Housing Grants Construction and Regeneration Act: Consultation on Amendments to the “Scheme”

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18 June 2010 is the response deadline for the final and arguably the most significant public consultation dealing with implementation of Sir Michael Latham’s report on the operation of Part 2 of the Housing Grants, Construction and Regeneration Act 1996. The 1996 Act was amended by Part 8 of the Local Democracy Economic Development and Construction Act 2009 but consequential amendments to the (overriding) Scheme for Construction Contracts (England and Wales) Regulations 1998 are still required. This current consultation is therefore, primarily, focused on seeking views on the Government’s proposed changes to the existing “Scheme” so as to enable the 2009 Act to take effect. These so-called ‘consequential proposals’ are small in number but raise significant conceptual issues (for example whether the payment process should be ‘payer-led’ or ‘payee-led’ and whether these should be a stand-still period between delivery by an adjudicator of a Decision and compliance by the parties of that Decision).

The Government has also used this opportunity to seek views on proposals submitted by the Construction Umbrella Bodies Adjudication Task Group (the CUBATG) which is hosted by the Construction Industry Council. The CUBATG proposals seek to “improve the effectiveness of the [existing] Scheme” and address only some of the issues that have been raised in jurisdictional arguments at adjudication enforcement stage.

The Department for Business, Innovation and Skills has produced an excellent consultation paper. The paper is clear, well reasoned and exceptionally easy to understand. Those in the construction industry who prefer not to submit formal responses should nevertheless read the paper to best understand Government’s thinking and reasons for amending the existing Scheme. Those minded to respond will be delighted to see 12 questions (framed with clarity) the majority of which have simple binary answers (although alternative approaches and additional comments are no barred).

Consequential Proposals

The consequential proposals cover “adjudication costs”, the so-called “slip-rule” and payment notices.

Adjudication Costs

This proposal seeks to prevent ‘fetters’ to adjudication as seen in Brideway Construction Ltd v Tolent Construction Ltd (2000) CILL1662. In that case the sub-contract stated that the referring party would pay all the costs and expenses incurred by both parties including all legal fees and expert fees. The proposal is that the parties are free to reach agreements on the “costs relating to the adjudication” but only after the notice to refer a dispute to adjudication has been issued. The proposals also state that if there is a contractual provision that deals with costs then to be effective it must confer powers on the adjudicator to allocate his fees and expenses.
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between the parties. The existing Scheme already makes provision relating to the fees and expenses of the adjudicator and the proposals deals with the consequential amendments required if the parties reach agreement on costs after the notice of adjudication.

It is not entirely clear that the so-called ‘Tolent Clause’ would always be ineffective. Some may be tempted to argue that the a contractual provision that states that a Referring Party will pay all the legal costs and expenses incurred by the Responding Party is effective so long as the clause also states that the adjudicator has the power to allocate his fees and expenses as between the parties. Such argument may be based upon the different wording used in the new Clause 108A(1) and 108A(2)(a): as set out below, the former refers to “costs relating to the adjudication” and the latter refers to the adjudicator’s fees and expenses.

“108A Adjudication costs: effectiveness of provision

(1) This section applies in relation to any contractual provision made between the parties to a construction contract which concerns the allocation as between those parties of costs relating to the adjudication of a dispute arising under the construction contract. (emphasis added)

(2) The contractual provision referred to in subsection (1) is ineffective unless—

(a) it is made in writing, is contained in the construction contract and confers power on the adjudicator to allocate his fees and expenses as between the parties, or

(b) it is made in writing after the giving of notice of intention to refer the dispute to adjudication.” (emphasis added)

Such arguments are likely to be raised at the adjudication stage as well as at the enforcement stages (where, for example, if an adjudicator decided that he did not have the power to award that the (loosing) Responding Party’s legal costs and expenses be paid by the Referring Party, a Responding Party may seek to argue that the adjudicator’s decision is not enforceable. However, a jurisdictional challenge is not obvious and it is arguable that such non-payment based on a ‘Tolent Clause’ is a separate or discrete issue of cause of action.

One can see that, in the first instance, the Technology and Construction Court may need to deal with this issue. The recent decision in Yuanda (UK) Co. Ltd v WW Gear Construction Ltd [2010] EWHC 720 may be very useful. In that case Edwards-Stuart J held that a clause that required the trade contractor to bear both parties’ legal and expert costs if it referred a dispute to adjudication (‘a non-reciprocal clause’) did not comply with section 108 of the 1996 Act and so the contractual adjudication agreement was ousted and replaced by the adjudication provisions in the Scheme. Although, Yuanda is a case where only party would be liable for both parties’ costs the case does show that the Court may not readily favour an interpretation that fetters one party’s right to statutory adjudication.
The “Slip-Rule”

The 1996 Act has been amended such that parties are now required to provide in their contract that the adjudicator has the power to “correct his decision so as to remove a clerical or typographical error arising by accident or omission”. If this term is missing then the contractual adjudication procedure will be replaced by the new Scheme. Whilst this concept may be uncontroversial the consultation seeks views on the time adjudicators should be allowed and if there should be a ‘stand-still’ period for the requirement to comply with the adjudicator’s decision. Government has suggested that adjudicators should have seven days from the “date upon which the adjudicator’s decision was delivered to the parties” and that there should be an eight day ‘stand still’ period before the decision is required to be complied with. The time periods may be controversial: some consider that this additional period is, relative to the 28 day process, too long; others consider that terms such as “forthwith” or “within a reasonable time” or “as soon as practicable” are more appropriate, lend themselves to factual investigation and allow the Courts to set guidance.

Payment Notices

The 1996 Act has been amended such that a construction contract must contain a provision to the effect that a “payment notice” setting out the sum considered due must be given by the person as agreed between the parties – i.e. the payer, the payee or a third party (e.g. an architect). A new section 110B sets out a default mechanism which allows the payee to give the payer a “payment notice” where the payer has omitted to do so and a new section 111 introduces a requirement to pay the sum set out in the “payment notice”. It also makes provision requiring the payer to give notice to the other party if he intends to pay less than that sum. The consultation seeks to assess whether the industry agrees that it should be a payer-led process; whether the payer should get 5 days to issue the payment notice (after which the payee can issue a notice); and whether the ‘pay-less’ or ‘withholding notice’ should be given no later than 7 days before the final date for payment. Timescales aside there are divergent views on whether the payer or payee should start the payment process.

CUBATG Proposals

These proposals relate solely to the adjudication procedure and appear to address issues highlighted in the case law. The proposals relate to the date of the referral notice, multiple disputes, power to award interest, power to open up and revise ‘final and conclusive’ decisions and/or certificates and whether adjudications should be confidential.

Referral Notice Timing

It is considered that that part of the existing Scheme that states that a referral notice should be given “not later than 7 days from the date of the notice of adjudication” is not clear enough and that perhaps the 7 days should start from the date of receipt of the notice by the adjudicator or
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from the date of appointment of the adjudicator. Given that the 2009 Act did not amend Section 108(2)(b) of the 1996 Act that requires “referral of the dispute to [the adjudicator] within 7 days of [the notice of intention to refer a dispute]” it is not clear that the options proposed would be feasible.

**Multiple Disputes**

The existing Scheme allows the adjudicator (with the parties consent) to adjudicate one or more disputes under the same contract, or related disputes under different contracts. Thus an adjudicator cannot adjudicate on more than one dispute under the contract at the same time unless both parties agree. The Government seeks views on whether this position should change such that the adjudicator can now deal with multiple disputes. Absent *David and Theresa Bothma t/a DAB Builders v Mayhaven Healthcare Ltd* (2006) cases where there are discrete and multiple disputes are rare and so reasons for change do not appear compelling.

**Power to award interest**

The Court of Appeal in *Carillion Construction Ltd v Davenport Royal Dockyard* [2005] EWCA Civ 1358 held that adjudicators did not have a free-standing power to award interest. Instead, paragraph 20 (c) of Part 1 of the Scheme was held as providing the adjudicator with the power to award interest if: the particular issue has been referred to him; it had been agreed by the parties to be within the scope of the adjudication; or it was necessarily connected with the dispute. The Government seeks views on whether this common-law position should be altered. Whilst, adjudicators will readily accept these powers one wonders why, given that adjudication is a contractual process, that if terms on interest are absent in the underlying contract that interest should be awardable.

**Final and Conclusive Decisions/Certificates**

Government states that whilst there has already been a significant amount of discussion around “final and conclusive clauses” the issues were complex and it was ultimately concluded that it was undesirable to seek to use primary legislation to limit their use. The current question is whether an amendment to paragraph 20 (a) of the Scheme would limit the use of such clauses and so increase the ‘reach’ of statutory adjudication. This is likely to be highly controversial (with sub-contractors keen to limit use of such clauses) and an area where change may be made.

**Confidentiality**

Paragraph 18 of Part 1 of the existing Scheme requires the adjudicator and any party not to disclose any information which the party supplying it has indicated should be treated confidentially – except in so far as
The consultation raises complex points which if adopted would require extensive amendment to standard forms of contract.

necessary for the adjudication. Some in the industry have stated a preference for the Scheme to adopt a presumption in favour of overall confidentiality and to cover the conduct of the adjudication as well. Government seeks views on whether this preference is widespread. It is arguable that confidentiality can be addressed in the Construction Contract and drafted to include all matters related to adjudication.

Summary

This is a very important consultation. There is no evidence that the Government has already decided the form of the ‘new’ Scheme or indeed that the existing Scheme and existing 1996 Act will not be amended. The consultation raises complex points which if adopted would require extensive amendment to standard forms of contract (for example, in relation to the final and conclusive nature of certain decisions and certificates). The question of ‘Tolent Clauses’ may not have been resolved. The CUBATG Proposals deal with a number of points that may be considered to be well-settled by the Courts and so may be less likely to ‘drive’ change. However, the tangible desire in the industry to remove fetters to adjudication and increase the jurisdiction of adjudicators means it is likely that the inclusion of a free-standing power to award interest and the limit of final and conclusive clauses will be reflected in the new Scheme.
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