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The application of the amended Construction Act

The coming into force of the amended Construction Act in England and Wales on 1 October prompted some developers to push through their contracts to avoid the new payment regime. Nevertheless, the transition from old to new rules is producing headaches. For instance, however inconvenient it may be, a subcontract entered into on 1 October is governed by the new Act even if the main contract entered into on 30 September is not.

Worse still, contracts drafted for the old regime may in fact be subject to the new. In such cases the agreed payment provisions will be replaced by statutorily implied payment terms that unwittingly won't have been operated. As a result some payers will incur substantial liabilities.

Over the next year or so many of us will have to deal simultaneously with contracts under both the old and new rules. It will be important to recognise which contract is governed by which regime. Cases from when the original Act came into force will help with this, but problems will still arise from the unclear ways in which the law and parties treat contracts.

Take a letter of intent, for example, that was in place before 1 October. If on or after 1 October a replacement contract is concluded, the new Act will usually apply to it. Similarly where, say, a consultant's pre-1 October appointment is on or after 1 October novated from a developer to a contractor, the new Act will apply to the novated contract. While a case called *Yarm v Costain* (2001) supports this analysis, it has its doubters.

Call-off contracts made from 1 October under pre-1 October framework agreements produce problems all of their own.

Might amendments to a pre-1 October contract create a new contract? In *Earl's Terrace v Waterloo* (2002) the amendments only altered the fee arrangements and it was decided that they did not create a new contract. The result may have been the opposite had the work scope been amended. However, extra work under a variations clause is unlikely to create a new contract.

Sometimes a contract has clearly been concluded but it is unclear when. There is now greater scope for this problem given the Act's extension to cover contracts not wholly in writing. In *Atlas v Crowngate* (2000), the parties signed a contract before the original Act came into force. However, because the work scope was only finalised after the Act's commencement date, the Act applied when the contract was formed.

Another issue arises from the fact that however late in a project a contract is concluded, it will readily be deemed to apply retrospectively to when the works started. A contract complying with the new payment rules that does not address this presumption may produce claims against the payer based on a lack of "new regime" notices at a time when it did not think it should be providing them. Contracts should address this issue. This is important as payers now more readily face harsh consequences for not issuing proper notices.

In this regard old case law might, again, help with a major new issue. All contracts are now required to trigger payments by a notice given by the payer or the payee. For the former, if the payer fails to give a payment notice, the payee's preceding payment application may qualify as one or, failing that, he may issue a payment notice of his own. However payment is triggered, the payer may give notice that he will pay less than the sum stated in the payment notice. If the

payer fails to give a valid pay-less notice he must pay the sum stated in the payment notice by the formal date for payment, without any deduction.

Each payment and pay-less notice must state the "basis" on which the stated sum is calculated. It will be uncertain what this requires pending judicial clarification. The Act's changes were supposed to reduce the administrative burden imposed by the notice regime but one Scottish case (*Maxi v Morton*, 2001) suggests more detail is required than the existing requirement of stating the "ground" for withholding in a withholding notice. If that is correct, payers and certifiers may find it burdensome providing valid payment and pay-less notices (and the different information needed for each). One can foresee parties arguing about whether notices are invalid for failing to state the "basis" on which the stated sum was calculated.

Overall, the lesson from the past is that it will take some guinea pigs to smooth the new regime's fluffy bits for everyone else.

This article first appeared in *Building* on 4 November 2011. The amended Construction Act came into force in Scotland on 1 November 2011 and similar issues as those described above will apply there. It is unclear if and when changes will be made to the equivalent regimes in Northern Ireland and the Isle of Man. For a summary of how the new Act affects standard forms and practices click **here**.

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