The Draft Construction Contracts Bill

Response by the City of London Law Society Construction Law Committee – Technical Scrutiny of Draft Construction Act Clauses – September 2008

The City of London Law Society

The City of London Law Society is the representative body of law firms with offices within the City of London. Nearly all of the top twenty UK law firms, by size and turnover, are members of the CLLS. The CLLS Construction Law Committee is made up of representatives of twenty three major City law firms. Committee members include many well known construction law practitioners acting for a wide variety of clients including employers, contractors, consultants and sub-contractors. Associate members of the committee include representatives from major contractors, insurers, employers and consultants. Members of the committee are familiar with the issues covered by the draft Construction Contracts Bill and have first hand experience of the payment processes found in the UK construction industry and of the resolution of disputes by adjudication.

The CLLS provided a full response to both the first and second Construction Act consultation exercises in June 2005 and September 2007 respectively. The CLLS note with disappointment the intention of the Government to retain the use of payment notices and to allow, in certain circumstances, a payee's application for payment to constitute the "sum due". We would reiterate that it is our belief that these changes will have an adverse impact on payment in the construction industry and will lead to an increase in disputes.

Main Concerns

The draft Bill would allow a party seeking payment to make an application for payment which would in certain circumstances be binding on the payer. The CLLS do not agree with such proposals and believe that adjudication would provide a sufficient default mechanism where a certifier fails to certify a sum due. A binding application process will be extremely unfavourable to small companies and those who are a one off client of the construction industry. For example such a client could find itself liable to pay a grossly inflated application for payment due to the failure of its certifier to issue a certificate or withholding notice when required. In such circumstances the client would find itself unable to make any set offs withholdings or abatements against the sums claimed in the application for payment and could find themselves in a position where a large amount of money was payable for works which had either not been done or which had been done defectively. Payment of such grossly inflated applications would seem to be an extremely onerous consequence of what might be a simple administrative oversight.

Comments on the draft Bill

The CLLS is aware that the Department for Business Enterprise and Regulatory Reform is not looking to reopen the consultation exercise but is merely looking for comments on the effectiveness of the legal drafting of the Bill. It is unfortunate that comments on the drafting were sought during the summer holiday period as this will have undoubtedly limited the amount of scrutiny applied by the industry to the draft Bill. Below we do not revisit any of our concerns relating to the approach taken by the Bill but instead focus on how the legal drafting of the Bill might be clarified or improved.

Section 109 (3A): Rather than use the term "binding" it may be better to use the term "final and conclusive". This would mirror the language typically used in construction contracts and in the industry.

Section 110A(1)(a): At the end of the sub-section "and/" should be inserted before "or" as Section 110B correctly assumes same contracts might allow for either party to issue a payment notice.

Section 110A(1)(b): For clarity it would be better to replace "after that date" with "after the payment due date" as otherwise the reference to "that date" could be taken to be a reference to the date a payer is to issue a notice under section 110A(1)(a).

Section 110A(5): We assume the intention is to provide that the sum due to be notified should be net of sums already paid. This is not clear from the current drafting. It would help if "disregarded" was changed to "deducted".

Section 110A(7): Many standard forms of contract do not specify a particular date as the due date for payment. As such to prevent the need for wholesale amendment to standard form contracts it would be advisable to amend the definition of payment due date so that it "means the date on which the payment is due".

Section 110B(4): The drafting always assumes there will be a postponement but if a contractually required notice is issued on time by the payee as provided for in Section 110B(3) it will be issued on the due date and as such will not give rise to a postponement.

Section 111(2): As referred to above, under certain contracts correct payment notices could be issued by either the payer or payee. This section needs to make clear that in such circumstances the payer's notice would prevail.

Section 111(4): The main concern of the CLLS relates to the drafting of sub-section (b) of this clause. It is not clear what "the basis on which the sum is calculated" is meant to cover. It clearly envisages a different approach to the requirements relating to withholding notices under section 111 of the existing Construction Act. Is it necessary to adopt a different approach? At the time any notice is given under section 111(3) there will already be a "notified sum". All that the notice under section 111(3) needs to cover is the amount to be deducted. This could be expressed in the same way as the information to be provided when a withholding notice is issued under section 111 of the existing Construction Act. The payer would have to show:

> "The amount proposed to be withheld and the ground for withholding payment or if there is more than one ground each ground and the amount attributable to it".

Section 111(6) could then be amended such that the balance of the notified sum after the deduction of the withheld amount is paid. The advantage of this approach would be that existing case law as to what constitutes sufficient information for a withholding notice would continue to apply to the new notices envisaged by the Bill. Such case law took a number of years to reach its

current accepted definition. If the Act is to be amended to introduce new wording and a potentially different test the CLLS envisage that it is likely that there will be many disputes as to what is meant by "basis on which the sum is calculated". This would be an unnecessary extra burden on the industry.

An additional benefit of reverting to the approach described above is that the current drafting of Section 111(4) would require a recalculation of the sum due at the time the notice was issued. This could be in excess of the initial amount notified as due if a further application for payment has been received in the period following the initial payment notice but prior to the date of the Section 111(3) notice. Furthermore, there is a concern that the current drafting of Section 111(4)(a) could operate to exclude any general legal right to set off.

Section 111(10)(b): The intent of the sub-section is clear, the drafting is not. It might be better to refer to the insolvency occurring after the last date on which the payer could have issued a Section 111(3) notice but prior to the final date for payment.

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