

The Construction Act 2009



On 1 October 2011 the provisions of Part 8 of the Local Democracy Economic Development and Construction Act 2009 came into force. Recently we held seminars explaining the changes that have taken place and how they may affect you.

In case you were unable to attend we have dedicated this newsletter to the changes that have occurred. The changes are very important, particularly if you do not use standard form contracts. The rules on payment, suspension, adjudication and which contracts are covered by the Act are all affected.

You may remember that the Housing Grants Construction and

Regeneration Act 1996 and the Scheme for Construction Contracts brought about significant changes to the way in which construction contracts worked. However, there were problems with those changes.

Excluded Contracts

A number of contracts are already excluded from the provisions. This includes contracts relating to utility, gas and the oil industry, supply only contracts and artistic works.

The Secretary of State can also exclude other areas, for example, first tier PFI contracts. Contracts with residential occupiers are also excluded as are any contracts where the works will take less than 45 days.

You should remember though that the provisions can be expressly included by contract, such as the clauses seen in standard forms.

Contracts which were not in writing were also excluded. These restrictions mean that oral contracts are now included and the terms do not have to be in writing.

Payment Notices

The paying party must give notice of the amount due to be paid not later than five days after payment falls due. This should be done, even if the amount is zero. The due date can no longer be dependent on the serving of a Notice by the paying party.

If the paying party fails to serve a Notice of the amount due, then the receiving party may serve a Notice of the amount they think is due. If that receiving party has already provided a valuation then that valuation counts as such a Notice.

The amount in the Payment Notice must then be paid by the Final Date for payment. This can be prevented if the paying party serves a pay less notice. This has to be served not less than the specified period before the Final Date for payment which, in the Scheme, is seven days.

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Conditional Payment

It should be remembered that “pay when paid” clauses are still illegal, except in the insolvency situation. There has to be a specific term of the contract dealing with this.

However, it is now illegal for payments to be conditional on obligations such as certification under another contract. Therefore, a clause in the contract cannot say that the sub-contractor will receive what is certified by the employer under the main contract.

Changes to Suspension Provisions

It is now possible to suspend only part of the performance of the contract. Also, the costs of demobilisation and remobilisation are payable by the paying party. The suspending party can also obtain extra time for completion of the works where they are delayed as a consequence of the suspension.

Time does not automatically start running again as soon as the suspension ends. For example if a critical item is delayed in being delivered because of the suspension, and that is for longer than the actual suspension, then that extra time would be awarded.

Changes to Costs of Adjudication

“Tolent” clauses are used so that a referring party is liable for both the adjudicator’s and the other party’s costs, no matter what the outcome of the adjudication. This is a disincentive to refer a dispute to adjudication because even if successful, the referring party will have considerable costs to pay. Such clauses have now been made illegal.

Conclusion

These are important changes with more contracts are covered. Receiving parties can obtain payment when the paying party has not certified the sums due to them. The party that suspends performance can be fully compensated for that suspension. Also parties who would not adjudicate because of the costs will now be able to adjudicate. The changes are not retrospective and only apply to contracts made on or after the date of them coming into force. This could lead to a situation where a main contract is dealt with under the old law and sub-contracts are dealt with under the new law.

This is an outline of the changes. If you have any queries or require detailed advice please do not hesitate to contact Peter Allen on 01245 453813 or peter.allen@birkettlong.co.uk

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Meet two members of our construction team

David Rayner

David joined Birkett Long LLP in November 2010 to lead the Commercial Property team. He works across all aspects of commercial property, but has particular expertise



in commercial development, investment work, landlord and tenant and secured lending. He also has a specialism in environmental matters and has recently been advising clients on Carbon Reduction Commitment as well as contamination and other ‘green’ issues. David also works with clients from retail and leisure sectors. Contact David on 01245 453826 or david.rayner@birkettlong.co.uk

Claire Wiles

Claire joined our team in 2006. She deals principally with commercial contract disputes, which include construction disputes as well as property litigation and injunctions.



Claire has experience of both the High Court and the County Court, as well as alternative dispute resolution forums. Her clients include both businesses and private individuals. Contact Claire on 01245 453811 or claire.wiles@birkettlong.co.uk

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