Protecting your interests - don't just talk about it, act on it…and put it in writing

Construction and Engineering briefing
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Martin McKervey, Partner in the Nabarro Construction and Engineering team, reviews how the construction industry continues to struggle with the concept of having a written contract and the implications of this. He considers how this affects options for dispute resolution, especially adjudication.

YOU ARE COVERED…IN WRITING

The construction industry has more than come to terms with the regime of the Housing Grants, Construction & Regeneration Act 1996 (the Act). There is no doubt that the Act continues to have an attraction as a forum for dispute resolution. For many, the attraction is the swift timetable providing for a decision within twenty-eight days of referring a dispute.

However the Act is not without problems – or perhaps it is the industry's difficulty in understanding what the Act requires. Some of these problems arise from the industry's approach to contractual terms, defining contractual arrangements and, in particular the frequent failure to capture these in writing.

All too often substantial works are carried out under an oral agreement only, with no written contractual terms. This can have very important implications should a party later want to seek redress or pursue a claim under the Act.

The Act **only** applies where the construction contract is evidenced in writing. What does that mean? For many in the industry, the answer is perhaps obvious: every project has extensive documentation including correspondence (describing the work to be done), invoices and minutes of site meetings and applications for payment etc. This chain of correspondence is the contract, but is it?

WHY PUT IT IN WRITING? - THE VIEW OF THE COURTS

The courts have had some important things to say about this.

In March 2002 the Technology & Construction Court decided that it was not necessary for the evidence in support of a contract to identify every term. (*RJT Consulting Engineers Limited -v-DM Engineering (Northern Ireland) Limited*). The court was happy to have regard to correspondence, invoices and minutes of meetings etc., all of which could satisfy the requirements for having a construction contract in writing. The parties in that case headed off to the Court of Appeal, which took a rather different view of matters. There it was held that, in order to meet the requirements of the Act, **all** the terms of the contract must be evidenced in writing. However, it was not entirely clear which terms the court had in mind, was it all the terms, all but the trivial terms or just the terms in dispute? The Court of Appeal decision has largely

been followed. For example, in *Carillion Construction Limited -v- Devonport Royal Dockyard Limited* the court held that an adjudicator did not have jurisdiction to consider a dispute about an oral variation to a contract that was in writing.

The courts, in more recent times, were tasked with looking at this issue again in *Westdawn -v- Roselodge*. Westdawn carried out construction works (largely repair and refurbishment) to a number of properties owned by Roselodge. As is common practice, Westdawn issued a Quotation setting out the items of work and the price and Roselodge issued a Purchase Order. All of this together represented the contract. The terms were clear to the parties. Westdawn and Roselodge had their differences and these were placed before an adjudicator. Things deteriorated and the parties went to court. Westdawn argued that the adjudicator's decision should be set aside because the terms of the contract were not in writing. The court identified a number of material terms which it decided were not set out in writing in either the Quotation or the Purchase Order: In particular:

Arrangements for completion of the works
There was no dispute between Westdawn and Roselodge regarding the contractual arrangements for completion of the works. They had agreed orally that completion would take place when Westdawn returned the keys and issued completion certificates. The court construed this to be a material term of the contract, but one which was not evidenced in writing.

Payment of invoices
Westdawn and Roselodge both understood the payment terms. Roselodge would pay on thirty days following Westdawn submitting the invoice. This was considered to be a material term, but one which was not evidenced in writing.

Since these two material terms were not evidenced in writing, the court was not prepared to enforce the adjudicator's decision.

The importance of setting down contractual terms in writing cannot be over stated.

THE PROBLEM

The problem therefore is a simple one. It is acknowledged and recognised that the industry rarely records all the terms of a contract in writing. The approach taken by the courts has however led to much jurisdictional wrangling and this has perhaps limited the opportunities for expeditious adjudication.

There are those who say that all construction contracts, whether evidenced in writing or not, should be caught by the Act. There are others who believe it is for the industry to get its act together and ensure that contractual arrangements are set down in writing and that when parties fail to do so then they should simply suffer the consequences and accept that they will fall outside the ambit of the Act and not benefit from the many safeguards it provides.

There is then perhaps the desire to find some middle ground? Perhaps surprisingly, it is government driven. Consultation on the long running review of the Construction Act finally began in late June. The consultation will run until September 2007. It remains to be seen whether this will culminate in wholesale changes or simply tweaking of the Act. One aspect of

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CLARITY MATTERS

the consultation is to consider whether the Act should be extended to cover oral and partly oral construction contracts.

THE WAY FORWARD

Will the mist ever clear? It may do so with any changes that may emerge from the consultation and the review of the Act. There must be a concern as to whether in fact there will be any change and, even if there is when will that be enacted?

There is of course a rather simple solution - make sure that all contractual terms are put in writing. Writing is important because it provides certainty and perhaps clarity?

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