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**THE CONSTRUCTION CONTRACTS ACT 2013**  
**Fail to Prepare, Prepare to Fail**

**By**

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# INTRODUCTION

## **Construction Contracts Act 2013**

Commenced 29<sup>th</sup> July 2013

Comes into effect by order of the Minister for Public Expenditure and Reform once:

A chairperson has been appointed to the Panel of Adjudicators – Dr. Nael Bunni has been appointed

An Adjudicators Code of Conduct has been prepared – complete, awaiting final sign off

A panel of adjudicators has been formed – imminent

# INTRODUCTION

## Speculation and discussion

Numerous talks on various issues, such as:

- The main provisions of the Act

- The effects of these provisions

- The potential challenges to the operation of the Act

In addition there have been courses to train people as adjudicators

This presentation is an attempt to pull all this together

# CHALLENGES

**Be Aware of but DO NOT rely on succeeding with any of these**

**To the Act and its provisions in general**

Constitutional/procedural

**To an Adjudication or Adjudicator under the Act**

Jurisdictional/procedural/public law (irrationality, legitimate expectation)

**To the Decision of an Adjudicator**

Jurisdictional/procedural/public law (irrationality, legitimate expectation)

# CHALLENGES

## **Public Law (Judicial Review)**

The dispute provisions of the Act impose adjudication upon the parties on a statutory basis, and the default panel is a creature of statute, it is very likely that the adjudication process will be subject to public law, that is amenable to judicial review.

Arising from this is the question of whether or not parties ought to include the adjudication dispute resolution provisions in their contracts. If they do, then the adjudication becomes a contractual adjudication; however, if they don't then the adjudication is purely statutory and therefore the additional grounds of judicial review may be available to challenge the adjudication process.

The primary additional grounds are irrationality (unreasonableness), legitimate expectation, exceeding statutory powers – importantly – error of law on the face of the record.

# THE APPLICATION OF THE ACT

## Construction Contracts – Section 1(1)

“construction contract” means (subject to *subsection (2)* and *section 2*) an agreement (whether or not in writing) between an executing party and another party, where the executing party is engaged for any one or more of the following activities:

- (a) carrying out construction operations by the executing party;
- (b) arranging for the carrying out of construction operations by one or more other persons, whether under subcontract to the executing party or otherwise;
- (c) providing the executing party’s own labour, or the labour of others, for the carrying out of construction operations;

# THE APPLICATION OF THE ACT

## Construction Contracts – Section 1(2)

In this Act references to a construction contract include an agreement, in relation to construction operations, to do work or provide services ancillary to the construction contract such as—

- (a) architectural, design, archaeological or surveying work, (b) engineering or project management services, or
- (c) advice on building, engineering, interior or exterior decoration or on the laying-out of landscape.

# THE APPLICATION OF THE ACT

## NOT Construction Contracts – Section 1(3)

Subject to *subsection (4)* references in this Act to construction operations do not include the manufacture or delivery to a construction site of—

(a) building or engineering components or equipment, (b) materials, plant or machinery, or

(c) components for systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or for security or communications systems.

(4) In this Act references to construction operations do include a case where the things referred to in *subsection (3)* are supplied under a contract which also provides for their installation.



# THE APPLICATION OF THE ACT

## NOT Construction Contracts – Section 2

- (1) A contract is not a construction contract—
  - (a) if the value of the contract is not more than €10,000, or (b) if—
    - (i) the contract relates only to a dwelling, and
    - (ii) the dwelling has a floor area not greater than 200 square metres, and
    - (iii) one of the parties to the contract is a person who occupies, or intends to occupy, the dwelling as his or her residence.
- (2) A contract of employment (within the meaning of the Organisation of Working Time Act 1997) is not a construction contract.
- (3) A contract between a State authority and its partner in a public private partnership arrangement...

# THE APPLICATION OF THE ACT

## Construction Contracts – Construction Operations – Section 1

“construction operations” means, subject to *subsections (3) and (4)*, any activity associated with construction, including operations of any one or more of the following descriptions:

- (a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land (whether permanent or not);
- (b) construction, alteration, repair, maintenance, extension, demolition or dismantling of works forming, or to form, part of the land, including (without prejudice to the foregoing) walls, roadworks, power-lines, telecommunications apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;
- (c) installation in any building or structure of fittings forming part of the land, including (without prejudice to the foregoing) systems of heating, lighting, air-conditioning, thermal insulation, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems;

# THE APPLICATION OF THE ACT

## Construction Contracts – Construction Operations – Section 1 – cont'd

(d) external or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration;

(e) operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site clearance, earth-moving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works and traffic management;

(f) painting or decorating the internal or external surfaces of any building or structure;

(g) making, installing or repairing sculptures, murals and other artistic works that are attached to real property;

# THE APPLICATION OF THE ACT

## Disputes relating to payment – Section 6(1)

A party to a construction contract has the right to refer for adjudication in accordance with this section any dispute relating to payment arising under the construction contract (in this Act referred to as a “payment dispute”).

# THE PROVISIONS

## Payments

Sections 3 to 4 of the Act provide for methodology for processing and pursuing payments in a construction contract.

## Disputes

Section 6 of the Act introduces adjudication as an unavoidable, but optional, means of resolving disputes relating to payment.

## Suspension

Sections 5 and 7 of the Act provide for a right to suspend works for failure to comply with the payment provisions of the Act or an adjudicator's decision respectively.

# PAYMENTS

## Required Inclusions – Section 3

A construction contract shall provide for—

(a) the amount of each interim payment to be made under the construction contract, and

(b) the amount of the final payment to be made under the construction contract,

or for an adequate mechanism for determining those amounts. (2) A construction contract shall provide for—

(a) the payment claim date, or an adequate mechanism for determining the payment claim date, for each amount due under the construction contract, and

(b) the period between the payment claim date for each such amount and the date on which the amount is so due.

# **PAYMENTS**

## **Required Inclusions – Section 3**

Parties to a construction contract have to include for the items specified under the act; in the instance that a contracting party fails to provide these inclusions in a main contract, then the provision of The Schedule shall apply – importantly this is only to the extent that the actual inclusions aren't in keeping with the Act.

However, in relation to a sub-contract the provisions of the sub contract must be equal to or more favourable to the sub-contractor than the provisions of the schedule.

# **PAYMENTS**

## **The Schedule**

The Act provides for a schedule for processing payments should there be no inclusion within the contract in accordance with the inclusions as required under the Act.

In addition the provisions of the schedule will apply to a sub-contract if the inclusions in the contract, in keeping with the requirements of sections 3 and 4 of the Act, as less favourable than those of the schedule.



# PAYMENTS

## **The Schedule – A problem for main contractors as a result of the provisions of section 3**

The schedule dictates that payment claim dates must be no greater than 30 days after commencement and no more than 30 days apart thereafter.

Therefore a sub-contract cannot be any worse than this.

However, a main contract need only comply with the provisions of sections 3 and 4 of the Act, it need not be equal or more favourable to a party than the provisions of the schedule.

In effect this means that a main contractor could be tied to a 45 day payment period or longer (ref. some large multinational corporations operating in Ireland), whereas it will be obliged to pay its sub-contractors on a 30 days basis.

There is an argument that there is no requirement to pay the sub-contractor on a 30-day basis, but only to have a payment claim date on a 30-day basis, and these payment claim dates could be for valuations set at 'nil' in the set amount of interim payments under clause 3(1)(a) of the Act; however, this is a rather novel approach to the provisions.

# **PAYMENTS**

## **The Crossover Period**

### Section 12(2)

This Act applies in relation to construction contracts entered into after such day as the Minister may by order appoint.

Both the RIAI and the PWC are presently being reviewed to take account of the new regime; however, all contracts entered into before the Act comes into effect (by order) will remain to be considered under the old contracts.

More importantly, all contracts entered into post the Act coming into effect, but before new contracts are issued will have dispute resolution provisions that are usurped, in the short terms at least, by the statutory provisions.

# PAYMENTS

## The Act with RIAI wording inserted

### Interpretation – Section 1

“payment claim” means progress statement;

“payment claim date”, in relation to a construction contract, means the period of interim certificates;

“payment claim notice” has the meaning assigned to it by *section 4*;

# PAYMENTS

## The Act with RIAI wording inserted

### Section 3 – Payments under construction contracts

(2) A construction contract shall provide for—

(a) the [period of interim certificates], or an adequate mechanism for determining the [period of interim certificates], for each amount due under the construction contract, and

(b) the period between the [interim certificates] for each such amount and the date on which the amount is so due.

# PAYMENTS

## Payment claim notices – Section 4

(1) This section applies where, not later than 5 days after the [period of interim certificates], an executing party to a construction contract delivers a payment claim notice relating to a [progress statement] to the other party or another person specified under the construction contract.

(2) A payment claim notice is a notice specifying—

(a) the amount claimed (even if the amount is zero),

(b) the period, stage of work or activity to which the [progress statement] relates,

(c) the subject matter of the [progress statement], and

(d) the basis of the calculation of the amount claimed.

# PAYMENTS

## Payment claim notices – Section 4 – cont'd

(3) If the other party or specified person referred to in *subsection (1)* contests that the amount is due and payable, then the other party or specified person

—

(a) shall deliver a response to the payment claim notice to the executing party, not later than 21 days after the payment claim date, specifying—

(i) the amount proposed to be paid,

(ii) the reason or reasons for the difference between the amount in the payment claim notice and the amount referred to in *subparagraph (i)*, and

(iii) the basis on which the amount referred to in *subparagraph (i)* is calculated,

and

(b) if the matter has not been settled by the day on which the amount is due, shall pay the amount referred to in *paragraph (a)* to the executing party not later than on that day.

# **PAYMENTS**

## **An Alternative View (payment is only due on certification)**

Money only becomes due on foot of a completed certification process, therefore these provisions operate after the valuation process has been completed.

The alternative version is in my mind fundamentally flawed and would run entirely contrary to the intention of the legislature, and on the basis that when there are two possible interpretations but one clearly reflects the intention of the legislature this will prevail, it is my view that the provisions relate to the valuation provisions themselves.

# **DISPUTES**

## **The Current Regime**

Present dispute resolution provisions in certain contracts

**RIAI** – conciliation/arbitration

**PWC** – conciliation/arbitration

**Bespoke Sub-Contracts** – up to mediation/conciliation/arbitration

These sorts of provisions will no longer be effective to delay payment.



# DISPUTES

## Adjudication – PAY NOW ARGUE LATER

*Cameron Ltd. v. John Mowlem* (1990) 53 BLR 24 (E&W):

“Adjudication is not arbitration, it is ephemeral and subordinate, the decision being subject to review in arbitration (or litigation).”

However, it is binding pending any further proceedings (Section 6(10))

It is often referred to as rough justice: why?

Under the legislation it is to be completed within 28 days – by necessity, that removes a lot of the polish and refinement of litigation or arbitration, but, and this is very important, it also should remove the associated costs.

# **DISPUTES**

## **Adjudication – 28 days**

The period of 28 days can be extended by 14 days by the adjudicator with the consent of the referring party, or for a duration of whatever length as both parties so wish – however, bear in mind the reason a sub-contractor (or main contractor) will commence adjudication is to effect prompt payment, it is unlikely the period will be extended for any significant duration.

# DISPUTES

## Adjudication – cont'd

### Rough justice:

*Bouygues (UK) Ltd v Dahl- Jensen (UK) Ltd [2000] EWCA 507:*

*“Mr Gard chose to approach the calculation of the sums due under the contract, he was wrong to make an actual award requiring payment under that contract without taking account of the fact that the 5% of the contract sum that represented the retention monies was not yet due for payment. The award, therefore, was wrong: but is that a ground on which its enforcement can be resisted?”*

The Court went on to find:

*“He answered the right question. But, as is accepted by both parties, he answered that question in the wrong way. That being so, notwithstanding that he appears to have made an error that is manifest on the face of his calculations, it is accepted that, subject to the limitation to which I have already referred, his determination is binding upon the parties.”*

# SUSPENSION

## Payments – Section 5

(1) Where any amount due under a construction contract is not paid in full by the day on which the amount is due, the executing party may suspend work under the construction contract by giving notice in writing under *subsection (2)*.

...

(4) Where work is suspended ... and the ability of the executing party to complete work within a contractual time limit is affected by the suspension of work, the period of suspension shall be disregarded for the purpose of computing the contractual time limit unless the suspension of work is unjustified in the circumstances.

(5) Where work is ... and the ability of a subcontractor to complete work within a contractual time limit is affected by the suspension of work, the period of suspension shall be disregarded for the purpose of computing the contractual time limit.

# SUSPENSION

## Adjudicator's Decision – Section 7

(1) Where any amount due pursuant to the decision of the adjudicator is not paid in full before the end of the period of 7 days beginning with that on which the decision is made, the executing party may suspend work under the construction contract by giving notice in writing under *subsection (2)*.

# COMPLIANCE

## Revise contracts

Or NOT

As noted under the section on challenges – there might be an advantage to not including adjudication in the contract (judicial review).

However,

For payment regimes and sub-contracts, it is hard to see an advantage to having the payment regime from the Act imposed on a contract.

# COMPLIANCE

## Revise contracts – Pay when Paid – Section 3(5)

(5) Except after the occurrence of the circumstances specified in *subsection (6)*, a provision in a construction contract is ineffective to the extent that it provides that payment of an amount due under the construction contract, or the timing of such a payment, is conditional on the making of a payment by a person who is not a party to the construction contract.

(6) The circumstances referred to in *subsection (5)* are: (all relate to insolvency events or similar)

# COMPLIANCE

## **Revise contracts – Pay when Paid – Section 3(5)**

It has widely been misstated that Pay when Paid clauses are now prohibited, this is not the case, they are merely ineffective unless one of the situations in section 3(6) exists – therefore parties ought to leave these provisions in contracts to provide for the circumstances that justify pay when paid provisions.



## **THE EFFECT OF ALL THIS...**

**A means to get paid promptly**

**A duty to pay promptly**

**A duty to draft contracts that make adequate payment provisions**

**A duty to draft sub-contracts in keeping with the Act**

**The requirement to answer and deal with disputes quickly**

**The making of existing supposed dispute resolution provisions  
useless**

# **FAIL TO PREPARE, PREPARE TO FAIL**

## **Main Contractors and/or Sub Contractors**

### **Internal Staff**

For larger organisations it would be prudent to allocate certain staff members the tasks of

- Ensuring correct revision to contracts being used
- Ensuring compliance with the timelines provided for in the Act
- Managing adjudications commenced as a result of the Act

### **External Assistance**

For smaller organisations having dedicated staff will not be a possibility; these firms would be well advised to source an external firm and obtain quotes to provide oversight and advices on the matters noted above.

# **FAIL TO PREPARE, PREPARE TO FAIL**

## **Main Contractors and/or Sub Contractors – cont'd**

### **Improved Record Keeping and/or Revised Quality Assurance Procedures**

It is highly unlikely that existing Quality Assurance systems will be adequate to address the matters arising under the Act, therefore it will be necessary to update systems accordingly.

### **Expect that existing staff will be able to manage**

This option is only going to be possible if the existing staff have the capacity timewise (unlikely these days) and if they are trained in the revised requirements.

# **FAIL TO PREPARE, PREPARE TO FAIL**

## **Construction Professionals**

### **1. For their own engagement – Section 1(2)**

All of the comments made in relation to main and sub-contractors apply here to construction consultants.

### **2. For their involvement in client/main contractor/sub-contract disputes**

Most construction consultants are all too aware of the strains placed on resources to assist in clients responding to main contractor claims, this is going to be even more pronounced under the tight timeframe of adjudication.

They will need to ask what if they don't provide the information or responses on time, will this amount to negligence if your client is made to pay amounts they ought not to have?

# **FAIL TO PREPARE, PREPARE TO FAIL**

## **THE CONSTRUCTION CONTRACTS ACT 2013**

**AN ACT TO REGULATE PAYMENTS UNDER CONSTRUCTION CONTRACTS AND TO PROVIDE FOR RELATED MATTERS.**

If the Oireachtas sets about regulating something, the parties affected would be extremely foolish not to prepare for those regulations.

**“An ounce of prevention is worth a pound of cure.” Benjamin Franklin**

**“He who fails to prepare, prepares to fail” Benjamin Franklin (a man who evidently favoured preparation)**

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