

Retention: what does your sub-contract say?

Many people are familiar now with the effect of clause 110 of the Housing Grants, Construction and Regeneration Act 1996 ("the Construction Act"). Under this clause, every construction contract must include an adequate mechanism for determining what payments become due under the contract - and when - and provide for a final date for payment in relation to any sum which becomes due.

If, or to the extent that, a contract does not contain such provisions, the relevant provisions of The Scheme for Construction Contracts (England and Wales) Regulations 1998 ("the Scheme") apply. You may be used to comparing these provisions to the payment mechanism on which you rely for your interim payments, but have you also looked at how clause 110 may apply to any retention provisions in your sub-contract?

If you are a sub-contractor, the following two example clauses may look familiar to you:

Example 1: Within 14 days of receipt of a certificate or other relevant notification under the Main Contract which includes a sum in respect of the retention or any part thereof under this Agreement ("the Retention Notice Period") the Contractor shall give written notice to the Sub-Contractor specifying the amount of retention then due to it and the basis on which that amount has been calculated. The said sum shall become due to the Sub-Contractor on the day following the expiry of the Retention Notice Period and the final date for payment of that sum shall be 17 days after it becomes due subject to Clause 8.4 [set-off].

Example 2: Within 28 days of the date of issue of the Defects Correction Certificate under the Main Contract, there shall be due to the Sub-Contractor the second half of the retention monies under the Sub-Contract.

In effect, these clauses state that the recovery of outstanding retentions is dependent upon the operation of provisions under another contract, i.e. the main contract. Such clauses may be capable of being challenged if they are contrary to the provisions of the Construction Act.

The payment provisions in the Construction Act are structured on the basis that the payee must have contractual certainty as to the timing of payment and the circumstances in which he becomes entitled to payment. The two examples given above are unlikely to qualify as an "adequate



mechanism". In example 2, the sub-contractor will not know the date when the Defects Correction Certificate will be issued under the main contract, has no control over the issue of such certificate, and has no redress if the certificate is delayed or not issued at all.

If your sub-contract does not comply with the Construction Act, then the Scheme applies. The final payment becomes due on the expiry of thirty days following completion of the work or the making of a claim by the payee, whichever is later. If the outstanding retention is not tied in with the final payment, it will become due on the expiry of seven days following completion of the work, or on the making of a claim by the payee, whichever is later. The final date for payment is seventeen days from the due date for payment.

If the main contractor does not agree with your interpretation of the sub-contract, then adjudication may be an appropriate, quick and relatively inexpensive dispute resolution process if the issue to be decided is limited to the question of adequacy, or otherwise, of the sub-contract retention release clause(s).

If you would like more information on retention issues, please contact Madelaine Hanlon in our construction department.

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Litigation costs: the final report

On 14th January 2010 Lord Justice Jackson's final report on costs in civil litigation was published with recommendations on reducing excessive and disproportionate costs. Lord Justice Jackson is a Court of Appeal judge who used to head up the Technology and Construction Court ("TCC").

Is the report of any relevance to me?

Yes, if you are currently a party to proceedings or are likely to be so in the future.

Tell me more...

The report is wide-ranging, covering areas such as personal injury, defamation and professional negligence. If its recommendations are implemented it could fundamentally change the way litigation is funded in the future.

It's a 584 page report. Just give me the headlines.

For construction disputes there are three main areas of interest:

1. After-the Event ("ATE") Insurance and Conditional Fee Arrangements ("CFAs")
2. Contingency Fees
3. New Fast Track for TCC

In Plain English this means...?

1. After-the Event ("ATE") Insurance and Conditional Fee Arrangements ("CFAs")

ATE insurance can be taken out by claimants to protect against paying their opponent's costs in the event that they lose the case.

CFAs, commonly known as 'no win no fee' or 'success fee' arrangements, mean that either no fee or a reduced fee is payable if a party loses its case but, if the case succeeds, then an uplift of up to 100% is applied to the fees. At the moment, the cost of these arrangements is normally recoverable by the winning party from the losing party in litigation.

Lord Justice Jackson, having found that these arrangements add significantly to the cost of litigation, has recommended that CFAs and ATE insurance premiums should cease to be recoverable from the opposing party in litigation. A party can still enter into such arrangements to fund its litigation but it would have to bear the additional costs of doing so



TESSA MCINNES discusses Lord Justice Jackson's report and its implications if the recommendations are implemented.

itself (and that could come out of any damages awarded to it). As an alternative, small and medium size businesses should be encouraged to take up before-the-event insurance (legal expenses insurance).

2. Contingency fees

Contingency Fees are arrangements where the lawyer's fees are paid out of the client's damages. This type of fee arrangement is not currently allowed for litigation.

After extensive consultation, Lord Justice Jackson decided that, providing adequate safeguards were in place, Contingency Fees should be permitted for litigation in future. Further, the arrangement should be restricted so that the losing party would only have to pay a standard amount of costs. If the contingency fee exceeded what would be payable under a 'normal' fee arrangement, the client would have to pay the difference.

If ATE premiums and CFAs do become irrecoverable, a type of Contingency Fee might become the preferred funding model.

3. Low Value Technology and Construction Court cases to be allocated to Fast Track

At present all TCC cases are allocated to the Multi Track but this can result in disproportionate costs in small construction disputes. To improve the situation, Lord Justice Jackson recommends that disputes of less than £25,000 should be allocated to the court Fast Track. Under this process there are set, limited costs for the litigation. This acts as a cap on what can be recovered from the losing party.

Anything else I should know?

There are several administrative proposals aimed at reducing users' costs, particularly prior to, or at the start of, proceedings. Emphasis is

also placed on greater use of mediation. No party will be forced to undergo mediation, but judges are strongly encouraged to promote it for small, low value disputes, where negotiation has proved unsuccessful.

These are just recommendations – will they be implemented?

That depends. TCC Judges can already begin promoting mediation, and many already do. However, other recommendations require primary legislation or changes to the court's Civil Procedures Rules. Post general election, it is possible that some recommendations, such as abolishing the recoverability of ATE insurance and CFAs, will not be implemented by the new Government.

However Lord Justice Jackson appears determined to reform the area of ATE insurance and CFAs. As a fallback position, in case his recommendations are not implemented, he proposes a series of measures to ensure that the level of CFAs is "rigorously controlled" and, to address "anomalies" in the current system. Primary legislation would not be necessary to achieve these measures.

We will keep our clients updated as the picture becomes clearer, but if you would like to know more, contact Tessa McInnes.

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Date for your diary!
Wright Hassall's 7th Annual Conference for the Construction Industry.

This year's conference will take place on 8th October 2010. The Heritage Motor Centre in Warwickshire proved to be so popular last year that we will be holding the event there again.

As always, we will have expert speakers from the industry addressing topical issues. Details will be confirmed shortly and invitations will be posted late Summer.

Look forward to seeing you there!

An update on The Defective Premises Act

The Defective Premises Act 1972 ("the Act") imposes important obligations on both contractors and consultants involved in the design and construction of a dwelling. A dwelling can include a house or flat, and the Act applies both to new build dwellings as well as conversions or enlargements of dwellings, but does not apply to repairs.

The Act imposes some onerous obligations. It provides that anyone with a legal or equitable interest in a dwelling can bring a claim against anyone involved in the design or construction of that dwelling where such works or services have resulted in the property not being fit for habitation.

Normally professionals involved in a construction project only have to act with "reasonable skill and care". However where the Act applies, the standard of performance is

much higher and, in such circumstances, it is no defence that the professional acted with reasonable skill and care.

Considering the significance of the obligations imposed by the Act, there has been surprisingly little case law on the subject. However the Court of Appeal has recently given an important decision which updates the law in this area.

The case of *Bole v Huntsbuild Ltd* concerned homeowners who had brought a claim against their contractor relating to the construction of their new house. The contractor had engaged a structural engineer to advise on and design the foundations. After the house had been completed, extensive cracking appeared which was found to be due to defects in the design of the foundations. Unsurprisingly the homeowners

began proceedings against the contractor and the engineer.

The Court of Appeal laid down important guidelines for determining whether a dwelling is unfit for habitation. Important among these was that the duration of the required remedial works can be a relevant fact. In addition, it held that the courts are entitled to take account of the overall effect of the defects, rather than approaching the issue on a defect by defect analysis. The court upheld the decision that the property was unfit for habitation and that a piled raft solution was required.

For more information on any of the issues raised here, please contact Stuart Thwaites.

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Successful parties in adjudication are entitled to apply for judgment in default

During the final few months of 2009 an unprecedented raft of cases came before the Technology and Construction Court (TCC) concerning applications to enforce adjudicators' decisions. Generally speaking, where a party fails to comply with a decision it is open to the party seeking to rely on it to apply for summary judgment for the sums ordered by the adjudicator. Since this type of case first came before the courts in the late 1990s it has become settled law that the only grounds for challenging an adjudicator's decision are that the adjudicator lacked jurisdiction to reach the decision that he/she has reached, or that the adjudicator has reached his decision without regard for the rules of natural justice. The general approach of the TCC is to enforce adjudicators' decisions except where the defending party is able to fall back on one of these two limited grounds.

Coventry Scaffolding Company (London) v Lansville Construction Limited [2009] EWHC 2995 (TCC) is one such case. The claimant in this case found itself in dispute with the defendant main contractor over a number of issues and two disputes were referred to the same adjudicator (in two adjudications); the first concerning the correct gross valuation of the claimant's works and the second concerning the proper amount due and payable to the claimant at that interim stage. The claimant succeeded in both. The defendant failed to honour either of the adjudicator's decisions. Court enforcement proceedings were commenced in October 2009 and the matter was listed for a hearing in November 2009. The claimant's solicitors duly served the proceedings on the defendant and filed a certificate with the court confirming this. The defendant failed to answer the proceedings and did not lodge an Acknowledgement of

Service with the court or file any evidence in response.

Mr Justice Akenhead held that it was clear in this case that both of the adjudicator's decisions were enforceable and judgment was entered for the claimant for the sums claimed.

However the judge also went on to give some useful guidance. In this situation, the judge explained, a claimant/their legal representative should apply for judgment in default of an Acknowledgment of Service in the same way as a claimant would apply for judgment in the event of a default by a defendant in regular court proceedings. This is despite the fact that the period for filing an Acknowledgement of Service is usually abridged to just five days in proceedings to enforce an adjudicator's decision, from the usual fourteen. The judge emphasised that there is no reason why a claimant should not be entitled to obtain judgment in default after this abridged period has elapsed.

This is welcome guidance from the court. Once the court is satisfied that service of the claim documentation has been properly carried out in accordance with any order made by the court, there is no reason why default judgment should not be entered.

The judge indicated that the TCC will henceforth encourage claimants, and those advising them, to apply for judgment in default as a routine measure where an Acknowledgement of Service is not filed within the abridged time period. The judge noted that the right of the defendant to apply to the court for the judgment in default to be set aside is however preserved.

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Adjudicators' decisions and statutory demands - traps for the unwary

As regular readers will know, the courts will enforce adjudicator's decisions unless the adjudicator lacked jurisdiction or there is a breach of the rules of natural justice. Once armed with a court order enforcing an adjudicator's decision, there are a number of ways of seeking to enforce that order to obtain payment.

In the recent (January 2010) case of MFP Foundations & Piling Ltd v Mr and Mrs Shaw, the contractor obtained an adjudicator's decision against the Shaws. The Shaws did not pay, so the contractor got a court order enforcing the adjudicator's decision. So far, so normal.

The Shaws did not pay the sums ordered by the court so the contractor issued statutory demands against them for the amount of the

adjudicator's decision, which was now the subject of a court order. The Shaws applied to court to have those statutory demands set aside on the ground that they had a cross claim which equalled or exceeded the amount of the adjudicator's award.

The contractor succeeded in the county court, and the Shaw's application to set aside the demands was dismissed. However the Shaws appealed.

On appeal, the court found that where there was a valid cross claim which equalled or exceeded the amount of an adjudicator's decision, the court could exercise its discretion to set aside the statutory demand under the Insolvency Rules. Importantly, the court took the view that, although enforcement of adjudicators'

decisions generally operates on a "pay now, litigate later" approach, that did not override the principles set out in the Insolvency Rules.

In light of this decision, parties that obtain an adjudicator's decision in their favour will need to think very carefully before seeking to enforce that decision by the insolvency/ bankruptcy route where there is likely to be a valid cross claim. This does not mean the decision cannot be enforced after judgment is obtained, but rather that consideration needs to be given to the most appropriate enforcement route.

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Gurdwara is constructive lesson for builders

Members of the Midlands' construction community received an insight into how Leamington's £9 million Gurdwara Sahib temple was built.

Around 70 people gathered at the Gurdwara Sahib to learn about the construction project, which was consecrated in October 2009.

The event, organised by Wright Hassall, included talks from Dr Gurdev Singh – the man behind the concept – Phillida Turrell of architects MCP Partnership, Harnam Ghatuara of structural engineers GCA and James Button of quantity surveyors Starkey Button.

Matthew Phipps, a member of Wright Hassall's construction & engineering team which advised the Gurdwara's builders, AC Lloyd commented: "The Gurdwara has been one of Leamington's biggest and most exciting developments in the last decade and it is an absolutely stunning temple.

"Gurdev explained how this project went from his initial dream and drawings to the impressive landmark we see today.

"The sheer size of the building obviously creates unique challenges. For instance, we heard how the whole development had to be moved forward by a metre due to the location of a major sewage pipe. This itself presented the engineers and architect with a fresh set of challenges.

"I am sure that the Gurdwara will continue to define the local landscape for many years to come."

This event was organised as part of Wright Hassall's series of Construction Law Bytes seminars, which focuses on different aspects of the construction industry.

For the Law Bytes diary of events visit:
www.wrightthassall.co.uk/news/pr_newsandeventshomepage.aspx.



Left to right: Dr Gurdev Singh (Gurdwara Sahib), Philip Harris (Partner, Wright Hassall), Harnam Ghatuara (GCA), Phillida Turrell (MCP Partnership), Matthew Phipps (Wright Hassall) and James Button (Starkey Button).

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