

These notes refer to the Construction Contracts (Amendment) Act (Northern Ireland) 2011 (c.4) which received Royal Assent on 10 February 2011

Construction Contracts (Amendment) Act (Northern Ireland) 2011

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Section 7 - Requirement to pay notified sum

As originally enacted, Article 10 of the 1997 Order provided that a party to a construction contract could not withhold payment after the “final date for payment” of a sum due under the contract unless that party had given a notice of the intention to do so. Subsection (1) of section 7 substitutes a new Article 10 and, in doing so, replaces this provision in respect of “withholding notices” with (generally speaking) a requirement on the part of the payer to pay the sum set out in such a notice. The new Article 10 also makes provision for the sum in such a notice to, in effect, be challenged or revised by the giving of a type of counter-notice.

Paragraph (1) of new Article 10 provides that the payer must pay the “notified sum” — the sum set out in such notice — on or before the final date for payment of such sum, (to the extent that it is unpaid). Paragraph (2) has the effect of explaining what is meant by “the notified sum”. In relation to a payment, it is (as appropriate):

the sum set out in a “payment notice” given by a payer (whether such notice is given pursuant to an express term or one implied into the contract pursuant to the Scheme for Construction Contracts) or by a “specified person” (paragraph (2) (a));

the sum set out in a “payment notice” given by a payee (paragraph (2)(b));

the sum set out in a payee’s “payment notice” in default of one given by the payer or “specified person” (paragraph (2)(c)); or

the sum set out in a payee’s “application”, where such notification is deemed to be a notice given in default of one given by the payer (paragraph (2)(c)).

This requirement to pay the notified sum is intended further to facilitate cash flow by determining what is provisionally payable. What is properly and ultimately payable as a matter of the parties' contract is unaffected (see the decision of the Court of Appeal in *Rupert Morgan Building Services*

(LLC) Limited v David and Harriet Jervis [2003] EWCA Civ 1563), (a transcript of which judgment can be found at <http://www.bailii.org/ew/cases/EWCA/2003/1563.html>).

Paragraph (3) of new Article 10 provides that a payer (or a “specified person”) may, in relation to a payment, give a notice to the payee of the payer’s intention to pay less than the notified sum. Paragraph (3) permits both the giving of such a counter-notice where the notice containing the “notified sum” was given by the payee and, also, the giving of such a counter-notice where the notice containing the “notified sum” was given by the payer – a payer may wish to revise the amount he proposes to pay because, for instance, he subsequently discovers that the work in question was unsound.

Paragraph (4) prescribes the content of such a counter-notice. It must identify the sum which the payer believes is payable on the date that such notice is given and is to explain how that sum has been arrived at (for instance, by identifying any moneys already paid by the date of the notice or by identifying any set-off or abatement applied by the payer). Paragraph (4) makes it clear that such counter-notice may be for a nil payment (for example, as a consequence of any such set-off or abatement).

Paragraph (5), read in conjunction with paragraph (7), prescribes the timing of such a counter-notice. It must be given no later than such number of days as the parties have agreed in their contract before the final date for payment or, where there is no contractual provision, such number of days before the final date for payment as the Scheme for Construction Contracts provides. Paragraph (5)(b) has the effect of prohibiting the giving of such a counter-notice before the payee has actually given his “payment notice” (whether in a case where the parties had agreed in their contract that “payment notices” were to be given by the payee, or the payee is giving (or is deemed to have given) his “payment notice” in a default of the payer giving a “payment notice”).

Paragraph (6) has the effect that the amount set out in a counter-notice given under paragraph (3) of new Article 10 becomes the “notified sum” which the payer must pay pursuant to paragraph (1).

Paragraph (7) defines the “prescribed period”. It is the period that has been agreed by the parties to the construction contract. Where there is no such agreement, the provisions of the Scheme for Construction Contract will apply. The Scheme currently provides that this is seven days before payment is finally due.

Paragraph (8) states that paragraph (9) applies where the payment notice provisions have been complied with but there is a dispute about the amount owing and the adjudicator decides that more money is owed than that set out in the relevant notice.

In such a case, paragraph (9) provides that any such additional amount must be paid by the date which is the later of seven days from the date of the adjudicator’s

decision or the date which, but for the notice, would have been the final date for payment.

Paragraph (10) has reference to the decision of the House of Lords in *Melville Dundas Limited (in receivership) and others v George Wimpey UK Limited and others* [2007] UKHL 18 - a transcript of which judgment can be found at

<http://www.bailii.org/uk/cases/UKHL/2007/18.html>.

In that case, the House of Lords decided that the payer could legitimately withhold monies, notwithstanding that no “withholding notice” under current section 111 (of Part 2 of the Housing Grants, Construction Regeneration 1996 Act, the corresponding legislation in GB to the 1997 Order) had been given, in a case where the parties’ contract had provided that moneys need not be paid in the event of the payee’s insolvency. The key to that decision was the fact that the insolvency occurred *after* the period for giving a “withholding notice” had expired i.e. it was not in the nature of things possible for the payer to have given such a notice beforehand.

Paragraph (10) is intended to ensure that the *Melville Dundas* decision remains confined to insolvency situations alone (and is not interpreted to include other events which the parties may have specified in their contract). In the context of new Article 10, it provides that the paragraph (1) requirement to pay the “notified sum” does not apply where the contract allows the payer to withhold monies upon the payee’s insolvency and the payee becomes insolvent after the expiry of the period for giving a notice of intention to pay less than this sum (pursuant to paragraph (3)).

Paragraph (11) applies the existing definitions of “insolvent” in the 1997 Order (Article 12) to paragraph (10).

Subsection (2) of section 7 makes consequential amendments to Article 11 of the 1997 Order such that, in effect, relevant references in that Article are to the new paragraph (1) requirement i.e. the requirement to pay the “notified sum”.