

## Power to the Payee!

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**The “new” Construction Act 2009 came into force in England and Wales on 1 October 2011[1]. This affects all “construction contracts” entered into on or after that date whether or not in writing. There are traps for the unwary payer, and for some time to come care needs to be taken to ascertain which payment and adjudication regime applies on any particular project, while many contracts remain covered by the 1996 Construction Act.**

### Payment notices

The main changes affect the payment terms. The contract still has to have an adequate mechanism for determining when payments become due and the final date for payment. Within no more than 5 days of the “payment due date” the payer must be required by the contract to give a payment notice which states the sum due at the payment due date and the basis on which that sum is calculated. Alternatively the contract must enable the receiving party (the payee) to give the payment notice. Failure in the contract to provide for a payer payment notice means the relevant provision of the amended Scheme will apply.

Under the “old” 1996 Construction Act there was no sanction if the paying party failed to serve a notice. Now if the payer does not give its payment notice on time, the payee may give a payee notice in default. This has the effect of postponing the final date for payment by the same number of days e.g. The contract provides for a 5 day payment notice; the payer defaults, 2 days later the payee gives a payee notice in default. The final date for payment is extended by 2 days.

There is no provision for a payee notice in default under the amended Scheme.

Where the contract enables or requires a payee notice before the payer notice i.e. an application for payment, and the payee provides such, then it is not necessary for the payee to give another notice if the payer defaults.

### How to pay less

We have new terminology for the amount due. It is now the “notified sum”. Paying parties need to be aware that they no longer get a second bite of the cherry if they fail

to pay, by making the payee prove the “amount due”. An adjudicator or judge will simply award the notified sum.

If the payer wants to pay less than the notified sum it must give another notice. The “pay less” notice must specify the sum it now considers due at the date of the pay less notice and the basis on which that sum is calculated. This is a different approach to the “withholding notice” under the 1996 Act which must state the amount being withheld rather than the amount due.

The parties remain free to agree the period for the pay less notice. The default position under the Scheme remains 7 days before the final date for payment.

### Specified person

The contract may specify a “specified person” who can give notices on behalf of the payer. The Act also allows the “specified person” to be “determined in accordance with the provisions of the contract”, but it is not clear who does the determining!

### Suspension

If the notified sum is not paid by the final date for payment, the new Act puts the payee in a stronger position than before. It can now suspend performance of any or all of its obligations, not just the work. The contractor can stop insuring the works, postpone applying for a necessary consent or refuse to implement a variation instruction – whatever will have the most impact on the project. Moreover the payee will now be entitled to a “reasonable amount” for its re-mobilisation costs, as well as an extension of time.

### Retention

It is no longer possible to link payment to an obligation under another contract e.g. pay when certified. This means contractors are looking for innovative ways to hold on to subcontractors’ retention monies.

## Adjudication

There are a couple of key changes. The contract (even if oral or only partly in writing) must provide in writing for adjudication otherwise the adjudication provisions of the Scheme will apply. The contract must also provide a “slip rule” and if it does not, all its adjudication provisions will fall away and be replaced by the Scheme’s adjudication provisions. So if you have bespoke adjudication provisions make sure you have included a slip rule!

The intention of the new Act is to outlaw “Tolent” clauses which had the unfair impact of making the referring party pay all the costs. It is debatable whether the Act achieves this aim and we may see reliance on Yuanda[2] and new case law in this area in due course.

## Agreements in writing

The restriction in the old 1996 Construction Act that it only applied to contracts in or evidenced in writing has been removed. The payment and adjudication provisions of the new Act will apply to oral or partly written agreements.

This gives a whole new battlefield for adjudicators to play on, deciding whether a contract exists, and if so what it’s implied and express terms are, and all within the same 28 day period!

## Novation

Consideration needs to be given to professional appointments novated after 1 October 2011. They will probably be treated as “new” contracts and the Scheme will apply to any terms e.g. payment terms, which are not compliant with the new Act. Whilst not fatal this may be inconvenient.

Notes:

[1] It will be 1st November 2011 for Scotland

[2] Yuanda (UK) Co Ltd -v- WW Gear Construction Ltd [2010] EWHC 720 (TCC)

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