



NSCC Fair Payment Seminar- 4 March 2008

How to improve your chances of getting paid

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It should be stressed that the following summary of the seminar materials is no substitute for appropriate legal advice. The summary is given for general information and does not constitute legal advice on any specific matter.

Slide 1

What Makes a Contract?

- Offer
 - For a statement to amount to an offer it must be clear and unambiguous (Falck v Williams (1900))
 - An estimate can also be an offer- Crowshaw v Pritchard (1899) “our estimate amounts to the sum of £1,230” was capable of being accepted.

- Rejection and Counter Offer
 - If any new terms are suggested then this cannot be an acceptance and probably amounts to a fresh offer (Hyde v Wench (1840))

- Certainty of essential terms
 - Parties, price, time and description of the works is normally the minimum necessary to make the contract commercially workable.
 - However, very occasionally the particular circumstances will question whether price is an essential term. It is thought that an agreement to do specified work which is silent as to price can be a binding agreement as the law implies a promise on the part of the employer to pay a reasonable charge. (BSC v Cleveland Bridge Co (1984))



- Implied Terms

There are numerous implied terms which can be incorporated into a contract either through statute or common law.

For example, it is implied that the employer will do all that is necessary on his part to bring about completion of the contract. It is an implied term that possession must be given within a reasonable time to enable the contractor to complete by any completion date which may exist (T&R Duncanson v The Scottish County Investment Co Ltd (1915))

There is an implied term that the Employer must not interfere with the performance by the Contractor of his performance under the Contract. (Scottish Power Plc v Kvaerner Construction Ltd (1999))

The Contractor must also do the work with all proper skill and care (Young and Marten v McManus Childs (1969)).

There are a number of cases which have considered the extent of the duty of a contractor to warn of defective design. In the recent case of CGA Brown Ltd v Carr, the Court of Appeal confirmed that a contractor may have a duty to ensure that drawings supplied by a third party designer are adequate. Failure to do so could be a breach of contract if it amounts to a failure by the contractor to carry out work with reasonable skill and care. If a reasonably competent contractor would have realised that the design contained in the drawings and instructions was inadequate then he is duty bound to report the problems to the client.

- Acceptance

Acceptance can be by conduct showing an intention to accept the terms of the offer (G Percy Trentham vs Archital Luxfer (1992)) although silence or inactivity will not generally amount to acceptance.

- Battle of the forms – Crystallisation of Contract



- Letters of Intent
 - Clear scope
 - Clear payment
 - Clear duration

Slide 2

Getting your contract right (1) Enquiries/ Invitations to tender

- Read Carefully

In the case of Interfoto Picture Library Limited v Stiletto Visual Programmes Limited (1987) the English Court of Appeal held that in order to rely on an onerous or unusual condition printed on a delivery note the party seeking to rely on it had to show that it had been fairly brought to the attention of the other party. This should not be understood as setting a general rule applying to all printed conditions.

If a particular clause is common in the trade and a sub-contractor is aware that a main contractor uses it regularly in his contracts then he may be found to have had that particular condition brought to his attention.
- Ambiguous / unclear terms
 - Contra Proferentum rule
 - Order of priority of documents
 - Supercession clauses
- What have you taken / not taken into account
 - Allowances
 - Price of bonds
 - Surveys / ground condition reports
 - Warranties
 - Bills of Quantity – are they contractor's – if so, based on his quantities and subject to re-measurement



- What qualifications are you going to make?
 - Programme – no impediments
 - Clear access to site
 - Attendances
 - Adverse weather conditions / detrimental site conditions
 - Number of visits to site
 - Interface with other surfaces

 - Liquidated damages
 - Additional materials / labour
 - Additional rights to suspend / terminate
 - That your terms and conditions take precedence
 - Insurance exclusions

Slide 3 Price

- Discount for early payment
- Period for which your quote is fixed
- Deadline for acceptance
 - Start on site; or
 - Signature of contract

Payment

- Are the terms clear? APPLICATION DATES / DUE DATES / FINAL DATES
 - If the terms are not “Act” compliant, the Scheme for Construction Contracts applies
 - 28 days payment intervals – Submit on the time – with all relevant back-up information
- Early works
 - Clear terms
 - Drop dead date
 - Insurances
 - Risk



- Retention / retention bonds – Roy told you about this
 - SBCC Default position 3%
 - Include cost of retention bond in tender
 - Make sure these are very clear final dates for release
 - Small claims

Slide 4

Tender / Estimates / Quotations - The Basics (contin)

- Identify docs / drawings you have priced
- These must be clearly referenced with either the docs & drawings attached or clearly identifiable and expressly incorporated by reference to drawing numbers / dates etc
- Bills of Quantities

Common Practice is to set out in the prelims section of the Bills of Quantities the form of contract and any amendments to the standard printed conditions of contract. Determining the precedence of such documents can however give rise to difficulties since the Bills of Quants will be a specially written “one-off” document in contrast to the printed standard conditions. The normal rule is as applied in J Evans and Sons Ltd v Andrea Merzano Ltd (1976), that in the absence of any express terms to the contrary specially prepared documents will take precedence over standard printed conditions.

- Programme/ Time for completion

If the contract does not specify a time for completion of the Works a reasonable time will normally be implied (Charnock v Liverpool Corporation (1968)). What is a reasonable time is a question of fact, to be considered in relation to the relevant circumstances.



If the contractor fails to comply with the terms of the contract as to time, he will be in breach. "Time being of the essence" means that strict compliance with the contractual time scale is required as this timescale is a material condition of the contract. The leading Scottish authority on this is Visionhire Ltd v Britel Fund Trustees Ltd (1991). In this case the court decided that there is room for consideration of the nature of the contract and the circumstances in deciding whether or not a stipulation as to time is material.

- Design
 - Risk for design – Product Liability
 - Collateral Warranties – length / standard of care / SBCC form
 - Assignments
 - Net contribution clauses
 - Step-in rights – duty to pay you first
 - Copyright
 - PI cover – level – X 1½ Contract Value
 - PCG's

Slide 5

Other terms

- Attendances
 - Who is providing what and who is paying? Exclusions
- Protection – Site & Staff
 - CDM risks – pre-agreed Method Statement and risk and COSHH assessments for labour plant and materials
- Lead in times / preceding trades
 - Access issues
 - Programming
- Dayworks / rates / non-productive overtime rates
 - Keep good records



- Delay Costs

The sum agreed as liquidated damages must be a genuine pre-estimate of the loss which will be caused to the employer if the delay occurs. If it is not a genuine pre-estimate it will be a penalty clause and would not be enforceable by the courts. The distinction is an important one and was considered by the House of Lords in Dunlop Pneumatic tyres Ltd v New Garage and Motor Co. Ltd (1915). The House of Lords held that the agreed sum would be a penalty if

it was “extravagant and unconscionable” compared with the greatest loss that could possibly follow from the breach.

If an employer prevents the completion of the works in any way he loses the right to claim LADs for non-completion to time as he “cannot insist on a condition if it is his own fault” even if the contractor is also partially responsible for the delay (Amalgamated Building Contractors Ltd v Waltham Holy Cross UDC (1952))

- Insurance

- PI cover
- Public Liability
- Employees Liability
- Cert from the Employer / Main Contractor
 - You design sub-specialists

- Bonds/ Warranties

Bonds where liability arise on default are true performance bonds. In Perar BV v General Surety and Guarantee Co Ltd (1994) the contractor went into receivership. The contract provided for automatic determination of the contractor’s employment in these circumstances.

It was held that the contractor was under no obligation to continue with the works following the determination and therefore there was no breach of the



contract and so no default within the meaning of the bond. Accordingly, the employer was unable to claim against the bond.

In relation to design:

Glasgow Airport Limited v Kirkman and Bradford. (2007).

A Collateral Warranty was granted to Glasgow Airport by engineers and designers appointed under a Design and Build Contract. Problems arose with the floor slab.

In the warranty, there was provision that the “subconsultants liability for costs under this Agreement shall be limited to that proportion of such costs which it would be just and equitable to require the sub-consultant to pay, having regard to the extent of the Sub-consultants responsibility for the same.”

This is known as a net contribution clause as it seeks to limit a party’s liability to the losses allocated on a “fair and reasonable basis”. This is contrary to the joint and several liability rule which applies at common law.

The wording of the warranty and in particular what was meant by “cost” was the issue. Did it include recovery of consequential losses? The engineers argued that this wording limited the recoverable costs to repair and replacement costs only.

It was held by the court that Costs could not be read as narrowly as suggested by the engineer. It included damages or payment of other sums which might be recoverable. However, this decision did not elaborate on how liability can be allocated on a just and equitable basis.

- Limitations on liability
 - Capping of liability to match insurance
 - Net contribution clauses
 - Pass the risk back up / down
 - Capping on LDs



- Top Tips

- Use the tool kit

- Learn from your own experience and that of others – that is why you should attend the NSCC seminars

Slide 6

- Keep track of and record arrangements

- Check site minutes

- Retain emails

- Keep writing to the Main Contractor

- Pre-Contract meetings

- If the agenda does not reflect the items you believe are key – ask for amendments

- Do not be bullied – it is only a sign of things to come**

- Do not sign minutes unless checked and agreed – walk away and check them after the meeting with a clear head

- Do not agree to docs you have not seen

- Docs incorporated by way of reference

- Docs to be inspected at Main Contractors office

- Include anything agreed in final contract

- Attach them or clearly reference them

Pre-printed minute statements – P9 of toolkit
Tender fixed for duration of main contract
Detailed payment application procedures
LDs at same rate as main contract
Continuity of work not guarantee



Slide 7

- Acceptance
 - Not qualified
 - Re-qualify
 - Incorporate everything
 - Expressly by reference or attached
 - Nothing added
 - Check for amendments – manual or addendum
 - The SBCC docs are fair – they should not be amended without good cause
- No contradictory docs
 - Check they hang together
 - If there is an order of priority, is it correct?
 - Usually “special” conditions take precedence over printed docs
 - You understand all the docs
- AS is here to help! You get a free 15 minute call!!!

Slide 8

Suspension of Works

- If the contractor is delaying payment or flatly refusing to pay then you'll be happy to learn that do not have to carry on with the works regardless.
- The construction act allows you to suspend your performance when you're not being paid.
- Legally, it is where a sum due to you from the other party to the contract is not paid in full by the final date for payment and no effective notice to withhold payment has been given.
- You must first ask whether the Act applies to the contract you're dealing with.
- The Act only applies to construction contracts entered into after 1 May 1998



A contract with someone for work on their own house is not technically a construction contract under the Act

In order for the act and the scheme to apply the contract must be in writing or at least all non trivial terms are required to be in writing or evidenced in writing if work has commenced under a letter of intent then the question is whether the letter of intent itself constitutes a contract and that will depend on what the letter says in the context of any other correspondence exchanged at the time

- The most important thing you must do before downing tools is give the contractor seven days notice in writing of your intention to suspend work in order to give them the opportunity to pay. After that you can formally suspend.
- It is a very useful tool for putting pressure on the contractor to pay you in full. Only paying in full will eliminate your right to suspend.
- You'll be happy to learn that if you validly exercise your right to suspend work then you're entitled to an extension of time for any delay.
- It's important to always remember that you can't suspend if there is a valid withholding notice. Even more so you should remember that a wrongful suspension will almost always be a breach of contract so you must think very carefully about whether you are correct to suspend. Be particularly wary if there are accusations that your work is substandard. If it is later found that your work isn't in accordance with the contract then you could be exposed to very considerable damages.
- Also remember and be conscious of the effect of suspension on possible damage to the works, other surrounding property or the safety of people getting on to site. You have no special immunity from any third parties so make sure the site and the works are secure before you traipse off.
- The right to suspend ceases when you're paid in full so at that point you're contractually obliged to resume work. You should also be aware that the Act doesn't provide for reimbursement of your costs of suspension or remobilisation. However, several of the recent standard forms are now providing for this.
- It is a very useful tool and more often than not the threat itself is enough to get someone to pay up. But you shouldn't threaten unless you're in a position to do it and you shouldn't do it unless you're sure of your position.



Slide 9

Adjudication

- Adjudication was introduced by the Construction Act in 1996. The whole process of adjudication can be over in as little as 28 days. The informality of adjudication, including the absence of any strict rules of evidence and the fact that a hearing is often not required, has appealed to parties that are a lot happier being out on site than facing off against each other in court.

From a contractual point of view, the same rules apply for adjudication as they did with suspension when you're considering whether or not it is a construction contract in terms of the act. Most importantly it must be in writing.

The Act requires a construction contract to include an adjudication procedure. This procedure must allow

that either party is free to give notice to other party at any time of their intention to refer dispute to adjudication

The contract must have a timetable which has the aim of having an adjudicator appointed and the dispute referred to him within 7 days of the notice

This adjudicator is required to reach a decision within 28 days of referral or longer if following referral the parties agree

the adjudicator is permitted to extend the 28 day period by up to 14 days of the party referring the dispute consents

the adjudicator is to act impartially

the adjudicator should exercise his own initiative in finding out facts and the law



- These are the key points of construction adjudication and if the contract does not comply with all of these requirements then the scheme for construction contracts will apply. The whole of the scheme's provisions on adjudication apply in the event that the contractual provisions are either non-existent or deficient. The scheme will not just fill in the gaps. However, you may decide just to leave it silent and simply let the scheme apply.
- The next consideration is whether an adjudicator is named and if not whether an appointing body is named. I would suggest that you use a nominating body such as the AICA which I understand is free to members of the NSCC.
- You should then look to see if there is an arbitration clause in your sub-contract. Such a clause is likely to require that all disputes connected with the contract have to go to arbitration. This could cause particular problems in the context of applications to enforce adjudicator's decision since enforcement may have to be referred first to an arbitrator whose powers in that regard are less than those of the court. The enforcement of the adjudicator's decision should therefore be excluded from arbitration clauses
- If there is an issue you think should go to adjudication you have to firstly technically be in a dispute with them. It simply requires that you have raised the issues with the other party. Its common sense too to make a genuine effort to resolve it by negotiating with them. You should also think about the other parties financial position before committing to adjudication against them. If the other party goes under you'll still not get paid and you'll be stuck with the adjudicator's expenses even if you got a result in your favour.
- Each party to a construction contract has a right to refer a dispute or difference to adjudication. You cannot contract out of this statutory right. Provided a dispute exists, either party can adjudicate at any time including during the works period.



- Once a dispute has arisen under a construction contract, an adjudication can be initiated by submitting a written notice of adjudication to the other party. The notice must usually say a little about the nature of the dispute, when and where
- the dispute arose, what you want from the adjudication and the names and addresses of the parties to the contract. Once an adjudicator has been appointed then the next step is to send a referral notice to both the adjudicator and the other party. The referral notice is the document which contains all the information that you wish the adjudicator to consider. It is up to the adjudicator to decide whether to hold a hearing or not. If there is a hearing the adjudicator will also decide how formal it is to be although it is normally relatively informal.
- The adjudicator then issues his decision. There is no statutory requirement for adjudicator's to give written reasons for the decision although often this is provided for contractually.
- There is very little in the Act on enforcement of adjudicator's decision except that the decision is binding until the dispute is finally resolved. So what do you do if they don't pay up when an adjudicator orders it?
- Thankfully, Adjudication has received the full backing of the courts. There is very clear case law indicating that generally the courts will enforce adjudication decisions without enquiring as to their correctness. The exceptions are where the adjudicator is not acted in accordance with procedural fairness so the adjudicator must be impartial and he must allow each party the opportunity to make its case. The second exception is where the adjudicator's acted without having the authority to act or to make the decision that has been made for example, where the adjudicator decides something that he was not asked to decide on.
- Although it's technically a stop gap process, disputes are not routinely being referred to the courts or to arbitration for final determination. As intended, parties are taking a commercial view on it and moving on to the next job or dispute for some contractors.



- **Advantages of Adjudication**

- **Speed.** Adjudication is intended to be a speedy method of sorting out disputes.

should be cheaper than arbitration or litigation

in practice the parties will often accept the adjudicator's decision as resolving their dispute

- **Disadvantages of Adjudication**

the decision is only temporary until the dispute is finally resolved

an adjudicator can take the initiative in ascertaining the facts and the law necessary but is not obliged by law to tell the parties what information or consideration he took into account in arriving at his decision

the speed of the adjudication procedure could result in decisions which are latterly considered to be wrong.

We can advise further on any of the issues raised above. For further information please contact Karyn Watt or Martin Whiteford.

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