of Appeal found that the adjudication Decision in favour of Galliford was enforceable.

Adjudicators’ fees - can you ever avoid paying the adjudicator?

Is an adjudicator entitled to his fees when his decision is unenforceable due to breaches of natural justice?

Systech International Limited v PC Harrington Contractors Limited

Harrington had been involved in an adjudication with a company called Tyroddy Construction Limited regarding the recovery of retention monies. Harrington had argued that Tyroddy was not entitled to payment of the retention because Tyroddy had been overpaid. The adjudicator, who was employed by Systech, believed he did not have jurisdiction to consider Harrington’s defence and awarded Tyroddy the requested sums.

Harrington applied to the Court for a declaration that the adjudicator’s decision was unenforceable, as the adjudicator had breached the principles of natural justice in failing to consider Harrington’s defence. The Court held that although the adjudicator had acted honestly and transparently, his inadvertent breach of the rules of natural justice had resulted in an unenforceable decision.

As Tyroddy had ceased trading, and the parties were jointly and severally liable for payment of the adjudicator's fees, Systech brought legal proceedings against Harrington to recover the fees. Harrington refused to make payment, arguing that the adjudicator's failure to produce an enforceable decision had resulted in a 'total failure of consideration' on the part of the adjudicator. In other words, Harrington's argument was that the adjudicator had completely failed to provide the service he had been appointed to provide and was therefore not entitled to payment.

Looking at the adjudication provisions set out in the Construction Act and the Scheme, the Court held that producing a decision is not the only function which an adjudicator is appointed to provide. Adjudicators have to perform a number of services as part of their appointment, such as giving directions to the parties, addressing correspondence, considering the evidence and dealing with jurisdictional objections.

It was clear from looking at the adjudicator's timesheets that he had spent a great deal of time dealing with jurisdictional objections from Harrington, communicating with the parties and reviewing the parties' submissions. Accordingly, even though the adjudicator had produced an unenforceable decision, he had fulfilled the role he had been appointed to perform. This meant that there had not been a total failure of consideration on the part of the adjudicator and Systech was entitled to payment for the work the adjudicator had carried out.

Can an adjudicator's fees be challenged on the basis that his fees are unreasonable?

Fenice Investments Inc v Jerram Falkus Construction Limited

Fenice had employed JFC to construct 5 residential properties in London. Disputes arose between the parties and Fenice commenced an adjudication against JFC. The adjudicator found in Fenice's favour and ordered that JFC pay his fees, which were £19,775 plus VAT. Despite having previously been notified of the adjudicator's hourly rate, JFC argued that these fees were excessive. JFC paid £5,000 plus VAT and argued that the adjudicator was not entitled to any further payment. As the parties were jointly and severally liable for payment of the fees, Fenice eventually paid the balance of the adjudicator's fees and the adjudicator's legal costs. Fenice then brought legal proceedings against JFC to recover the costs it had incurred.

The adjudicator had already provided the parties with details of his rates and the work he had carried out during the adjudication. Accordingly, it was for JFC to show that the fees were unreasonable. The Court explained that as long as the hourly rate claimed by the adjudicator is reasonable in the circumstances, the Court will not interfere. Equally, the Court will not entertain claims that the adjudicator took too long to carry out his tasks or did unnecessary work. It is for the adjudicator to decide what matters he should take into account when making his decision.

Turning to the specifics of the adjudication between Fenice and JFC, the Court found that there was no basis to argue that the adjudicator's hourly rate of £350 was unreasonable. The adjudicator had previously been appointed to deal with other disputes between the parties and JFC was fully aware of his hourly rate, which was appropriate to his level of expertise. The time spent by the adjudicator in coming to his decision was quite reasonable given the length of the parties' submissions. Accordingly, the Court held that JFC was to reimburse Fenice for the part of the adjudicator's fees that Fenice had paid.

With an anticipated increase in government infrastructure projects over the coming years, contractors should be aware of the recent change to the public procurement laws.

Public Procurement Update

Time Limitations – What Has Changed?

The Public Procurement (Miscellaneous Provisions) Regulations 2011, which came in to force on 1 October 2011, have updated the Public Contracts Regulations 2006 (the “Regulations”). The Regulations govern the way in which contracting authorities, such as the NHS or local government, must award contracts for services, works and/or goods over a certain value. The main change to the updated Regulations is the time limit in which a party alleging a breach of the Regulations must bring a claim.

Previously, the time limit in which an aggrieved party had to bring a claim under the Regulations was 3 months, with the Court having the discretion to extend this time limit where it had a good reason to do so. However, under the updated Regulations, this time limit is now 30 days, with the Court’s discretion to extend the time limit capped to a maximum of 3 months. The time in which to bring a claim will begin to run from the date when the tenderer first knew, or ought to have known, that grounds for starting proceedings for a breach of the Regulations had arisen.

As the date when the tenderer “knew or ought to have known” is not defined in the Regulations, there have been a number of recent cases which consider what degree of knowledge is required before the time limit under the Regulations starts running.

The case of *Mermec UK Limited v Network Rail Infrastructure Limited* concerned the tender for a contract to provide new safety software to Network Rail. On 23 September 2010, Mermec received an email from Network Rail stating that it had been unsuccessful in its tender and that the contract was to be awarded to a company called Omnicom. The email contained a table which set out Mermec’s and Omnicom’s scoring against each of the award criteria and clearly showed that Omnicom had achieved a higher overall scoring. On 1 October 2010 Mermec asked Network Rail for more information regarding the award of the contract and a de-briefing meeting took place on 14 October 2010. Mermec brought proceedings against Network Rail for breach of the Regulations in December 2010. At that time, the previous 3 month time limit for bringing claims was in force, so the key question was whether the time limited had started to run on 23 September 2010 (when Mermec was informed of its unsuccessful bid) or on 14 October 2010 (when the de-briefing meeting was held).

The Court said that:

“the fact that Mermec could not be certain about all the facts or that it definitely had an unchallengeable case does not mean that time does not start running. All that is needed is knowledge of the basic facts which would lead to the reasonable belief that there was a claim.”

On the facts of this case, time was held to run from the 23 September 2010, when Mermec received Network Rail’s email containing its decision.

It is clear from this case that the time limit can start to run as soon as the claimant has a reasonable belief that the Regulations have been breached by the contracting authority.

In the case of *Mears v Leeds City Council*, it was argued that a potential claimant would not have the knowledge required to start the time limit running until it had been given the reasons for its unsuccessful tender bid. The Court was quick to reject this reasoning, stating if a breach of the Regulations occurred before the contracting authority made a decision, then provided that the tenderer knew or ought to have known about that breach of the Regulations, the time limit would start to run.

In the case of *J. Varney & Sons Waste Management Limited v Hertfordshire City Council*, Varney alleged that the Council had breached the Regulations by failing to disclose the weightings of relevant sub-criteria in their invitation to tender. The Court disagreed that the Regulations had been breached and held that Varney was time-barred from bringing a claim anyway. The time limit had begun to run when Varney received and read the invitation to tender, because at that point it was obvious that the weightings for the sub-criteria had not been disclosed.

Analysis

These changes to the Regulations mean contractors will need to act very quickly to challenge any potential breach of the Regulations by a contracting authority.

It is fairly clear from the case law that in situations where the contracting authority's decision making process is in breach of the Regulations, the time limit will start to run when the contracting authority's decision and its reasons are published. However, where there has been a breach of the Regulations during the tender process, the time limit may start to run before the contract has even been awarded. In these circumstances, potential claimants will have to decide whether they should challenge the contracting authority's process before the contract is awarded (potentially damaging their chances of being awarded the contract) or take the risk of not challenging the process and having no recourse under the Regulations if the contract is awarded to another party.

News In Brief

Bribery Act 2010 comes into force

On 1 July 2011, the Bribery Act 2010 came into force. The Bribery Act modernised the law on bribery and corruption, creating a new offence which can be committed by commercial organisations who fail to prevent persons associated with them from bribing another person on their behalf. Commercial organisations can avoid being prosecuted for this offence if they can show they had adequate procedures in place to prevent bribery. The Government has issued extensive guidance on what constitutes ‘adequate procedures’ and how commercial organisations should deal with the risk of bribery. Since the construction industry is widely recognised as being susceptible to bribery and corruption, particularly where work is being carried out overseas, it is sensible for construction firms to ensure they have ‘adequate procedures’ in place.

New version of “Good Practice in the Selection of Construction Materials”

In early 2011, the British Council for Offices published an updated version of “*Good Practice in the Selection of Construction Materials*”, the guide originally put together in 1997 by Ove Arup & Partners, the British Council for Offices and the British Property Federation. The original publication was aimed at encouraging the use of appropriate materials, rather than simply excluding prohibited materials. It is commonly referred to in contracts, sub-contracts and consultant appointments. The new updated version of the Guide reflects recent changes in the practice of selecting materials and emphasises the importance of considering environmental issues when selecting construction materials. Going forward, you should ensure that your contract documents are updated to refer to the 2011 version of the Guide.

ICC Arbitration Rules 2012 come into force

On 1 January 2012, the ICC Arbitration Rules 2012 came into force, replacing the 1998 version of the Rules. The 2012 Rules are intended to update and clarify the existing Rules, in addition to codifying existing practice and adding new provisions which are intended to help deal with particularly complex disputes. In addition, a number of amendments have been made with the purpose of making the arbitration process more efficient and cost-effective. For example, the Rules give arbitrators the power to take into account the extent to which the parties have acted in an “expeditious and cost-effective manner” when awarding costs.

Amended CPA Model Conditions

The 2011 CPA Model Conditions came into effect on 1 July 2011. The previous versions of the Model Conditions (published in 2001) should no longer be used for new plant hire contracts. The CPA introduced the 2011 Model Conditions in response to changes to legislation and industry practice.

Government steps up its emphasis on BIM

The Government Construction Strategy, which was published in May 2011, sets Strategy sets out the Government’s intention to require that Building Information Modelling (“BIM”) is used on all Government projects by 2016. Those in the industry who intend to win Government work in the future will need to bear this in mind and focus on improving their knowledge and experience of BIM.

Prepared by Hawkswell Kilvington Limited

**Hawkswell Kilvington Limited is a specialist law firm, dedicated to addressing and resolving
Construction and Engineering industry issues.**

**17 Navigation Court
Calder Park
Wakefield
WF2 7BJ**

**90 Long Acre
Covent Garden
London
WC2E 9RZ**

T: 0844 809 9566

E: enquiries@thkp.co.uk

W: www.thkp.co.uk

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