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THE CONSTRUCTION CONTRACTS ACT 2013 – AN OVERVIEW

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It is absolutely fundamental to trust within the construction industry that participants should be paid for the work which they have undertaken – Sir Michael Latham (1994, p.93)

In March 2013, the Author of this study published a paper entitled *Will the Construction Contracts Bill Improve Subcontractor Cash Flow?* [<http://arrow.dit.ie/beschreoth/10/>] The study investigated whether the Construction Contracts Bill, then going through its second reading in the Dail, was likely to improve payment practice within the industry. The Bill's primary aim was to address the perceived widespread practice of late payment and underpayment by main contractors to subcontractors. The study examined the importance of cash-flow to contracting companies and explained how main contractors could, by delaying payment to their supply chain, transfer much of the cost of financing the project onto their subcontractors; an approach which may cause major difficulties throughout the entire supply chain.

The study examined the payment provisions of the Construction Contracts Bill as then drafted and identified a number of serious concerns and weaknesses raised by senior industry figures and public representatives regarding the application and operation of the proposed legislation. In the light of these perceived flaws and the lack of success of previous prompt payment legislation to prevent late and non-payment, the Author argued that the proposed legislation was likely to have a limited effect in resolving subcontractor cash-flow problems. The Author acknowledged, however, that change is usually a gradual process and rarely comes about overnight, adding that the Bill was regarded as 'a step in the right direction'. He concluded that it is one thing to change the law; changing the culture is another thing entirely.

This study has been undertaken in the aftermath of the commencement of the Act on the 25th July 2016. The study reviews the rationale for the introduction of the Act, examines the Act's provisions, reports industry commentary and analysis, and reviews the findings of various undergraduate and postgraduate studies undertaken on the topic within the School of Surveying and Construction Management in the Dublin Institute of Technology since 2013.

Rationale for the Introduction of the Act

‘The Government is committed to protecting small building subcontractors that have been denied payment from bigger companies’. (Houses of the Oireachtas, 2012)

O’Brien (2016) explains that the Act was introduced to combat poor payment practices in the construction sector generally and particularly ‘tier 2’ and lower tier subcontracts. He observes that contracts in that sector are often unwritten, and adds that there is often no express agreement governing payment between the contactor and the subcontractor. He explains that enforcing payment is difficult in these circumstances and that courts may have difficulties in interpreting the presumed intentions of the contracting parties. He contrasts these informal (sub) contract ‘agreements’ with ‘tier 1’ contracts agreed between employers and main contractors. Tier 1 contracts are typically executed on the basis of standard forms of contract such as those published by the RIAI (Royal Institute of Architects in Ireland) and the GCCC (Government Construction Contracts Committee) Public Works Contracts. These contracts are comprehensive in their coverage of matters which may arise in the course of constructing building projects and they contain detailed procedures relating to the matters covered by the Act. O’Brien identifies these matters as those that govern payments, provide a right to suspend for non-payment, and provide for speedy dispute resolution.

Cunningham (2013) noted, that despite the introduction of prompt payment legislation in 1997 and in 2002, the autumn 2012 Irish Small and Medium Enterprise Association (ISME) SME Credit Watch Survey revealed that, on average, firms operating in the construction industry were kept waiting on average 75 days for payment. The recent autumn 2016, Survey reveals that construction firms still wait 62 days for payment, which although an improvement, remains a problem, despite the implementation of the Act and the improving economic environment.

The Construction Contracts Act 2013.¹

The Act was enacted on the 29th July 2013 and came into force almost three years later on 25th July 2016. The purpose of the Act is to *‘regulate payments under construction contracts and to provide for related matters.’* The Act consists of twelve sections over 10 pages, plus a single page Schedule. The Sections are: 1 Interpretation; 2 Construction contracts: exceptions etc.; 3 Payments under construction contracts; 4 Payment claim notices; 5 Right to suspend

¹A copy of the Act is available on-line at <http://www.irishstatutebook.ie/eli/2013/act/34/enacted/en/html>

work for non-payment; 6 Right to refer payment disputes to adjudication; 7 Right to suspend work for failure to comply with adjudicator's decision; 8 Selection of panel of adjudicators; 9 Code of practice for adjudication; 10 Delivery of notices etc.; 11 Expenses; and, 12 Short title and commencement. These sections are now reviewed in turn.

Section One; Interpretation.

Section One sets out, in alphabetic order, the meanings to be given to the various terms used within the Act. This is standard practice for legislative enactments. Interpretations are provided for: "construction contract"; "construction operations"; "executing party"; "main contract"; "Minister"; "other party" "payment claim"; "payment claim date"; "payment claim notice"; "payment dispute"; "subcontract"; "subcontractor", and "work".

Of particular importance are the definitions covering "construction contract" and "construction operations" which identify the scope of the Act and which are both very broadly defined. "*Construction contracts*" (subject to the particular exceptions set out in Section Two, - see next subsection) not only relate to 'typical' main-contracting and sub-contracting activities and/or labour-only arrangements, but also include the provision of professional consultancy services including architecture, engineering, (quantity) surveying and project management among others. Similarly '*construction operations*' includes activities ranging from major civil engineering infrastructure works to every-day activities such as painting and decorating contracts, and extends to occasional or 'one-off' individual projects such as repairing artistic works attached to real property.

Subsection 3 defines that *supply only* of building materials, components, equipment and plant and machinery *do not* constitute construction contracts.

Commentary

As is the case with much legislation, the Author found the wording in certain passages of the Act somewhat indigestible, and in places, utterly confusing. For example the *opening* definition, of a '*construction contract*' refers to it as being between an '*executing party*' and '*another party*'; however, the terms '*executing party*' and '*other party*', require further definition: it is also not difficult to confuse these terms with other expressions, such as '*other person*', used within the Act's text. Commentators may criticise the wording for needlessly complicating standard industry terminology to identify the principal contracting parties: *viz.*

the employer, contractor, subcontractor and sub-subcontractor. Durack (2016) describes the various definitions and terms set out in this Section as a ‘*new language*’. Some assistance in interpreting the Act has been provided by the publication of an information booklet by the Department of Jobs, Enterprise and Innovation (2016). Bearing in mind that one of the primary intentions of the Act is to protect (small) contractors and subcontractors from payment abuse when carrying out work, it is suggested that the language used in the Act could have been more clearly drafted and made more accessible with this group in mind². Confusion generates uncertainty which in turn may inhibit contractors or subcontractors from availing of their rights and entitlements afforded by the Act.

Cunningham (2013) noted that one of the main areas of debate in connection with the Act was whether its scope should be extended to include ‘bespoke’ products manufactured for the particular project. Indeed, a number of Deputies also called for the meaning of ‘bespoke products’ to be expanded to include materials such as concrete, blocks and general building supplies which could not be recovered once incorporated in the Works. Quigg Golden Solicitors (2013b) reported, however, that the Minister indicated that ‘*it had not been bureaucratically possible to define supplies delivered to a construction site in a way which would see that category of materials included within the remit*’ of the Act. Supply only contracts, therefore, are not covered by the Act. O’Connell (2014) comments that this exclusion was justified on the basis that ‘*such contracts are already covered by existing legislation*’.

Section Two; construction contracts: exceptions, etc.

Section Two identifies the particular exceptions to the general broad scope of the Act noted above. This Section exempts contracts below €10,000 in value (Section 2. (1 a)). Section 2. (1 b) exempts contracts relating to owner-occupier residences of less than 200m² in area. The remainder of the Section excludes employment contracts, Public Private Partnership arrangements, and limits the application of the Act to matters relating to construction where particulars within the contract relate to matters other than construction operations. Parties to a construction contract cannot opt out of the provisions of the Act.

Contracts of employment are excluded from the Act.

² For example see Section 5 (6) regarding the programme implications of subcontractor work suspensions as particularly challenging

Commentary

The Act does not apply to small ‘jobbing’ contracts and subcontracts below a €10,000 value threshold, nor to private residential projects except for so called ‘trophy homes’ over 200m² in area. According to the Department of Public Enterprise and Reform (2011) the drafters of the 2011 Bill (and presumably the subsequent Act) considered that including small commercial and domestic residential projects within the scope of the legislation would impose a disproportionate burden on the contracting parties. (DPER, 2011) and substantially reduced the original thresholds to the €10,000 level. These exclusions, nevertheless, appear capable of producing somewhat incongruous scenarios/conditions, for example the main contractor on a typical owner-occupier project may be excluded from the operation of the Act while the ‘larger’ subcontractors would be covered by the Act but the smaller ones would not. Similarly the exclusion of PPP contracts relates to their top tier only.

Cunningham (2013) reported industry concerns, at the time of the Bill debate, regarding the two threshold exemptions, quoting sources advocating that the Act should ‘*apply to all construction contracts*’; ... and noting that ... ‘*that the residential market is where a lot of the problems arise*’. Quigg Golden (2013a) comment that the €10,000 threshold remains ‘*problematic*’ adding that ‘*there are principled objections to having any threshold at all*’. They question whether a contract initially below the €10K threshold becomes subject to the Act if variations and other contractual claims results in the contract value exceeding the threshold. Similarly, they question whether the Act applies where a main contractor’s contra-charge reduces a subcontract value below the €10K threshold with the result that the ‘*dispute could not be adjudicated upon*’, concluding that the current provisions ‘*will be sure to attract High Court litigation*’. As in other areas of life boundaries (thresholds) can cause difficulties.

Martin (2016) is of the opinion that the threshold exemptions run contrary to the Act’s original objectives; - to protect subcontractors, particularly small subcontractors. He notes, however, that in many if not most cases, these small-scale contracts would be completed within ‘*1 to 2 months*’ – a period which he relates to the UK HGCR³. Act’s 45 day exclusion period. He also raises suspicions that unscrupulous contractors might attempt to circumvent the legislation by

³ The Housing Grants Construction and Regeneration Act 1996.

splitting large contracts into packages below the threshold exemptions thereby removing the protections offered by the Act.

With regard to the residential construction threshold, Martin (2016) reports CSO 2014 planning permission statistics which record that of the 6,626 permissions granted, that 3,096 of these were for one-off housing whose average floor area was 244.8 m² – indicating that a large proportion of this type of development would be within the scope of the Act. He contrasts this provision with the current corresponding UK legislation which exempts all owner-occupier residential development.

Martin (2016) investigated the reaction of four small, four medium and one large sized contracting organisations⁴ to the threshold exemptions and discovered, somewhat to his surprise, that only one of his participants expressed concern regarding the €10,000 threshold. He reported that the other eight participants regarded the exclusion as ‘fair’ as they would not normally, if ever, work on contracts below this threshold. Martin reports that the participant who expressed concern added that ‘*he had never worked on a subcontract with an actual written contract in hand*’. Regarding the residential threshold, again, eight of the participants expressed no issue with this exclusion. Martin reports that his all of his interviewees support the inclusion of the 200m² threshold within the Act’s scope. He reports their comments that employers in such contracts are often ‘benign’ ‘self-builders’ and that they ‘almost always have the money to make these payments’ Two of the interviewees commented that the location of the project was perhaps a more important determinant of value than the 200m² threshold, one observing that ‘*working on a large city centre terrace home in Dublin ... would easily exceed the value of most 200m² self builds in any rural location, due to the complexity of this type of work alone*’. His commentary also supports the contention that many projects under €10,000 would not normally be in writing and the Act’s provisions would be beneficial in these instances.

Byrne (2017), on the other hand, found that all seven of his interviewees coming from a contracting background disapproved of the residential exemption. He quotes one of his participants “*the residential market, in particular, the one-off area can be a dangerous area to*

⁴ Martin classified his small contractor participants as those with a turnover of less than €1,000,000, medium as those with a turnover in excess of €1 million to €15 million. His large contractor is an international organisation with a turnover in multiples €100.million.

be involved in, primarily because they involve the least number of professionals, ... which means they have the least amount of guidance on how to behave with contractors, I believe this leaves contractors exposed.”

O’Connell (2014) regards it as ‘*very significant*’ that the parties cannot opt out of the Act’s provisions. She notes that where a contract falls within the definition of a construction contract that the Act’s provisions ‘*automatically apply*’, adding that if a contract ‘*fails to conform to the legislation, the provisions of the Act are automatically incorporated*’. She adds that where a contract’s provisions conflict with the Act, that the Act will take precedence. She concludes that the inability to contract out of the Act ‘*is a central feature of the legislation*’. Fenelon (2016), reinforces this point, informing us that ‘*it is illegal to say that the Act does not apply in a contract*’.

Section Three; Payments under construction contracts.

Subsections 3 (1) and 3 (2) regulate payment arrangements under construction contracts and requires these either to set out the amount of each interim payment and, the final payment, *or* provide an *adequate mechanism* for calculating the amount of these payments. The contract must also establish the payment claim date(s) or set out a mechanism for determining such dates, and must also identify the periods within which these payments must be honoured.

Subsections 3 (3) and 3 (4) identifies a ‘*Schedule*’ which applies to main contracts ‘*which do not include the subsection 3 (1) and/or (2) (above) provisions.*’ The Schedule also applies to subcontracts unless the particular subcontract contains ‘*more favourable*’ mechanisms for the subcontractor than those provided for in the Schedule. The Schedule provides that payment claims be made 30 days⁵ after the commencement of the contract and at 30 day intervals thereafter until substantial completion is achieved. The final payment claim is to be made 30 days following final completion. On short duration contracts, not exceeding 45 days, the payment claim date is to be 14 days following completion of the work. Payments become due 30 days after the payment claim date.

Subsection 3 (5) prohibits the use of ‘pay when paid’ arrangements except in the limited circumstances set out in subsection 3 (6) which involve employer insolvency.

⁵ ‘Days’ refers to calendar days – see Section 10 below for further commentary.

Commentary.

Section 3 of the Act regulates the timing of payments.

The primary objectives of the Act are to free up cash-flow within the industry by ensuring timely payment, improving communication regarding deductions from payment claims, and providing mechanisms to enforce payment entitlements. Section 3 addresses the first of these objectives by requiring an adequate payment mechanisms for main contracts and setting statutory maximum payment periods of 30 days for contractor to subcontractor, and subcontractor to sub-subcontractor payments. It may be said that this Section and the following Section Four represent core objectives of the Act.

Durack (2016) suggests that the Act may be better described as the ‘Construction Payments Act’. Employers must now set out the dates for, and amounts of, each interim and final payment (stage payments) *or* provide an *adequate mechanism* for establishing the relevant dates and calculating the corresponding payments. These provisions will require a schedule of payments to be prepared such as that illustrated in Table 1 below for many main contracts and all subcontracts.

Commencement Date Monday 1 st August 2016	
Claim Number	Payment Claim Date
1	Wednesday 31 st August
2	Friday 30 th September
3	Sunday 30 th October (in effect this would become the 1 st November as the 31 st October is a Bank Holiday)

Table 1 Schedule of Payment Dates – Adapted from Durack (2016)

The maximum statutory payments periods are set out in the *Schedule* which, while typically applying to subcontracts, may nevertheless apply to main contracts between an employer and a contractor in the unlikely event that they do not include an adequate payment mechanism in their contract. Eugene F Collins Solicitors (2013) comment that most formal contracts (i.e. main contracts) provide for set payment arrangements in any event, and Curtin (2016) is of the opinion that the implementation of Act may have little noticeable impact on payment procedures at main contract level. O’Connell (2014) notes that the legislation permits

‘employers to agree/impose periods of time for paying the main contractor which exceed those noted in the Schedule.’

Subcontracts, on the other hand, are subject to the Schedule 30 day payment intervals unless ‘more favourable’ terms are secured. What constitutes more favourable terms, is a matter of commercial judgement and may include agreements where longer payment terms are accepted in exchange for concessions such as making advance payments; or payments for materials on or off site, or reduced retention levels, etc.

Prohibition of Pay when Paid Arrangements

Section 3.5 of the Act prohibits the use of ‘pay when paid’ arrangements except in limited circumstances involving employer insolvency. O’Connell (2014) comments that *‘where a contract attempts to make a payment conditional on the actions of a third party, such provision is deemed ineffective.* Arthur Cox Solicitors commenting in 2012 described the prohibition of all conditional payment provisions as a *‘key change’*, commenting that

This provision will bring to an end to the process whereby the risk of a default by an employer is passed on to subcontractors. The legislature has sought to deal with the issues in an expansive fashion, hence the language used in the provision is very broad. Not only does this language prohibit “pay when paid” and “pay when certified” [*see below however*], it also extends to instances where a contractor might seek to make payment conditional upon securing financing or funding, or a third party satisfying some other criteria i.e. the reaching of a milestone on a programme. However, this provision will not apply in an insolvency situation where the “other person” has become insolvent/bankrupt.

The exception to the prohibition of pay-when-paid clauses arises in the event of a liquidation of an employer within the contractual chain. This measure avoids the prospect of, for example, the building client becoming insolvent but the main contractor remaining bound to pay his/her subcontractors, in full, for the work done during the interim. The measure, therefore distributes the insolvency risk more widely among the supply chain rather than concentrating it solely on the main contractor. Following the winding-up of the employer’s affairs the contractor typically becomes an unsecured creditor and may only be able to recover a small proportion, if indeed anything, of the outstanding value of the work. Money recovered from the liquidator would then be distributed pro-rata among the affected subcontractors and suppliers.

Politicians during the 2012-2013 Oireachtas debates described the prohibition of pay when paid practice as *‘a significant change’* a *‘breakthrough’* and an effective response to a *‘serious*

power imbalance in the sector”. However, some scepticism was also expressed: ‘*We can make legislation, but enforcement and breaking what has been a culture for decades ... will be a bigger job.*’ (Cunningham, 2013)

O’Higgins (2014) comments that conditional payment provisions are currently ‘*widely provided for in contracts within the Irish construction industry.*’ She explains that prohibiting this practice will, effectively transfer the risk of funding the project onto the main contractor. In this regard, in 2012, the Society of Chartered Surveyors Ireland (SCSI) raised a cautionary note on the ‘pay when paid’ prohibition. The Society claimed that main contractors typically provide 20% to 25% of the project finance with the balance being funded by subcontractors and suppliers. They claimed that banning pay when paid clauses, would force contractors to pay subcontractors before they, themselves, would be paid. Whilst the Society suggested that prompt payment of contractors is laudable, it warned that the requirement to fully finance projects could introduce a barrier to entry into the industry, or might limit smaller companies’ ability to compete with larger contractors.

Pay When Certified Arrangements

Despite the apparent intentions of the drafters of the Act to bring to an end the long-standing conditional payment practice, questions, nevertheless remain regarding whether the current wording of the Act achieves this end. O’Connell (2014) enquires ‘*Whether clauses which provide for “pay when certified” provisions are acceptable, on the current wording, it is considered likely they will be permitted, assuming the contract has been drafted appropriately.*’ O’Higgins (2014) comments that main contractors may attempt to limit their exposure to the risk of fully funding the project by making ‘*all payments to its sub-contractors conditional on the receipt of a certificate, in respect of the relevant works, either from its employer*’ or the contract administrator. She comments that the Act’s wording is ‘*broadly similar*’ to the corresponding UK HGCR Act, outlawing ‘*pay-when-paid provisions ... but not expressly outlawing pay-when-certified provisions*⁶. She notes that the wording of the earlier Construction Contracts Bill 2010, appeared to outlaw pay-when-certified provisions but was

⁶ In the English *Durabella* case, the judge said the provisions of the HGCR Act, concerning the exclusion of pay-when-paid clauses, did not affect the position of payment on conditional certificates (i.e. pay-when-certified).

changed in the Act's final wording. She concludes that the final wording '*supports the view that the Act does not outlaw pay-when-certified provisions.*'

Section Four Payment Claim Notices

Section 4 regulates the procedures for claiming and making payment. Under this Section the claimant must submit a *payment claim notice* to their employer within five days of the scheduled payment claim date. The notice specifies the amount claimed, identifying the relevant period or work stage, the subject matter, and a detailed break-down of the claim. The default mechanism for calculating the payment amount is set out in the Schedule and represents the gross value of the work at the payment date less the amounts already paid. If the employer disagrees with the claimed amount he/she must deliver a '*response to the payment claim notice*' to the claimant within 21 days of the payment claim date specifying the proposed payment amount, the reasons for the difference, and the relevant calculations supporting the proposed payment. If these matters are not settled, the amount stated in the response notice becomes payable on the scheduled date for payment.

Where a reason for the difference is due to an alleged breach of contract the response must identify when the loss and damage was incurred, its particulars, and calculations for each such claim.

Commentary

Section 4 of the Act deals with the administrative procedures involved in making payments.

The formalised payment claims notices and response notices required under Section 4 of the Act replace the widely practiced ad-hoc and informal approaches to claiming payment. The new procedures introduce a standardised, uniform approach to manage and administer the payment process. Figure 1 below identifies the **maximum** periods for submitting claims and issuing notices in compliance with the Act.

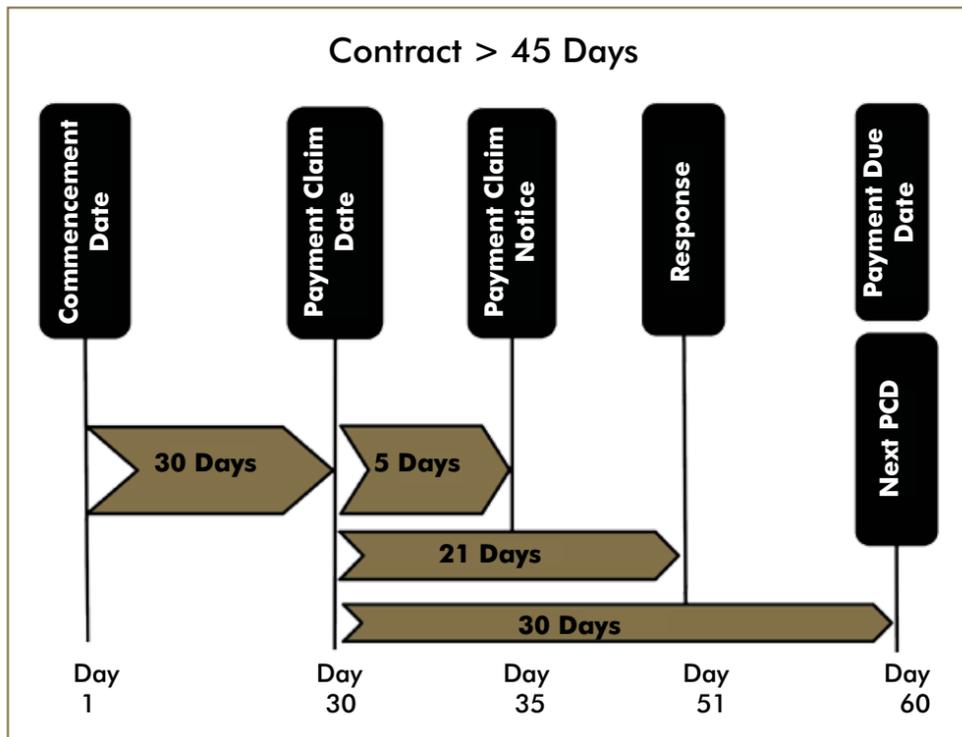


Fig 1 The Schedule: Default Administration of Payment Procedure under the Schedule to the Construction Contracts Act 2013 (Source Quigg Golden, 2016)

Table 2 below develops the previous Table (in Section 3) and includes the deadlines for Payment Claim Notices, Responses and Payment Dates

Commencement Date 1/Aug/2016		Monday 1st August 2016		
Claim Number	Payment Claim Date	Payment Claim Notice Date	Response Date	Payment Date
1	Wednesday 31 st August	Monday 5 th September	Wednesday 21 st September	Friday 30 th September
2	Friday 30 th September	Wednesday 5 th October	Friday 21 st October	Sunday 30 th October
3	Sunday 30 th October	Friday 4 th November	Sunday 20 th November	Tuesday 29 th November

Table 2 Schedule of Payment Dates – Adapted from Durack (2016)

Applications for payment are now to be presented in the form of a ‘payment claim notice’. These provide employers and/or contract administrators with the prescribed information and calculations on which to base their payment to the contractor. If the employer agrees to the amount claimed the contractor will be paid *in full* at the end of the 30 day cycle. Hughes (2016)

regards these notice requirements as ‘*very important*’ and explains that their procedures ‘*must be strictly followed when pursuing or defending a payment claim, otherwise, the claim or defence thereof will fail.*’ He stresses that the ‘*notice is clear, because if it is not, the party claiming the amount may not be able to rely on the notice in circumstances where it alleges that the other party did not deliver a proper response to the payment claim notice*’ In this regard, the Department of Jobs Enterprise and Industry has published a sample payment claim notice and response to payment claims notice are available at the footnote link below.⁷

Hussey (2016) reinforces the importance of the response to claims notices, warning employers that ‘*failure to respond as required by Section 4 could result in the paying party having to pay the full amount claimed by the executing party no matter how outrageous the claim.*’ He adds that the contractor is entitled to payment, provided the claim conforms to the Section 4 procedures and that the employer must respond if he/she disputes the claimed amount. He later refers to the practice known as “smash and grab” adjudications where a contractor, usually, towards the end of a project lodges a ‘*very substantial claim*’ on the chance that no response will be made within the twenty-one day period. Hussey warns that ‘*if he gets no response within that period he is then entitled to payment and is in a very strong position to enforce payment through adjudication if necessary.*’

The amount payable depends on the individual contract’s particulars, whether, for example, the contract provides that unfixed materials on, and/or off site may be included in the valuation. Durack (2016) sets out various heads of claim which a payment claim notice might include: work duly executed; an apportionment of preliminaries including fixed cost items and time-related costs; adjustments of provisional sums and provisionally measured work; adjustments of prime cost sums; adjustments for varied work; prolongation or acceleration claims resulting from delay events for which the client bears the risk; pre-agreed payment for bespoke materials off site; contractor’s design fees, expenses arising from the contractor’s right of suspension,

⁷<https://www.djei.ie/en/Search/?cof=FORID:11&cx=009364059844111358480:7y3ck43wrts&ie=UTF-8&q=Payment%20Claims%20Notice>

<https://www.djei.ie/en/Publications/Publication-files/Form-2-Response-to-Contested-Payment-Claim-Notice.docx>

and fluctuations. The contract may also permit deductions relating to liquidated damages and retention to be made. Although it would be unusual for typical claims to contain all these headings, it can nevertheless be sensed that compiling, and indeed checking, detailed progress claims is a time-consuming task.

Where the employer contests the amount claimed, he/she must respond with a *response to a payment claim notice* (also known as a withholding notice, (O'Connell, 2014) or a 'pay-less' notice⁸ (Quigg Golden, 2016)). Hughes (2016) notes that in the UK, failure to issue a withholding notice challenging the claimed amount or delivery of a notice which does not have the required contents '*results in the amount becoming due and immune from challenge.*' He adds that the employer '*will have to pay immediately and wait for the next payment cycle to contest the next amount claimed*'. He concludes Irish courts are likely to follow UK precedent and that this may cause serious cash flow problems particularly during the final stages of a contract.

Curtin (2016) comments that while this process might appear to enable the payer to decide what amount is to be paid, he notes that the response notice process will necessitate a '*better scrutiny of interim valuation assessments*'. Mulrean (2014) notes that contractor may dispute the withholding notice by referring the matter to adjudication. The provision affording the payer the opportunity to set-off money from the (sub)-contractor's payment claim in respect of counter-claims for loss/expense and/or damage arising from breaches of contract or '*any other claim*' may present particular difficulties in this regard.

Knowles (2002), commenting on the prohibition of pay when paid arrangements following the enactment of 1996 UK HGCR Act, hinted that some main contractors may have retained their pay when paid clauses leaving subcontractors to complain that their contract does not comply with the Act.

Section Five Right to suspend work for non-payment

Section Five of the Act establishes a contractor's right to suspend work where an employer fails to pay *in full* the amount stated in the Payment Claim Notice, unless modified by an effective Response to a Payment Claim Notice, by the due date. This right is subject to providing at least seven days' notice in writing, stating the grounds for the threatened

⁸ This is the term used in the UK for the corresponding notice under the HGCR Act

suspension. The notice may be delivered no earlier than the day *after* the payment was due. Work may not be suspended after payment has been received or where the disputed amount has been referred to adjudication under Section 6(2) of the Act.

Where a work suspension(s) causes a main contractor to fail to complete the works on time, the period of the suspension is disregarded for the purposes of the construction programme, *'unless the suspension of work is unjustified in the circumstances'*. Subsections 5(5 and 6) set out similar arrangements for subcontracts which are delayed because of a suspension by the main contractor or other subcontractor(s) acting as employers.

Subsection 5.7 affirms the rights of the various contracting parties to seek damages for losses caused by an unjustified work suspension.

Commentary

'Work stoppages will almost inevitably cause delays and disruption to a construction project, these can become extremely costly and are almost always avoidable'. (O'Sullivan, B. 2014, p.2)

Work suspensions are unusual on construction contracts.

Hughes, Champion and Murdoch (2015) explain that under common (and by extension, Irish) law a contractor or subcontractor had no right to suspend work on a temporary basis on the grounds that the employer was in breach of contract, (e.g. by failing to pay). They add that the (sub) contractor had to continue working but retained the right to claim damages **unless** the employer's *'breach was sufficiently serious to justify [the (sub) contractor] in terminating the contract altogether.'* They add that, *'unless the contract specifically provided for suspension of work as a remedy for non-payment'* [as does the RIAI and Public Works Contract Forms PW-CF 1-6], *'a contractor who suspended work on the ground of not having been paid would be guilty of a breach of contract in failing to maintain regular and diligent progress'*.

The common law position has now been reversed by Section 5 of the Act. O'Connell, (2014) considers the introduction of the right to suspend work in the event of non-payment or underpayment to be a *'very significant statutory entitlement'*. Translated loosely, the Section 5 provisions mean *'we will not finish the job until you pay us'*. This is a powerful threat, and is not one to be made lightly by aggrieved contractors. O'Sullivan, B. (2014) reports that, in

general, the Section 5 provisions have been well received, however the provisions are not without their criticisms. He reports 2013 RICS research in New Zealand which scored the effectiveness of the right to suspend work at 2.87 out of 5; with 17% rating the provision as not effective at all. The research also revealed that participants were reluctant to utilise the provisions due to the negative impact suspensions have on business relationships.

Collins (2013), Mulrean (2014) and O'Connell (2014), commenting on the requirement for the contractor to resume work once the disputed payment has been referred to adjudication, all consider that this measure '*has the potential to dilute the effect of a threat of suspension ... [and a] subcontractor would have to continue works whilst the adjudication process was underway*'. Martin (2016) notes that a main (or sub) contractor '*cannot simply walk off site*' if they are not paid on time or in full. Aggrieved contractors must comply with the seven days written notice requirements following the payment due date, stating the reasons for the threatened suspension.

A contractor/subcontractor is entitled to extra time to complete the works ***provided the work suspension is justified***. In these instances the employer/employing contractor is likely to become liable for the additional costs incurred by the aggrieved contractor/subcontractor.

Extra time, however, will ***not*** be granted where a contractor/subcontractor is late in completing the work because one (or more) of its subcontractors has justifiably suspended its part of the work. In these instances the offending contractor/subcontractor may be liable for the financial losses suffered by the employer and *other members* of the supply chain resulting from the delay and disruption caused by the suspension. This could give rise to significant additional costs.

The question remains, nevertheless, as to whether contractors are prepared to exercise their Section 5 rights and suspend their work. O'Sullivan, B. (2014) investigated this particular aspect of the Act. He quotes Sheridan Gold's (2009) comment that '*there are various factors which may make suspension of work an unattractive option. Where the paying party can pay but is not paying there is likely to be some reason in dispute. This means there is a risk that the party undertaking the work may turn out to be wrong if it pursues the suspension route.*' O'Sullivan points out that damages in these instances may be '*heavy*' and must be considered '*thoroughly before proceeding with a suspension*'. His review of work suspensions in the UK suggests that suspension is used more often as a threat rather than a fact. It is not difficult to see a contractor's bluff being called in these situations.

O'Sullivan's (2014) research comprised a survey of design team consultancies, professional and public bodies, and contracting organisations; he received 93 responses to his survey. He also carried out six semi structured interviews; three with senior officials of main contracting companies and three with senior officials in subcontracting organisations. The main findings of his research indicate that:

- The majority of survey respondents (57%) had *never* experienced a work suspension.
- More respondents, 30 out of 51, *disagreed* that the suspension provisions are biased in favour of the subcontractor.
- There was a mixed response regarding the practicality of suspending the work, 31 agreed that the provision was practical, 40 neither agreed nor disagreed, and 25 disagreed.
- Regarding suspending work, 11 respondents replied that they would suspend immediately in the case of a non-payment; 43 would suspend if non-payment became a regular occurrence; 37 would suspend only if the situation was deteriorating drastically, while only 5 would never suspend.
- 19% of the respondents have actually suspended work.
- In the event of non-payment, more of the respondents (54) would revert to adjudication than suspend the work (43).
- A very large majority (82) agreed that suspensions damage working relationships, 10 disagreed and 4 neither agreed nor disagreed.
- A larger majority (85) felt that suspension would adversely affect future work prospects with the client.

O'Sullivan (2014) concluded that work suspension is a high-risk response from subcontractors, particularly from those who depend on repeat business from a limited number of main contractors. Martin's (2016) research supports O'Sullivan's findings in that participants would only use suspension as '*a last resort*' and notes that '*they would need to be prepared to never work for that main contractor again ... [and] ... using this option would destroy any future working relationships*'.

Rooney (2016) comments that the seven day notice of suspension requirement is much shorter than the periods currently included in the Irish standard forms of contract and sub-contract in common use. Employers, consultants and contractors may be unaware of this whirlwind timeframe at present and should be reminded of the urgency of dealing with a notice to suspend

the works. He recommends that the drafters of the standard forms of contract co-ordinate their suspension provisions with the Act in order to prevent potential confusion regarding this matter.

Section Six; Right to refer payment disputes to adjudication.

Sections Six of the Act establishes a right of the parties to issue notice at *any time* to refer a *payment disputes* for adjudication. Ideally, the parties will be able to agree a mutually acceptable adjudicator, or choose a candidate from the Ministerial adjudication panel within the five-day period following the serving of the notice. Where the parties cannot agree on an appointment, the chair of the Ministerial adjudication panel will nominate an appointee. The serving party must then refer the dispute to the adjudicator within seven days of his/her appointment with a copy of the referral and supporting documentation to the other party. The decision of the adjudicator *shall* be delivered within a 28 day period from the date of the referral, unless a longer period is agreed, (See Fig 2 below). The 28 day period may, however, be extended by a further 14 days by the adjudicator with the consent of the *servicing* party. The adjudicator must act impartially in conducting the adjudication and must comply with the Code of Practice which has been published by the Minister for use in relation to the Act. Nevertheless, the adjudicator may use his/her own initiative to investigate the dispute(s).

Subsection 6 (10) provides that '*the decision of the adjudicator shall be binding until the payment dispute is finally settled by the parties or a different decision is reached on the reference of the payment dispute to arbitration*' or litigation. Where the parties accept the adjudicator's decision it becomes binding and the decision becomes enforceable by leave of the High Court and can be relied upon in other related legal proceedings. Clerical errors and 'typos' contained in the decision, however, are open to correction.

Adjudicators are not liable for their decisions, unless these are reached in bad faith. Each party bears its own costs and pays the adjudicator's cost in accordance with the decision. An adjudicator may resign at any time or have his/her appointment revoked by agreement of the disputing parties. In both cases the adjudicator's reasonable expenses are to be paid by the disputing parties.

Commentary

[W]here an adjudicator decides that a payment is due, that payment must be made.’ O’Higgins (2013b)

‘Adjudication may be described as a process whereby an independently appointed neutral, decides the issues in dispute within a predetermined, usually very short period of time’ (Engineers Ireland, n.d).

‘Adjudication is not (intended to be) arbitration lite.’ (Hutchinson, 2014)

Arthur Cox Solicitors (2014) comment that “*Adjudication provides a speedy and cost-effective means of dispute resolution, with the decision of the adjudicator becoming binding unless and until it is overturned either by the courts or by an arbitrator, depending on the agreed dispute resolution procedure within the particular construction contract.*” Mr Justice Frank Clarke (2014) comments that ‘*the decision is binding only in the short term sense of requiring specific payments to be made.*’ The option, nevertheless remains open for an aggrieved party to subsequently refer the dispute to arbitration or litigation.

O’Higgins (2013) commenting on the provisional nature of the decision, suggests that adjudication may result in ‘*rough justice*’ but she adds that it ‘*provides the parties with an answer to their differences, and will, hopefully, allow cash to flow, and may well finally resolve the dispute.*’ She identifies the support of the courts as an essential element in the Act to ensure that the adjudicator’s decisions can be promptly enforced.

The Act’s provisions may be said to adopt ‘a pay now argue later’ approach, which operate a limited 28 day timetable from referral and is designed to deliver a swift decision, see Fig 2 below. This period may be extended by a further fourteen with the referring party’s consent. A further period may be sanctioned if both parties are agreeable.

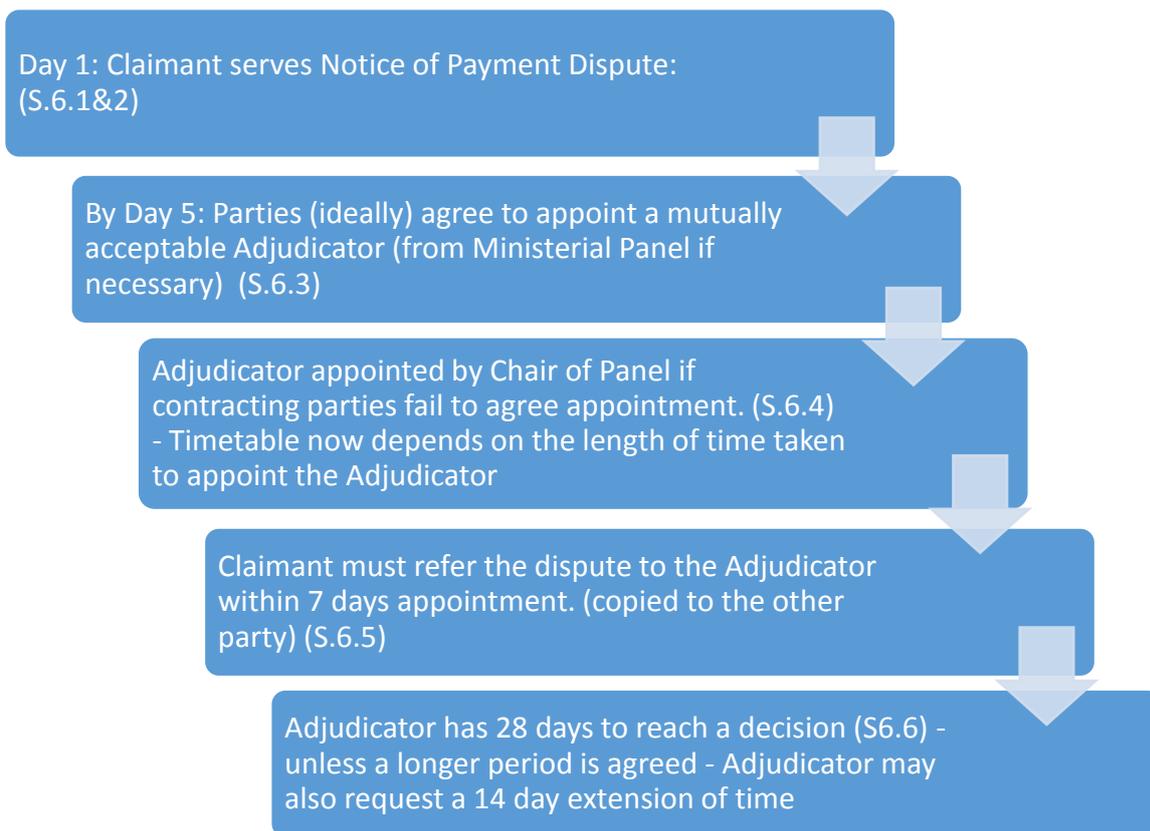


Fig 2 – Default Timetable for Adjudication under Section 6

Statistics have been published regarding the performance of adjudication in the UK, originally by the Adjudication Reporting Centre at Glasgow Caledonia University and more recently by Construction Dispute Resolution (CDR). The latest edition of *Construction Dispute Resolution Report No 14 – April 2016* (Milligan and Cattanaach, 2016) reveals that in the period 2014 to 2015, 439 adjudications were reported to CDR. Almost half of the adjudications (49%) involved ‘payment’ or ‘withholding / pay less’ disputes. Approximately 60% of adjudications concerned sums less than sums less than £100,000, with the highest occurrence frequency (over 25%) involving sums between £10,000 and £50,000. The Report indicates that most disputes were between sub-contractors and main contractors. A large proportion (80%) of adjudications were conducted on a documents only procedure. 52% of decisions were given within the prescribed 28 day period, a further 32% within the extended 28-42 day period, while 16% took more than 42 days to decide. 63% of appointments led to a decision, a further 25% were settled by the parties, 6% were abandoned, while the remaining 6% were ongoing. 25% of adjudicator appointments were challenged. The Report also reveals that claimants were successful in 48% of cases, respondents in 22%, and split decisions were given in 30% of cases. The most common hourly fee charged by adjudicators was in excess of £200 per hour.

Reports from the UK indicate that adjudication has a high success rate in resolving disputes. Hughes et al (2015) report Gaitskell's (2005) claim that over 80% of adjudication decisions were accepted by the parties, and Uff's (2005) opinion that '*well over 90%*' were settled using the adjudication approach. These success rates appear to be similar to those achieved by certain conciliators operating in Ireland (Bond, 2014). Mr Justice Frank Clarke (2014) makes the following comments which may explain the success of adjudication in settling disputes. '*If the parties are inclined to think that, by and large, adjudicators get things right, will an affected party really put a lot of time and effort into a major arbitration to second guess what happened in an adjudication? ... Therefore, to win an arbitration in substance, an affected party will have to do better than the adjudicator's award and equally, to lose an arbitration, a party will have to do worse than that same adjudicator's award.*'. An adjudicator's decision, therefore, is often a powerful indicator of the likely outcome of an arbitration or litigation action.

The right to seek adjudication under the Irish Act does not prevent the disputing parties from utilising other non-binding or consensual forms of dispute resolution (e.g. conciliation). Similarly the Act does not prevent the parties referring the dispute to finally-binding tribunals such as arbitration or litigation. Quinn (2013) argues, however, that litigation and arbitration are tedious and expensive processes and that contractors do not wish to have funds tied up for an extended, indefinite period while awaiting a resolution. He concludes that '*adjudication offers a speedy resolution of a dispute which will allow both parties to recover, or pay damages, but more importantly progress with the project*'.

From the specialist subcontractor's perspective Kelly (2016) argues that adjudication is not a '*panacea*' for all construction disputes but he argues that it is '*a big improvement.*' He remarks however, that the Act's provisions '*do not mean that the floodgates are opened for adjudications of every dispute, and suspending works on multiple sites.*' He argues, that adjudication is a quicker and cheaper form of dispute resolution and that the Act's procedures should foster better behaviour among contracting parties, adding that the protections/sanctions contained in the Act may persuade parties to come to the table. Kelly nevertheless urges claimants to exhaust dialogue before referring disputes to adjudication where decisions can be unpredictable, particularly in complex disputes. In particular he advises against the tactic of '*ambushing*' adjudicators with multiple simultaneous disputes or with complicated convoluted disputes aimed at forcing a rushed decision from the adjudicator. He also disapproves of the practice of submitting exaggerated claims, and the failure of the parties to acknowledge their

own weaknesses in a case. He notes that adjudicators ‘*may find a route to provide a fair decision*’ in these circumstances.

Quinn (2013) and Curtin (2016) raise questions regarding the reliability of a 28 day process. Quinn voices concerns over whether adjudicators can reach safe decisions within the timeframe, particularly on complicated disputes. Curtin reports (in Byrne, 2017) instances of adjudications which have lasted over 100 days and maintains that the process ‘*isn’t cheap*’ – (it is suggested that this is likely to be so on extended or complicated adjudications.) Curtin also refers to challenges to the adjudicator’s appointment as a means used by paying parties to delay the process in order to gain more time to prepare their response/defence. He also voices concerns regarding ‘rough justice’. Waldron (2016) notes the risks associated with tight timeframes noting that of necessity these lack full procedure and safeguards, and present difficulties in developing detailed arguments. Critics of the approach may argue that swift, but faulty, decisions may lead to a miscarriage of justice, particularly if the adjudicator’s decision remains unchallenged by the weaker party.

A serious abuse of non-binding dispute resolution techniques occurs where the paying party, while engaging in the process, has no intention of paying. This approach is intended to intimidate the claimant by stalling payment as long as possible and by escalating the cost of resolving the dispute at each stage in the process. The objective is to force the claimant to abandon the process. Mr. Justice Frank Clarke (2014) comments: ‘*if someone does not want to pay and there are ways in which they can delay the system, they will try to delay the system. That is a given. ... that system should not allow people who have no real basis for not paying what the adjudicator has decided, to delay payment by stringing out the process and, thus defeating the whole point of the timely payment principle*’ In these instances adjudication will *add* to the overall cost and time taken to resolve the dispute. Critics of non-binding resolutions may argue that ‘*it is soft justice, nothing more than an additional layer of cost in the litigation stream. ...*’ (Law Reform Commission, 2010).

Quinn (2013), on the eve of the publication of the Act, carried out a survey regarding the adjudication provisions of the Construction Contract’s *Bill*, which received 51 responses from: dispute resolution practitioners (32%); main contractors (24%); other construction professionals (22%); representatives of public bodies (13%) and subcontractors (9%). His survey revealed that there was a strong preference for consensual dispute resolution

approaches, particularly negotiation and conciliation. His respondents ranked negotiation, mediation, conciliation, in that order, as the three most effective resolution approaches; while adjudication, arbitration and, finally, litigation were considered to be the least effective methods. The survey revealed that the majority (75%) of disputes involved clients and main contractors, while main contractor versus sub-contractor dispute (18%) made up most of the balance. The respondents ranked the reduced time and cost of resolving the dispute as the most important reason for the introduction of adjudication provisions. Over two thirds of the respondents had no actual experience of adjudication, but of those who had, all bar one, expressed their experience of the method as 'positive'. The primary aim of Quinn's research focussed on whether adjudication would be successful in resolving payment disputes. His survey revealed mixed opinions on the matter: 5.5% replied that decisions would 'always' be referred to arbitration or litigation, 41.8% felt that the majority of decisions would be referred, 43.6% that a 'minority of decisions would be referred,' and 1.8% replied that decisions would 'never' be referred. The remaining 7.3% 'other' classification produced the following pertinent insights:

- *'Small disputes will stop at adjudication but where large sums are involved, parties will proceed to arbitration/litigation.'*
- *'Unless very large sums are involved the potential liabilities for costs of arbitration/litigation will nearly always bring into focus the benefit of reaching a settlement.'*

In concluding the survey Quinn's respondents were asked for their opinion of the proposed legislation. 21% replied that it legislation would be 'very effective'; 49% that it would be helpful; 12% of little use; 14% that it would make no difference, and 4% claimed it could be 'damaging'. One respondent commented *'the existing arrangements for conciliation in all the standard forms of contract are, in my experience, very successful and definitely superior to what is now proposed. Their replacement by the proposed adjudication would be damaging'*.

Hession (2014) investigated attitudes of eight experienced construction professionals, regarding the effectiveness of the adjudication provisions of the Act. He found that the participants were *'not entirely satisfied'* with conciliation, the 'incumbent' initial dispute resolution procedure required by the RIAI and Public Works Forms of Contract. The interviewees noted the lack of finality, the exposure to the use of delaying tactics, and the

susceptibility to incur significant costs even in advance of the hearing as particular flaws associated with conciliation. They referred to conciliation as *'toothless'*, *'lasting 18 months without being resolved'* and *'costing €500,000 to date'*. With regard to the implication of €10,000 exclusion threshold depriving subcontractors of the recourse to adjudication, most of the interviewees suggested that the exclusion would *'cause issues'* and should be removed. On the other hand they were *'in the main ... happy that adjudication under the Act related to payment-only disputes'*. Regarding the 28 day timeframe for adjudication decisions *'all participants agreed that the timeframe was adequate'*. The interviewees *'generally ... felt that business relationships could withstand the impact of a dispute due to the short time frame involved, however fears of being 'blacklisted' and suffering 'afters' emerged during the interviews. The interviewees held mixed opinions regarding whether the non-binding nature of adjudication decisions weakens the Act's effectiveness, with the majority suggesting that it did not weaken it. Individual participants commented that the non-binding nature of the process is, in itself, a positive and provides a 'good early measure' of the strength of their case, while others pointed out the potential to refer to arbitration/litigation to delay resolution as 'water[ing] down the process somewhat'. With regard to bearing their own costs of the adjudication, the interviewees were unanimous in agreeing that costs are a barrier to action. 'Costs ... inhibit parties from taking a case that they could potentially win.'*

Martin (2016) reports criticisms of the wording of the Act restricting adjudication to *'any dispute relating to payment'*; as being too narrow. He contrasts this with the more inclusive wording of UK HGCR Act which provides for adjudication on *'any dispute relating to a construction contract'*. Senator Feargal Quinn, the sponsor of the Act, in an address to students of the Dublin Institute of Technology (28th November 2013), when questioned on this point, remarked that practically all disputes involve some disagreement over payment, indicating that he believes that the legislation is not over restrictive.

William Fry Solicitors (2015) note that parties bear their own legal and other costs in connection with the adjudication. They add that *'given that the timescales are short, adjudication is generally considered less expensive than prolonged litigation. This aspect has, nevertheless, caused concern among contractors (Hession, 2014 above). A quantity surveyor participating in Hession's investigation had this to say:*

"If costs aren't following the event, it is making it (pursuing or defending a claim) prohibitive. ... [And] will prevent a lot of adjudications going forward. ... For example

if I am right in not paying a subcontractor, and he is putting me to the expense in having to defend a claim, I will incur costs in addition to allocating my own time to an issue where I shouldn't have to deal with it. Why should I have to pay to get justice, if I am not wrong?

Section Seven; Right to suspend work for failure to comply with adjudicator's decision.

This Section provides a contractor with the statutory right to suspend work if the amount due from the adjudicator's decision is not paid *in full* within seven days of the decision. The administration and enforcement of this provision echoes that in Section Five above, requiring that seven days advance written notice of the intention to suspend the work must be delivered to the paying party stating the grounds for the threatened suspension. As with Section 5, a contractor/subcontractor must return to work once they are paid the amount due **or** if the dispute is referred to arbitration or litigation. Likewise, where a suspension of work is justified, the period of the work suspension will be disregarded as a cause of delay in failing to complete on schedule.

Commentary

The Law Society of Ireland (2016) points out that the adjudicator's decision '*is payable immediately, irrespective of the fact that the dispute may then be the subject matter of arbitration or litigation*'. If, however, the payment is not made the remedy is an entitlement to suspend the work, - it is suggested that in practice suspensions are more likely to occur under this Section of the Act than under Section 5. Hession (2014) comments that effectively it will be 14 days after the adjudicator's decision before a party can suspend work on site. O'Higgins (2014) regards the right to suspend in the event of non-payment of an adjudicator's award as '*very important*'. She argues, however, that the protection is '*emasculated*' by the requirement to cease suspension if the dispute is referred to arbitration or the courts. She describes the issue of enforcing an adjudicator's decision that has not been complied with as '*very uncertain*', and it is possible that the objective of providing a speedy decision may be '*undermined by a much longer process for enforcing that decision.*' Byrne (2017) supports this view, noting that the suspending party would be '*out of pocket*' for the period that the decision remains unenforced.

The ability of the non-paying party to prevent a contractor from suspending their work, or requiring them to return to work, by referring the dispute to arbitration or litigation in effect means that the contractor is forced to complete the works despite having not been paid. This is a far from satisfactory outcome. Regardless of the escalation in the cost of resolving the dispute,

there is the additional risk that the contractor may be involved with an employer who cannot pay rather than with one who will not pay. Contractors who complete works for near-insolvent employers may be unable to recover payment for work they have carried out – an example of ‘throwing good money after bad’.

The Act is silent on the matter of how long a suspension may last for and does not deal with issue of the ability to determine a contract in the event of extended suspensions. Standard forms of building contracts typically provide a definitive timetable for termination in these circumstances. This lack of clarity may lead to situations where contractors remain in limbo regarding what action to take in the circumstances.

Section Eight; Selection of panel of adjudicators.

Section Eight provides for the establishment and membership of a Ministerial panel of adjudicators. Appointees to the panel hold a five-year tenure which may be subsequently renewed. The Minister may revoke an appointment and or a member may resign his/her appointment. Appointees must have sufficient experience and expertise in resolving construction payment disputes and will be

- ‘A registered professional as defined in section 2 of the Building Control Act 2007
- a chartered member of the Institution of Engineers of Ireland;
- a barrister;
- a solicitor;
- a fellow of the Chartered Institute of Arbitrators;
- a person with a qualification equivalent to any of those specified above obtained in any EU Member State.’

Commentary

Hession (2014) reminds us that the disputing parties are not obliged to select adjudicators from the panel, but adjudicators, where selected by both parties, must comply with the requirements of the Act.

Section Nine; Code of practice for adjudication.

Section Nine provides that the Minister may publish a code of practice governing the conduct of adjudications.

Commentary

William Fry Solicitors (2016) comment that a version of the Code published on the 5th July 2016 was superseded by the current version published on 25th July 2016⁹. They summarise the Code as addressing the procedures for the appointment of an adjudicator; deadlines for the reaching of decisions; the allocation of the adjudicator's fees, and the adjudicator's responsibilities. They note that '*decisions must be in writing and unless agreed by the parties, include reasons.*' Adjudicators may also invite written submissions and hold oral hearings where appropriate. The Code requires adjudicators to be independent and impartial and be satisfied that no actual conflict of interest exists. They should be competent to determine the issues and able to give the adjudication the time and attention that the parties are reasonably entitled to expect. O'Sullivan, G. (2014) comments that the Code permits the adjudicator to:

- Request any reasonable supporting and relevant documentation;
- invite written submissions and evidence from either party;
- meet jointly with the parties;
- carry out site visits, inspections and tests with permission;
- appoint other advisors and experts, with notice to the parties, and
- give direction on the timetable for the adjudication and set deadlines to the length of submissions etc.

Section Ten; Delivery of notices, etc.

Section 10 deals with administrative processes explaining how notices are to be issued. Notices may be delivered by post or by any other effective means. When a notice is due to be delivered on a Saturday, Sunday or Bank Holiday such notice is deemed to be valid when it is communicated on the following working day, typically a Monday.

⁹ Department of Jobs, Enterprise and Innovation (2016), *Code of Practice Governing the Conduct of Adjudications under Section 6 of the Construction Contracts Act 2013* <https://www.djei.ie/en/Publications/Publication-files/Code-of-Practice-Governing-Conduct-of-Adjudications.pdf>

Comment

The Act is otherwise silent on whether ‘days’ refers to calendar or working days. The Section 10 provision indicates that calendar days are the determinants for the various dates identified by the Act.

Section Eleven; Expenses;

The Oireachtas shall pay the Ministers expenses. This provision requires no further comment.

Section Twelve; Short title and commencement.

Section 12 identifies the citation for the Act and provides for its commencement. This provision is standard and requires no further comment.

Implications of the Act for the Quantity Surveyor.

Quantity surveyors are relied upon to administer the payment arrangements of their contracts in a fair and professional manner by clients, colleagues and contractors. Interim valuations should, therefore be carried out promptly and accurately in order to ensure that contractors are properly paid, and cash-flow difficulties are minimised. The surveyor plays a key role in the payment process in recommending the amount to be paid to the contractor. It is important for surveyors to be aware of and understand the Act’s terms and possess the necessary skill to administer the contract properly. Failure to carry out their contractual duties or to perform the role in an impartial manner not only creates unnecessary difficulties throughout the supply chain but can also damage their professional reputation. Breaches of their contractual and statutory obligations may, in certain instances, lead to legal proceedings.

The trend towards the professionalization of the industry, evident within recent construction related legislation and reform measures such as the Public Works Contracts, is continued under this Act. The Act imposes a much greater emphasis on effective and efficient contract administration procedures than has previously been the case, particular at the subcontracting levels of the supply chain. Brian Quinn in a lecture to quantity surveying students in Dublin Institute of Technology (February, 2017) pointed out that delayed payment is no longer solely a breach of contract, - it is a breach of statute and as such has entirely different implications. He described the additional administration as ‘a big step up’ for quantity surveyors.

The Consultant QS (Tier 1 Contracts)

The QS should clearly communicate to the employer, design team and contractor what they need to do in order to comply with the Act

Regarding the payment provisions of Sections 3 and 4 of the Act, ‘tier one’ contracts between the building client and the main contractor are, with the possible exception of very low value and ‘jobbing’ contracts, characterised by the use of standard forms of building contract or purposely drafted ‘bespoke’ contracts. Such contracts invariably contain detailed ‘mechanisms’ relating to the administration of payments, and as such qualify as an ‘adequate mechanism’ for the purposes of the Act. As a result the Section 3 and 4 provisions will apply only in very isolated cases. Private sector building contracts are typically arranged on the basis of the RIAI Standard Form of Building Contract (currently the 2012 issue). Public sector projects are entered into using one of the suite of the GCCC Public Works Contracts, such as PW-CF1 (current version 2.1 - 28th June 2016).

The RIAI contract establishes a default 28 calendar day payment cycle which is initiated by the contractor. RIAI Clause 35 (b) relating to the Section 3 and 4 requirements of the Act reads:

(b) At the period of Interim Certificates named in the Appendix the Contractor shall (subject to Clause 16(c) of these Conditions) on production of a detailed progress statement be entitled to receive in five working days unless otherwise stated in the Appendix a certificate from the Architect of the amount due to him from the Employer, which certificate shall include any amounts allowed in respect of sub-contracts and the Architect shall specify and show separately the amount (if any) allowed in respect of each Nominated Sub-Contractor. Each certificate shall be honoured by the Employer within seven working days of presentation of same to him by the Contractor. If the amount certified differs from the progress statement submitted by the Contractor the Architect, on request, shall give the Contractor an explanation of the difference.

The provisions of the RIAI contract conform to the requirements of the Act, provided the various participants perform their roles accordingly. The five *working* day deadline for checking the contractor’s application (the payment claim notice) and raising an Architect’s certificate should be sufficient to enable the main contractor to incorporate any adjustments in the payment application in a response to payment notice to the relevant subcontractors within the 21 day (three week) deadline. It is also likely that where the employer honours the certificate within the following seven working day period that this will take place before the statutory 30 day deadline for paying subcontractors. Because, however, subcontractor payment

claim notices must be submitted before the contractor's payment can be finalised, there will be very little time where money to pay subcontractors will be 'resting' in the main contractor's account.

The Public Works Contract PW-CF1 has been revised following the commencement of the Act. The timetable for interim payments is set out in Clause 11 and is abridged as follows

(11.1.1) At each of the periods for interim payment stated in the Schedule, part 1L, if the amount payable is more than the minimum amount stated in the Schedule ... the Contractor shall give a payment claim notice to the Employer's Representative, in the form of an interim statement, [not later than 5 days after the date agreed between the Parties to be the payment claim date]. ... (11.1.3) **Within 14 days** of receipt of the payment claim notice the Employer's Representative shall issue a response to the payment claim notice to the Contractor in the form of a certificate, sending a copy to the Employer. ... The Employer's Representative shall issue to the individual named Specialists, details of the gross and net amount included within the certificate to the respective named Specialists ... (11.1.4) If there is a sum due to the Contractor, the Contractor shall send an invoice to the Employer for that sum after receiving the response to the payment claim notice. The Employer shall pay the amount due on the invoice **within 21 days** after receiving the invoice. (Author's emphasis)

PW-CF1 operates a monthly payment cycle significantly longer payment schedule than the RIAI contract. It should also be noted that the term 'working days' used in the previous version of PW-CF1 has been removed and in the current version (v 2.1. 28th June 2016) the term days now relates to calendar days. The previous five week payment timetable has been retained in the current version.

There are a number of issues raised by the PW-CF1 payment schedule. In the first instance the contract may provide for the operation payment thresholds. Where a contractor does not carry out sufficient work to reach a threshold, no payment will be made. Nevertheless, the contractor will be obliged to pay subcontractors promptly in accordance with the Act provided these subcontracts exceed the Section 2 €10K threshold. Such situations are most likely to arise at the beginning of, and towards the end of the contract and will require the contractor to finance the cashflow shortfalls caused by these outflows.

While the fourteen day (two week) payment checking and certification period complies with the 21day response to payment claims notices required under the Act, it leaves a tight timeframe for the contractor to issue the corresponding response to payment claims notices to the various sub-contractors. Even assuming that the contractor's payment claim notice is submitted to the

Employer's Representative on the payment claim date, it must be borne in mind that the a number of subcontractors will have submitted their payment claims notices (probably several days beforehand) in order to enable the contractor formulate his payment claim. It is likely therefore that where the main contract withholding notice (certificate) is made close to, or at, the deadline and contains cuts, that it may be too late to incorporate these adjustments in the response to payment claims notice to be issued to the subcontractors. The issue of paid when certified relates directly to such occasions.

The 35 day payment timetable contained in PW-CF1 implies that, unless the client pays well in advance of (at least five days before) the payment deadline, the main contractor will have to pay subcontractors covered by the Act before, itself, being paid by the client.

Regardless of the contract being used, the payment process is likely to become much more intense than has previously been the case. Contractors will be aware that they must issue responses to payment claim notices within three weeks (21 days) of the payment claim date and are likely to press the consultant QS and the Architect for quick payment turnarounds and for more specific details of and reasons for cuts in the payment claim. Putting valuations 'on the long finger' may no longer be tolerated. As Martin Lang, Director of Main Contracting with the Construction Industry Federation, remarked '*What this Act re-introduces is discipline, it's as simple as that.*' (Hession 2014) Curtin's (2016) view regarding the response notice process necessitating a '*better scrutiny of interim valuation assessments*' may be repeated here.

Regarding the adjudication provisions of the Act, Waldron (2016) advises quantity surveyors to be alert to:

- The new dispute resolution regime generally and in particular the short time-frames involved in preparing and responding to claims.
- The nature of adjudication so as to advise clients.
- The risk of suspension of the works if a client fails to honour an adjudication award.
- The advantages and disadvantages of amending contracts or not.
- The effect of this on their own terms of engagement disputes clauses. and
- The rendering of existing extended dispute resolution provisions as ineffective.

The Contractor's Surveyor - Tier 2 and Lower Tier Subcontracts.

The function of the contractor's surveyor is to ensure that the contractor gains its full financial entitlement under the contract and maximises the profit on the project. Optimising cash flow is a key objective in achieving these aim. In the past, main contractors were able to run projects in a cash positive manner by employing pay when paid arrangements and agreeing extended credit terms with suppliers and subcontractors. The Act has now outlawed pay when paid and curtailed the credit (payment) period to 30 days. The Act has therefore introduced a regime under which the payment cycles for sub-contracts are often shorter than those of the parent main contract. Curtin (2016) describes these measures as changing '*everything*' relating to payment practice at subcontract level. He notes that financing and cashflow implications brought about by the Act may prompt contractors to review their payment terms with employers, seek increased banking credit facilities, and review their retention and material purchasing arrangements.

The Section 4 provisions of the Act have created an additional administrative burden due to the formalisation of the payment process. This falls primarily on the contractor's surveyor. Byrne (2017) refers to Durack's (2016) view that the Act has made the task of issuing and assessing payments '*increasingly procedural and labour intensive*', and that the extent of information required by the Act in processing payment claims has increased '*dramatically*'. Byrne also records the concerns of a main contractor in this regard claiming '*that additional surveyors or at a minimum more pressure on administrative staff would be required to process and check incoming valuations, to ensure the correct responses are being issued.*' In this regard, it may be noted that there are generally numerous subcontractors working on a 'typical' project and that the QS may be involved in more than one project at any given time. Delivering responses the various payment claim notices, specifying the amount proposed to be paid, explaining the reason for the differences, and providing the basis for calculating the amount to be paid are all time consuming tasks. It is not difficult to visualise occasions where workload pressures lead to deadlines for delivering the response notices being missed, and consequently requiring that subcontractors are paid in full. Quinn (2017) suggests that contractors may resort to staggering subcontractor payment claim dates in order to avoid payment delays at particularly busy times. He and Rooney (2016) also suggest that contractors may agree a very short first payment period with the various sub-contractors in order to synchronise payments and establish a common date for submitting payment applications. They also advises that, in

the interest of good contract administration, that payment claim notices and response to payment claim notices should be issued even if the amount claimed is zero. Durack (2016) suggests that the contracting parties may operate a 28 day payment cycle rather than the maximum 30 day cycle, - thus avoiding the irregularity of the monthly calendar. Calendar management and '*knowing your dates*' (Rooney, 2016), therefore, assumes a greater importance in the administration of payments under the Act than was previously the case.

It is suspected that a significant percentage, if not most, subcontracts on substantial projects are entered into on the basis of the main contractor's standard terms of business. These arrangements may need to be amended as a result of the introduction of the Act. There are also a number of 'standard form' subcontracts in use at present the principle ones being:

- *The Construction Industry Federation and the Sub-Contractors and Specialist Association Sub Contract 1989* (the 'White Form') is designed to be used with the RIAI form of main contract. Clause 11 provides that the contractor shall apply for payment on behalf of the sub-contractor giving the sub-contractor at least ***seven days' notice*** prior to making an application. Payment is normally due to the sub-contractor fourteen days after the contractor has received a certificate from the architect. This, therefore ***amounts to a "pay when paid" form of sub-contract which now contravenes the Act.*** The Form provides the subcontractor with the right to charge interest for late payment and suspend work for up to fourteen days for non-payment and thereafter terminate the subcontract if still not paid. Disputes are referred to the arbitration.
- The CIF Subcontract Forms for use with the Public Works Contracts are published in two versions: the 'Domestic Subcontract' (October 2016) and the 'NN Subcontract' (February 2016) which applies to specialist sub-contracts. The payment timetable in both contracts reflects the 30 day cycle contained in the Act and provides that the sub-contractor submits its application to the main contractor for payment on or before the payment claim date. Payment becomes ***due within 30 days of the payment claim date.*** The Forms provide for suspending work for 15 'working' days in the event of non-payment and termination if the sub-contractor is not paid by the end of that period. Disputes are initially referred to mediation, and if not resolved, then to conciliation and ultimately arbitration.

Curtin (2016) advises contractors to review their contract documentation in order to define the 'commencement date of the construction contract' noting that the payment claims and notice

requirements flow from here. He also advises that the terms ‘substantial completion’ and ‘final completion’ should be defined in the subcontract documentation. He agrees with Durack that a schedule of dates of when payment claims are to be made should be produced and he recommends that contractors prepare a standard response to payment claim notice. He advises contractors to ‘*close off subcontracts when the subcontract reaches completion*’ noting that this decision will require that the final valuation of the works be completed earlier than normal.

Regardless of the Act, contractors seek to maximise the value of their progress applications and get the payment in as soon as possible in order to minimise project finance costs. The contractor must ensure that all **completed work** is included in the valuation. Organising effective *procedures and approaches in-house* – by chasing and keeping subcontractor accounts up to date, and ensuring valuations are submitted on time, are key elements of this process. Once the initial payment date claim date has been established it is relatively straightforward to schedule future payment claim dates and confirm these in writing. It is also good practice to tie main contract valuation dates in with site meetings. The contractor's quantity surveyor should advise all subcontractors of the latest dates by which applications for payment should be made, and also formally ensure in-house costing personnel provided the necessary cost information on time to be included in the valuation. Payment dates should be strictly observed. It is important to remind subcontractors of the agreed dates when their orders are placed later in the project. Late or incomplete applications may foster an easy going attitude which may be difficult to correct at a later stage. Late applications often lead to late payment. It is also essential to ensure that all **notices and supporting documentation** required by the contract is provided along with the valuations. This is particularly important when dealing with the Public Works Contract Forms which contain sanctions, deductions and forfeiture of entitlements if the required documentation is not provided with the payment claim.

Reaction following Commencement of the Act

The principle objectives of the Act are to ensure prompt payment to (sub) contractors and to enable payment disputes to be resolved quickly and economically. Byrne (2017) reports broad support for the Act within the legislature, construction and legal professions and industry representative bodies, including the CIF. He comments, however, that the Act has received a more reserved reception among main contractors who may now have to finance a larger proportion of the works than was previously the case.

The question remains, nevertheless, whether the Act will be effective. Initial reactions following the implementation of the Act have been investigated by Byrne (2017). He conducted 9 interviews; four with main contractors, three with subcontractors and two with consultant quantity surveyors. His discussions suggest that construction participants *'have not experienced any significant change to the way they conduct their business or administer the contracts.'* He indicates that there is a lack of awareness of the legislation and a tolerance of existing payment procedures among subcontractors. He suggests that certain main contractors are continuing to pay sub-contractors in the same manner as previously and they do not intend to alter their payment practice *'until forced to do so'*. A main contractor commented on this matter: *'subcontractors we have been dealing with for many years and have excellent relationships with, it just wouldn't make sense for them to go back on their side of the agreement.'* A quantity surveyor remarked, however, *'things could change quickly once the word spreads among subcontractors of their entitlements'* and these might involve *'difficult conversations down the line with sub-contractors.'*

Regarding the Section 4 notice requirements, Byrne's (2017) research indicates that aspects of the payment claims notices and response to payment claims notices are currently being *'overlooked'*. He notes that fully compliant notices are not being delivered *'yet payment transactions are still being made ... [and] there appears to be no penalty'* involved for failure to submit compliant notices. He reports that consultant quantity surveyors are requesting notices and responses *'but are not 'yet' insisting on them'*.

Regarding work suspensions, Byrne's discussions support the O'Sullivan, B. (2014) contention that contractors are reluctant to threaten, let alone initiate, a work suspension because of the potential damage to working relationships and business reputations. It appears that none of the participants had either made or received a threat to suspend work since the Act came into operation. Comments such as *'if any subcontract carries out a work stoppage with me, they will be stopped for good'* and *'they know the consequences and wont risk losing out on work going forward'* emerged during the interviews.

It appears that none of the research participants in Byrne's investigation had experience of the adjudication process nor had any been involved in a referral since the introduction of the Act. Opinions regarding the effectiveness adjudication were mixed, the speed and economy of the process relative to arbitration was seen as a positive. However the lack of finality and damage

to business relationships were also commented upon ‘*the fastest way to populate your client list with ex clients is by means of adjudication.*’ The interviews revealed a general approval of conciliation as a means of resolving disputes.

Conclusion

The Construction Contracts Act 2013, in essence, deals with the timing of, amount of, and enforcement procedures for payments within the Irish construction industry. The Act was introduced to redress a perceived power imbalance between main contractors and sub-contractors which fostered poor payment practices. The Act establishes a formal payment process which may be enforced by aggrieved parties who claim they have not been paid on time or in full, through suspending the works or referring the disputed payment to adjudication.

The Irish construction sector is small and contracts are built in an environment where ‘everyone knows everyone else.’ This environment may encourage a ‘business as usual’ attitude in which change may be difficult to achieve. Change can occur where a party can freely exercise their contractual, and statutory entitlements, however, power imbalances may be such that aggrieved parties are reluctant to, or fail to, avail of their rights. Early indications suggest this to be the case, particularly among subcontractors who are aware of ‘not biting the hand that feeds them’ and are not inclined to ‘rock the boat’. There is currently no independent ‘watchdog’ to monitor whether the procedures required by the Act are actually being observed. If this remains the case, the Act may be criticised for allowing employers to self-regulate the implementation of the Act and in the process defeating the purpose of the Act. As such the Act may be accused of having ‘no teeth’. Poor payment practice is likely to continue among rogue employers as a result. If the Act is ignored by the groupings to which it applies, the whole endeavour will have been a pointless exercise.

The call for ‘somebody to do something about this’ may be best addressed to industry representative bodies who have publicly supported the introduction of the Act. Bodies such as the Construction Industry Federation, the Society of Chartered Surveyors Ireland, and the Royal Institution of Architects in Ireland have the authority and influence to modify their members’ practice. Initiatives similar to CIRI may also play a role in promoting improved payment practice.

People are slow to part with their money and the world is full of people who do not pay their bills on time. Reluctant payers will, no doubt, continue to attempt to circumvent or ignore the legislation. The Act goes some way in addressing payment problems by providing a statutory footing upon which ‘fairer’ payment arrangement can be based. It is ‘a step in the right direction’. As noted in the introduction, change is usually gradual; it is one thing to change the law; changing the culture is another thing entirely.

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