The Construction Act changes: How, if and when brought into force, they will affect standard forms and practices

The Construction Act – a qualified success?

Government's most significant effort in recent times to improve payment practices in the UK construction industry was the Housing Grants, Construction and Regeneration Act 1996, Part II ("Construction Contracts"). Generally called the Construction Act, it is also a significant exception to freedom of contract specific to construction contracts (as defined - there are arbitrary exceptions).

The Construction Act has been a qualified success for its main intended beneficiaries, namely "payees" as the Act calls contractors, sub-contractors and those further down the contractual chain who are paid for carrying out construction operations. The Act's "payers" are not just developers but also contractors when dealing with sub-contractors, sub-contractors when handling sub-sub-contractors and so on.

The introduction of a statutory right to a 28-day adjudication process has broadly speaking achieved the Act's aim of speeding up the resolution of construction disputes. Over the first ten years of the Act about 15,000 adjudications took place with only around 5% of adjudicators' decisions requiring enforcement by the courts. About 1% of decisions have not been enforced invariably because the adjudicator lacked jurisdiction, appeared to be biased or failed to give a party a reasonable opportunity of being heard. The Act notoriously did not state how decisions should be enforced or when they would not be enforced. The courts filled the vacuum.

While some parliamentarians envisaged a lawyer-free process this is often not the case. In fact, adjudication is becoming ever more expensive and legally complex - users must keep up to date with published judgments on the Act of which there are now around 400. However, adjudication still compares favourably with court or arbitration proceedings and such evidence as there is suggests its users prefer it. It helps that parties often accept what is only a temporarily binding outcome as conclusive, without having their dispute reheard in court or arbitration.

There is though precious little evidence as to whether the Act has achieved its other chief aim of improving cash flow in the industry. It is worth recalling that it sought to do this by:

- introducing the right to instalment, stage or periodic payments;
- requiring an adequate mechanism for determining what will become due and when;
- requiring the payer to give the payee early communication of what is to be paid (by a “payment notice” (“PN”));
- providing that the payer may not withhold monies unless it has given a notice stating the amount it intends to withhold from the sum due and the grounds for doing so (“WN”);
- providing that the payee may suspend performance when the amount due is not paid by the final date for payment; and
- banning contractual terms which make payment dependent upon the payer being paid.

Despite this framework, payees still complained about a lack of certainty as to when they would be paid, how much and why (when paid less than expected). The Act specified no sanction for failing to give PNs (which often were not given) and did not require WNs to state the sum that would be paid – only that which would be withheld (and need not, for example, say anything when the payer disagreed with the payees’ valuation of its works). There were also complaints

about Act-avoidance devices in respect of both the payment and adjudication regimes.

The Construction Act changes – will they even come into force?

In March 2004 Gordon Brown announced a review of the Act after lobbying from sub-contractors. (There was a review of adjudication alone in 2000/1 but the only mischief the government considered needed action was the banning of 'Tolent' clauses; see below).

Following much consultation and further lobbying, last November, Parliament enacted changes to the Construction Act, by way of the Local Democracy, Economic Development and Construction Act 2009, Part 8 ("Construction Contracts").

Part 8 will only apply to construction contracts entered into on or after a day yet to be appointed by the Secretary of State, Welsh Ministers and Scottish Ministers (they will hopefully chose the same day). It will not apply to contracts already concluded or contracts entered into before that day.

Part 8's coming into force is unlikely to happen before the end of this year, to allow for public consultation on changing the statutory Scheme, which for the Scheme for England and Wales started on 25 March 2010. It is unclear if there will also be consultation on changing the Scheme for Scotland.

The Scheme's rules are of course implied into construction contracts governed by the Construction Act which do not include Act-compliant provisions for adjudication and payment. Changes are necessary as a result of Part 8 but the opportunity is being taken to review the Scheme's adjudication and payment rules more generally, particularly the former.

It is likely that similar changes as those made to the Construction Act and the Scheme will be made to Northern Ireland's "Construction Act" equivalent legislation: the Construction Contracts (Northern Ireland) Order 1997. It concluded a consultation process last year, which recognised the sense of maximising parity throughout the UK.[1]

The aims and effects of the changes

Part 8's aims are (according to the government):

1. "to intervene where the legislation has shown to not have delivered its original objective"; and

2. to adopt "proportionate amendments to the existing framework".

It is implicit in the first aim that Part 8 will help the Construction Act deliver its original objectives (which are set out above). Part 8 is likely to have little material impact on achieving the Construction Act's original aims. Its effect on adjudication will be negligible. It is hard to see how the changes will help improve cash flow.

As for its second aim of being proportionate, the government's cost-benefit analysis of Part 8's expected impact, while in principle an admirable exercise, does not withstand scrutiny. Many will query the cost to the industry of changing standard forms and established payment practices as well as the associated extra training and advice that will be needed as a result of the proposed changes. They may also ask whether the costs for everyone of state intervention to prevent only *some* of the malpractices of the few are worth it.

[1] http://www.dfpni.gov.uk/construction-contracts-bill-report-on-public-consultation.pdf

Part 8 is a victim of two tensions:

a. Its governmental sponsors wanted industry consensus in supporting the changes. This may have been a hangover of when the government initially wanted to make the changes by way of secondary legislation under the Regulatory Reform Order procedure, for which consensus of those affected is essential. It was certainly also a function of recognising the industry's entrenched special interest groups and wanting to avoid upsetting any of them. Unfortunately, the reality is that no consensus could be found, perhaps unsurprisingly given that the changes are all about the obviously conflicting interests of payers and the interests of payees. To take an extreme, but no doubt minority group, those payers who want to abuse the spirit of the Construction Act (that is, its desire to improve cash flow). Why would they ever consent to measures that remove or limit their scope for delaying payments?

b. Prescription versus freedom of contract. Part 8's sponsors sought a balance between the two. However, this meant that while not being wholly prescriptive they permitted many Act-avoidance devices to survive.

Payment regime changes (amended section 110 and new sections 110A, 110B and 111 of the Construction Act)

Payment clauses in all standard forms will need overhauling. This is because Part 8 allows only three methods in which payments may be made under construction contracts (for which the works will take longer than 44 days; shorter contracts may opt in) (see Figure 1 below).

As the table's last row suggests, the termination and insolvency provisions of some standard forms will also need amending.

Like the position now, insofar as a contract does not include payment provisions that are compliant with the new payment regime, the statutory Scheme's default payment rules will fill any gaps in the contract.

An apparently unintended consequence of the new regime will be that convoluted drafting will be needed to permit negative certificates or payment notices requiring the party who has carried out work to pay the other party. It remains to be seen if standard forms will grapple adequately, or at all, with this issue. Insofar as a contract does not make adequate provision, it would be sensible to issue a nil value certificate or payment notice instead. Thus, it may remain ruthless but lawful for a payer to issue certificates in the lowest sums which it believes it could properly defend in adjudication, the effect of which is that no further payments would be made and all financial disputes between the parties would go to adjudication.

Bolstering the right to suspend performance for non-payment (amended section 112 of the Construction Act)

Standard forms may also need amending to allow payees (a) to suspend part of the works as well as all of them and (b) to obtain an extension of time and reasonable costs and expenses for both suspension and remobilisation periods (e.g. JCT DB 2005, clauses 2.26.4, 4.11 and 4.20.3).

Oddly, unlike other aspects of the Construction Act which apply by implying terms, the right to reasonable costs and expenses is a statutory one under subsection 112(3A). This may mean that for contracts executed by deed that do not make similar provision, the statutory right will expire after six years of accruing and will therefore expire before rights under the contract (which are subject to a 12 year limitation period). While there is no justification for this anomaly and it should arise rarely, it is symptomatic of legislative drafting that has not been fully considered.

Ban on pay-when-certified and pay-what-certified-clauses (new subsections 110(1A)-(1D) of the Construction Act)

Part 8 aims to ban pay-when-certified and pay-what-certified clauses, which contractors use to defer paying subcontractors until their client has put them in funds. However, the ban is sufficiently broad to catch equivalent project relief provisions which are standard to – and an important aspect of - PFI/PPP subcontracts. That said, it is possible that such provisions are already prohibited and ineffective given Jackson J's comment in *Midland Expressway Ltd v Carillion Construction Ltd (No.2)* [2005] EWHC 2963 (TCC); 106 Con. L.R. 154, at [71(5)].

Part 8, if brought into force, would have an unfortunate side effect for management contracting whereby the management contractor pays works contractors as and when certificates are given under the management contractor's contract with the developer. As a result the JCT Management Works Contract 2008 would need overhauling, if this procurement method survives at all.

During Part 8's final passage through Parliament the government introduced an amendment (replacing subsection 106(1)(b) with new section 106A of the Construction Act) so as to allow the Secretary of State to make an order disapplying any or all of the provisions of the Act (as now amended by Part 8) to any description of construction contract in England, with a similar power for Welsh and Scottish Ministers in relation to construction contracts for construction operations being carried out in Wales and Scotland respectively. Subsection 106(1)(b) had contained only an all-or-nothing power - in other words, the Secretary of State could only disapply from certain types of contract all the provisions in the Act; the amendment allows him/her to disapply just some of them.

In proposing the amendment, the Minister for Regional Economic Development and Co-ordination (Ms Rosie Winterton) said: "we have been approached by a number of stakeholders from the industry and its customers concerned about the nature of the Secretary of State's power to exclude contracts from the provisions of the 1996 Act... We would like to substitute a new power enabling the Secretary of State to disapply any - not necessarily all - of the provisions [of the amended Construction Act]. That approach would allow us to ensure that many of the valuable features of the 1996 Act, as amended by this Bill, continue to apply - for instance, the right to stage payments, the right to adjudication and the right to suspend performance in cases of non-payment - while giving us the flexibility to deal with specific issues of direct concern. The legislation could also respond proportionately to future contractual innovation."

This means that the Secretary of State could, for example, make an order to the effect that Part 8's ban on pay when certified provisions, or even the ban on pay when paid provisions in the Act, would not apply to construction contracts entered into as part of a PFI/PPP transaction. Thus the equivalent project relief provisions in PFI/PPP subcontracts may not have to be discarded after all.

Adjudicators' powers to correct their decisions (new subsection 108(3A) of the Construction Act)

It will be necessary to write into standard forms and adjudication rules (where they do not already so provide) a term permitting an adjudicator to correct any clerical or typographical error arising by accident or omission in his decision. (Otherwise the Scheme's adjudication rules will be implied.) The courts have found that such a power exists in England and Wales, but does not exist in Scotland. For the avoidance of any doubt, Part 8 applies not just to Scotland but also England and Wales. This change may have the effect of clearing out old adjudication rules (like the JCT 1998 rules), assuming they are not amended to include a slip rule, which in the case of the JCT 1998 rules seems unlikely (at

least on the part of the JCT). NEC3 options W1 and W2 already empower an adjudicator to correct a clerical mistake or ambiguity in his decision within 14 days of giving it (although the wording may need tweaking to guarantee compliance with new subsection 108(3A)).

Ban on pre-adjudication costs agreements (new section 108A of the Construction Act)

Part 8 bans agreements allocating adjudication costs unless made after an adjudication commences. This aims to prohibit clauses requiring the referring party in an adjudication to pay his own and his opponent's costs, win or lose (the so-called 'Tolent' clause, after the case that suggested they are Act-compliant, even though the clear effect of such clauses is to deter adjudication).

There are two exceptions:

1. a written provision in the construction contract empowering the adjudicator to allocate *his* fees and expenses as between the parties (new subsection 108A(2)(a)); and
2. a written agreement after the giving of the notice of intention to refer the dispute to adjudication (new subsection 108A(2)(b)).

Clearly 1. is the most important. It should save adjudication rules (such as those in the current Scheme) that empower adjudicators to apportion how the parties should pay their charges (so that they may direct the loser to pay all of them). It may not, however, save adjudication rules that pre-determine how adjudicators' charges should be apportioned, such as the NEC3 Adjudication Contract which requires the parties to share them equally.

Furthermore, some concern has been expressed as to whether 1. above permits a hybrid Tolent clause. On the face of it, a Tolent clause that, say, requires the

referring party to pay the responding party's costs, whatever the outcome of the adjudication, while permitting the adjudicator to apportion his fees and expenses as between the parties, would seem to survive.

1. was introduced very late in Part 8's parliamentary passage. The former construction minister and Labour MP, Nick Raynsford, had proposed a different amendment to address the same mischief as 1. He said[2]:

"On the surface, [1.] seems to achieve the desired effect and I welcome it. I have heard some representations made that it could still leave a lacuna whereby a contract could be devised that included exactly such a provision for the adjudicator to be entitled to payment of reasonable expenses but that might separately seek to impose a condition about other costs, including the legal costs of the parties—if they incurred such costs—being met by one party. I am assured that that is not the case, but I would welcome reassurance from the Minister that there is no scope for such a lacuna in the provisions which would allow the good intentions of the Government's provisions to be bypassed. I hope that she will be able to give me that assurance. If she is able to do so, I will be happy not to press my amendment and to favour Government amendments 21 and 22."

The minister then went on to give that assurance[3], which should suffice for the purposes of the guidelines in *Pepper v Hart*[4] as something that a court may refer to when interpreting new section 108A of the Construction Act.

[2] House of Commons report stage, 13 October 2009, col 180: http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm091013/debtext/91013-0004.htm
[3] Ibid, col 185.
[4] [1993] AC 593, HL, page 634, per Lord Browne-Wilkinson, who said that reference to parliamentary materials to construe legislation was permitted where the following three conditions were all satisfied: "a. Legislation is ambiguous or obscure, or leads to an absurdity; b. The material relied upon consists of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; c. The statements relied upon are clear."

Removal of requirement for construction contracts to be in writing (deletion of section 107 and amended subsections 108(2) and (3) of the Construction Act)

Part 8's other changes will have little impact on standard forms, but its extension of the Construction Act's scope to include oral and partly oral contracts should be highlighted. This will have a significant impact, including on contracts arising from letters of intent that do not provide expressly for the Act's payment and adjudication regimes. When they are amended orally or by conduct (as frequently occurs) the protection of the legislation (which only applies to contracts "in writing") is lost. That will change. It will not, however, resolve whether a letter of intent gives rise to a contract. When a contract is not clearly concluded by or after a letter of intent, doubts will continue to arise as to whether the payment and adjudication regimes apply. Thus, Part 8 will not prevent responding parties challenging the jurisdiction of adjudicators on the basis that there was no contract.

The only parts of contracts that will need to remain "in writing" are adjudication agreements providing for rules other than the Scheme to govern adjudications (failing which the Scheme's adjudication rules will apply). Part 8 does not retain the Construction Act's definition of "in writing". Instead it relies upon the Interpretation Act 1978's definition of "writing" (which "includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form, and expressions referring to writing are construed accordingly"). The Law Commission in 2001 opined that this definition is broad enough to include email.

On the one hand retaining such an "in writing" requirement may promote clarity when providing for adjudication rules (although such a policy seems to run counter to allowing otherwise purely oral contracts) but on the other hand may permit technical arguments as to whether the adjudication agreement was in writing (although the scope for this is likely to be limited).

With or without the “in writing” requirement, responding parties may allege that the wrong adjudication rules were adopted in the adjudication and the adjudicator’s decision is thereby unenforceable. (We would not have this difficulty if we had a single set of procedural rules that governed adjudication.) They may also argue that the wrong appointing body appointed the adjudicator or that an allegedly agreed named adjudicator acted when he should not have done.

In order for a responding party to defend successfully the enforcement of an adjudicator’s decision in court he would have to show a real prospect of success on such an issue (although it is less clear that applying the wrong rules would be fatal than the wrong adjudicator having acted).

Surviving Construction Act avoidance devices

Part 8 seeks to ban only one Construction Act avoidance device (the ‘Tolent’ clause; see above) and confirms – if not extends - the ban on conditional payment clauses. It remains to be seen if those inclined to use Tolent clauses will seek refuge in other such devices, which Part 8 does not prevent.
These include clauses:

1. providing for interim payment decisions to be “final and binding”, so as to prevent an adjudicator from revising them (the ban in July 2008’s draft Bill was dropped);

2. requiring any sum awarded by an adjudicator to be paid into a third party (trustee stakeholder) account and only released if and when certain conditions are met;

3. requiring a payee if awarded a sum by an adjudicator, or the payee's parent company, to lend an equivalent sum back to the payer, which is only repayable as and when specified; and

4. requiring any adjudicator's decision to be enforced by arbitration which cannot be commenced until after, say, a final certificate has been issued or having arbitration rules which delay the decision's enforcement.

The government decided against introducing a single mandatory adjudication procedure, even though one might prevent most of these devices. Instead the government hopes that the new Scheme will be so attractive that parties will opt to use (as for instance the JCT did in adopting its adjudication rules in the Major Project Form of 2003 and all later forms). Unfortunately it is hard to see how this will happen. Those intent on deploying Act-avoidance devices may continue to do so, with or without selected elements of the new Scheme.

The future

It is unfortunate that key aspects of Part 8 are so unclear, particularly what is required for stating "the basis" of sums – both in PNs (to trigger payment mechanisms) and WNs (given the new, more severe, consequences for a payer of failing to give a valid WN).

It remains to be seen if PFI/PPP subcontracts are excluded from the extended ban on conditional payment clauses, so that equivalent project relief provisions may still be used in such contracts.

If and when Part 8 is brought into force, the initial judgments will be keenly awaited, especially those on the payment rule changes. Hopefully such judgments will not necessitate yet further costly changes to standard forms and payment practices.

Time will tell if the current economic climate produces an upsurge in Act-avoidance devices. One test of the Act and Part 8 is to ask: would it have made any difference to the suppliers of those housebuilders who were (according to numerous press reports) asked on existing contracts to apply up to 15% price discounts, write-off unpaid retentions or extend payment periods? The Act and Part 8 say nothing to protect those suppliers who agreed. They say little more for those who disagreed – save in providing a right to adjudicate. There are limits to the state's powers.

Interestingly the government has suggested reviewing Part 8 about three years after it has been in force. So, there might be only a short respite before we are again talking about amending the Construction Act.

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Figure 1 – Payment methods possible under construction contracts

Payment trigger	Payment notice (PN)	Withholding notice (WN)[5]	Sum to be paid
1. Payer or third party issues a PN as per the contract	Within five days after the payment due date: (a) the payer gives a PN specifying the sum he considers to be due (or, where some or all of that sum has been paid before the PN is given, the sum that would have been payable on the payment due date) and the basis for that sum or, (b) a specified third party (such as an architect or engineer) gives a PN (such as a certificate) specifying the sum the payer or the third party considers to be due (or, as above, to have been due) and the basis for that sum. A PN should be issued even if the payer or third party considers that nothing is due.	The payer or specified third party may give a WN not later than the agreed period before the final date for payment (or if a period is not expressly agreed, within seven days before the final date for payment). The WN states the sum considered to be (or to have been) due *on the date the WN is served* and the basis on which that sum is calculated. The WN may be appropriate where, say, a defect is found after the PN was given (but is not limited to post-PN issues).	The payee should expect to receive the sum specified in the PN or, if there was one, the WN by the final date for payment. If the payer does not pay the sum stated in the PN or the WN the payee would be entitled to commence proceedings for that sum (and the payer would have no defence to any claim) and/or might suspend all or part of its performance. If the payee suspends, it is entitled to its reasonable costs of suspending and remobilising and an extension of time for the suspension and the remobilisation period (rather than just the suspension period as now). If the payer does pay the sum stated in the PN or the WN, the payee might adjudicate for any extra sum it considers due (but would first have to ensure a dispute crystallizes if the extra had not previously been claimed).

[5] Part 8 inserts a new section 111(3) into the Construction Act renaming WNs "a notice of the payer's intention to pay less than the notified sum". This reflects Part 8's removal of any scope to challenge the sum due if the new "WN" is not given (there being limited scope at present); the sum payable is that stated in the applicable PN.

Payment trigger	Payment notice (PN)	Withholding notice (WN)[5]	Sum to be paid
2. Payee issues a PN, the payer or third party having failed to issue one as per the contract	If the PN is not given by the payer or specified third party as per the contract, the payee may, at any time, give a PN. If the contract permits or requires a payment application (à la the JCT SBC 2005 and many other forms) and the payee has already made one, that application stands as the PN and the payee does not give another. If the payee gives a PN, the final date for payment is postponed by the same number of days after the date that the payer's or third party's PN was due. If the payee's payment application stands as the PN the final date for payment does not change.	As above, except that the WN may cover any matters in respect of which the payer believes the PN, or the payee's payment application, is wrong (that is, it is not just a second bite at the cherry as above).	As above, except that in the case where the payment application stands as the PN, this is the amount the payee can expect to receive, and in respect of which he can commence proceedings and/or suspend work, unless the payer has given a WN.
3 Payee issues a PN as per the contract	The payee gives a PN specifying the sum it considers to be due within five days after the payment due date.	As above. (Cf JCT D&B 98 approach: if the payer makes one mistake the sum applied for must be paid without withholding.)	As above.
Example (of 2. above): the payee may by the 1st of every month submit a payment application; the 8th is the payment due date; therefore the certifier is due to give a PN by the 13th; the final date for payment is the 22nd of every month.	The payee does not give an application by the 1st (which would otherwise have stood as a PN); the certifier gives no PN; on the 18th the payee gives a PN stating the sum due as £100 and the basis for that sum. The final date for payment is thereby postponed to the 27th.	The payer gives a valid WN stating the sum due as £80 and the basis for that sum.	The payee should expect to receive £80 by the 27th. If the payee is paid nothing, the payer would have no defence to a claim for £80 and/or the payee might suspend all or part of its performance. If the payee receives the £80 it might still adjudicate for the extra £20 it considers due.

Payment trigger	Payment notice (PN)	Withholding notice (WN)[5]	Sum to be paid
As above.	As above, but (1) the payee did give its application (for £100) by the 1st and (2) the certifier gives no PN because he (or the payer) considers nothing is due and wrongly believes he does not have to give a PN. The final date for payment remains as the 22nd.	The payer or certifier does not give a valid WN because (a) the person responsible is unexpectedly away when it has to be issued or (b) he does not realise that the payee's application is in fact the PN or (c) the WN does not state "the basis upon which the sum is calculated". If the WN simply said "£100 less £20 for defects = £80", case law suggests this would be an invalid WN as it is not a sufficient breakdown of how the £20 is calculated[6]. (In 2006 the government rejected requiring WNs to give more detailed grounds than presently, but Part 8 may in fact require this.) (a), (b) and (c) also readily arise from payment method 3. above, where the payee issues a PN as per the contract.	The payee should expect to receive £100 by the 22nd. If the payee is paid nothing, the payer would have no defence to a claim for £100 (although he might seek to recover any overpayment in the next interim payment, if there is one). The payer may not, as now when the sum due is not certified (and the contract allows), challenge the sum due because, say, work claimed for was not done. The sum due is as in the application (if it stated the basis for the sum's calculation). And/or the payee might suspend all or part of its performance.

[6] Similar wording is used in section 110(2) of the Act (which will be replaced if Part 8 is brought into force) as well as paragraphs 9 and 12 of Part 2 of the Scheme. In *Maxi Construction Management Ltd v Morton Rolls Ltd* (2001) Lord MacFadyen held (obiter) that a payment application was not a "claim by the payee" for the purposes of paragraph 12 because it did not set out fully enough the basis on which it was calculated (see paragraphs 24 and 29):

"*It is not, in my view, appropriate to demand of an application for an interim payment that it set out in full detail the basis of calculation of items already paid for under earlier applications. But paragraph 12 does, in my view, require specification of the basis of calculation of the new matter included in the application in question. In my opinion many of the items in the "Variations/Contract Instructions" part of Interim Valuation No. 10 cannot be regarded as specifying the basis on which they are calculated… particularly clear examples of such lack of specification are … item 20 was in respect of "Suspension/additional/ prolongation costs associated with formal instruction to halt operations on site. Citex [letter] 22.07.99", and item 21 was in respect of "Extension of time costs associated with formal instruction to suspend site operations ... and other factors". Together they were reflected in an addition to the contract sum of £35,000. No explanation of the basis of calculation of that sum was offered. Further, item 25 was in respect of "Complete revision and installation of drainage due to inaccurate 'as fitted' drawings", and was reflected in a deduction of £37,500 from, and an addition of £60,000 to, the contract sum. Again there was nothing to indicate what the basis of calculation of those sums was.*"

This suggests that the WN in our example would not be sufficient such that the notified sum (which might be the sum applied for by the payee) would be due. It suggests a level of detail not currently required in WNs. Merely stating the resultant figure from a calculation is not enough – the basis for it must be stated, which would presumably at a minimum include a build-up. This level of detail would also be required of PNs whoever issues them.

Payment trigger	Payment notice (PN)	Withholding notice (WN)[5]	Sum to be paid
As above.	As above.	The payer validly terminates its contract (for whatever reason) with the payee before the final date for payment.	The payer must still pay the £100 or, if it gave a valid WN, the £80. This overrides contractual terms such as those in JCT SFBC 1998 and JCT SBC 2005 that relieve payers of paying a sum when the final date for payment post-dates a termination (whether for insolvency or otherwise). The only exception is if the contract provides that where the payee goes insolvent after the WN deadline, the payer need not pay the sum otherwise due. Where a payee goes insolvent shortly before the WN is due, this is hard luck on the payer who does not find out until after the deadline for the WN (despite seeming a stronger case for non-payment without a WN (i.e. insolvency before not after the WN deadline). Any clause going beyond this is ineffective (such as clause 8.5.3.1 of the JCT SBC 2005, which says that upon the payee's insolvency no further payments fall due).[7]

[7] This is quite an inroad into the common law rules on termination. It is bound up with Part 8's attempt to limit the bounds of *Melville Dundas Ltd (In Receivership) v George Wimpey UK Ltd* [2007] B.L.R. 257, HL. But the majority in that case went further than Part 8 provides. *Melville Dundas* may bleed into areas beyond insolvency or termination, envisaging as it does the prospect for a black letter (rather than purposive) interpretation of the Construction Act thereby allowing for what some might see as greater Act avoidance (although proponents of this approach would respond by saying that the Act never intended, or is not clear enough, to impinge upon these areas). Part 8's proposals only go so far in limiting the consequences of *Melville Dundas*. In particular, they do not expressly prevent any bleeding.
In addition, Part 8 may not remove a payer's statutory right to withhold where the payee enters liquidation or goes bankrupt (as opposed to other forms of insolvency), including in respect of sums due for which the final date for payment passed before the payee entered liquidation. That is, even if the contract does not expressly allow it and the payer gave no WN for, say, in our example, its expected extra costs of completing the works and resolving the £20 of defects.