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Emerald Article: The new Construction Act: views and perceptions of construction industry stakeholders

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Abstract

Purpose – Part II of the Housing Grants, Construction and Regeneration Act 1996 introduced major changes to the way in which construction contracts are administered. The payment and adjudication provisions, in particular, have been well received by the United Kingdom construction industry and can be viewed as a success. However, avoidance tactics aimed at reducing liability for payment and discouraging payees away from adjudication became commonplace. The response from Parliament is contained in the Local Democracy, Economic Development and Construction Act 2009, which came into force on 1 October 2011. The purpose of this paper is to analyse stakeholders' first impressions of the new Act and disseminate the insights gained to the industry and policymakers.

Design/methodology/approach – Following a review of the current and proposed legislation, industry views were collected by an electronically administered survey. The views of construction industry stakeholders on how the new Act will operate and its prospects of delivering the intended outcomes were ascertained and are presented.

Findings – The survey findings indicate there is broad support for the original Act and for the amendments made in the new Act, tempered with pessimism about the likely inability of the new measures to address issues around entrenched industry practice. Avoidance and evasion of key terms is contemplated, for instance in relation to extending payment terms and drafting contracts in favour of the paying party.

Originality/value – The conclusions reached call into question the extent to which improvement of this aspect of the construction industry can be achieved by statutory intervention alone, particularly in testing economic circumstances.

Keywords United Kingdom, Construction industry, Legislation, Contracts, Adjudication, Cash flow, Construction Act, Oral contracts

Paper type Research paper

1. Introduction

The Housing Grants, Construction and Regeneration Act (HGCRA) 1996 became effective law on 1 May 1998. The Act's importance to the industry was understood from its inception (Bingham, 2008). A statutory regime for payment provisions was introduced based on mandatory minimum time periods and payment notices backed with the striking out of non-compliant express terms of contract and their replacement with a scheme. At a stroke, HGCRA ensured compliant procedures were introduced across the industry.

Over a decade later a new statute has been introduced to the industry. The Local Democracy, Economic Development and Construction Act 2009 (the New Act) received Royal Assent on 12 November 2009. Part 8 deals with construction contracts. The New Act became law in England and Wales with the effective date being 1 October 2011 and the key features of the New Act are summarised in Table I.

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Oral contracts	Section 107 of HGCRA is repealed. This section provided that only contracts that have been fully formed in writing could be covered by the Act
Adjudicator's power to make corrections	One of the less controversial proposals is the introduction of Section 140 which introduces a new subsection (3A) into section 108 of HGCRA. This provides the power to an adjudicator to correct his decision if it has become evident a "clerical or typographical error arising by accident or omission" has occurred. This remedies the previous problem of an adjudicator's decision awarding a sum of money to a party which contained a genuine error but was still an enforceable decision
Adjudication costs	Section 141 of the New Act is a significant change to section 108A of HGCRA. The New Act complements the Yuanda case (see Section 2 of paper) and provides that only contractual provisions which either confer power to the adjudicator to decide the allocation of his costs or are made in writing after a notice of intention to refer will be enforceable
Pay when certified	Arguably the most important overhaul of HGCRA is the effective banning of "pay when certified" clauses by Section 142 of the New Act. HGCRA had the requirement of an "adequate mechanism" but this has been remodelled to become more robust against "pay when certified" provisions. This is achieved by stating the "adequate mechanism" is not achieved where a contract makes payment conditional on "the performance of obligations under another contract, or a decision by any person as to whether obligations under another contract have been performed"
Payment notices	The new section 110B addresses the previous flaw in HGCRA where no payment notice is issued by the payer (with no consequence), as now this can be issued by the payee subject to the contractual requirements of being issued before the "final date for payment" The withholding notice section is also refreshed with the payer required to pay the amount set out in the payment notice (whether issued by the payer or payee) unless an effective "counter notice" (called a "pay less" notice) is issued prior to the final date of payment. To be effective the counter notice must now detail the basis on which the payer has calculated that sum
Upstream insolvency	Section 113 of HGCRA remains intact with no amendment, therefore effectively continuing to allow "pay when paid" to be acceptable in the case of an upstream insolvency occurring
Suspension	The New Act has both reinforced and enhanced the payee's position in respect of lawfully suspending its works through not having been properly paid in accordance with the provisions. The payee will now be entitled to suspend their obligations in whole or in part, be paid reasonable costs and expenses associated with the suspension and receive an extension of time which includes due allowance for remobilisation

Table I.
Summary of key points of the new act

A matter of months has passed since the introduction of the New Act and it is obviously too early to say whether or not it will be a success. The Government stated that, it would be reviewed three years after policy implementation to judge what benefits have been realised by the 2009 Act (Barnes, 2011). However, there has been some early criticism that the New Act will not meet its intended target (Helps, 2011) and that the old system was simply being replaced with another mistake (Bingham, 2008). Whilst it is not yet possible to draw any conclusions or substantive views on the New Act, the preliminary views and perceptions of industry stakeholders on how the New Act is perceived and how it has been received are discoverable. Rabin and Schrag (1999) suggest that the initial reactions of key stakeholders around new measures provide very good indicators of its future performance. It is crucial for a new regime to be well received by its citizens as the first impression is usually the one that matters.

The aim of this paper is to analyse these first impressions and to disseminate the insights gained to the industry and policymakers.

2. Background to the New Act

Statutory intervention into the practices of any industry is a risky undertaking for the legislature and something not undertaken lightly. It is worth reflecting that the replacement of non-compliant terms with a payment and adjudication regime is towards the far end of the spectrum of what statutory intervention in an industry can achieve. Usually, under English law, the parties are left to their own freedom to contract. Provided the contract is enforceable and complies with the Unfair Contract Terms Act 1977 the contract will stand (Wood *et al.*, 2011). HGCRA signalled a departure from this principle of freedom to contract. In the words of one commentator "the Act was more than unusual; it was unique. Apart from consumer legislation, there had never before been legislation (other than in a state of emergency) which intervened to regulate the freedom of contract in a sector of the economy that is generally buoyant and which should be capable of looking after itself" (Lloyd His Honour Humphrey QC, 2006).

Notwithstanding the drastic nature of the changes, the results have been viewed as a success. Greater transparency in the flow of payment information was achieved alongside quick access to a decisive form of justice (Choat, 2010). The new framework produced by HGCRA provided more certainty to payees with the right to interim payments, an "adequate mechanism" for determining payment and, in the event of set-off, an obligatory payer's notice of intention to withhold payment with reasons (Lynch, 2011). The net effect was to improve cash flow, memorably described in 1974 by Lord Denning as the "lifeblood of industry"[1]. The new payment regime was underpinned by the new adjudication procedure. This procedure provided the disgruntled with quick access to a binding until overturned decision (Furst and Ramsey, 2006). The adjudication provisions of HGCRA has been viewed in the industry as a success (Choat, 2010) with 15,453 adjudication referrals having been issued to April 2008 (Kennedy, 2010).The parties have overwhelmingly decided to adopt an adjudicator's decision as conclusive, without having the dispute re-opened in litigation or arbitration (Atherton, 2010).

Issues began to arise in the years following HGCRA implementation (Sir Latham, 2004). Some of these issues were seen as faults within the drafting; whilst some industry stakeholders were observed by the then Department of Trade and Industry (DTi, 2004) to be deliberately seeking to exploit grey areas to their benefit. These grey areas included variance to the amount of certainty given to a payee as to when and how much and why they were being paid less than expected.

Specific attention was drawn to the lack of any sanction or penalty specified in HGCRA for not providing payment notices. Payers also developed other avoidance devices, such as extending deadlines for payments and placing obstacles in the way of payee's access to adjudication (Choat, 2011). Many parties to a contract had devised provisions that meant the referring party was required to bear all of the costs of the adjudication (Redmond, 2011), irrespective of the outcome. This tactic became known as the use of a "Tolent" clause, after the case of the same name where such a term was permitted[2]. In a demonstration that statute is not the only way of bringing about legal change, a recent case[3] has effectively outlawed Tolent-like clauses that have as their intention discouraging parties from adjudicating.

Another perceived problem with HGCRA was that oral contracts were excluded from its coverage. HGCRA has been described (Lynch, 2011) as an attempt to redress the balance between main contractors and subcontractors. However, many of the arrangements entered into by subcontractors were excluded on the grounds that the contracts made were either wholly or partially oral, which excluded them from HGCRA coverage. The suggestion that this exclusion be lifted has been viewed as a positive step (Entwistle, 2010), with the likely benefactors generally being smaller "less contractually aware" main contractors and subcontractors. However, the counter view is that this will merely serve to encourage slack practices with regards to record keeping. This poor record of evidencing contracts in writing has long been a cause of some of the ills which beset the industry. HH Judge Coulson stated in one judgement "as is so often the case in the construction industry, the only reason that this issue even arises for consideration at all can be traced back to sloppy paperwork"[4].

Further shortcomings of HGCRA were identified as the effects of upstream insolvency on supply chain payments and the unwieldly nature of the right to suspend performance on the grounds of non-payment (McGuiness, 2007). The retention of the former clause in the New Act has surprised some commentators and riled others. "In the department's 2005 consultation 67% of respondents agreed that this should go. It must go" (Klein, 2009). Conversely, the change to the latter is seen as a potential improvement, as a consequence the right to suspend might be used more frequently (Gemmel, 2010).

Expressions of concern about the shortcomings of HGCRA were raised by representative bodies of the construction industry to the chancellor and other ministers, which led to a review of the operation of the adjudication and payment provisions. These were the first steps along the road that led to the introduction of the New Act. The journey was to prove a slow one, involving seemingly endless rounds of industry lobbying, government backed reports, consultation, analysis, post consultation events, a change from secondary to primary legislation and impact assessments. The success of the consultation was called into question by one commentator who thought it a "missed opportunity" to consult more widely (Wessing and Nichols, 2006). The result of this consultation repeated the message that a similar exercise had established prior to the introduction of HGCRA, 15 years earlier. The stakeholders in the construction industry wanted a statue that provided improved cash flow between parties, improved the operation of construction contracts and promoted adjudication as a form of dispute resolution.

Research methodology

One of the priorities for the "new academic community" of legal scholars described in this journal (Chynoweth, 2007) was to communicate its purpose, norms values and methodologies to the wider built environment research community in which it resides. The exposition of the following methodology is intended to support the further development towards the blossoming of legal scholarship within the built environment. The socio-legal context for this study seeks to move beyond the wording of the statutes concerned and to investigate law "from the perspectives of the social sciences" (Tebbit, 2005). This tradition moves away from the search for coherence within the law in favour of analysis of the processes of law and its inter-relation with its stakeholders. The relationship between law making and the sometimes competing, sometimes complimentary, interests of the most significant and

powerful economic groups in the social structure has long been identified as being of vital importance (Jaffe, 1937).

The selected researcher role in this project is that of the empathetic observer (Blaikie, 2000). The commitment is to discover the socially constructed reality of those being observed, to penetrate their frames of meaning and discover their mutual knowledge. This approach is consistent with the ontological stance taken, which is that social interaction consists of essential uniformities from which social science can unearth universal statements. Epistemologically, these statements can be relied upon as being true because they correspond to the descriptions of the observed state of affairs.

The research strategy adopted, recognises that all data collection is selective and involves interpretation by the observer. Questionnaires were used to gain access to the individual's worlds and interpretations. The questions were designed to gather views on the key issues arising from the New Act. The issues addressed required detailed knowledge on the part of the respondents who appeared well informed on the relevant areas. The quantitative data gathered were explored through numerical comparisons and statistical inferences and analysis. Responses were recorded in pre-coded categories.

The sampling technique used was stratified random sampling with the strata attributes being subcontractors, main contractors/clients and advisors all of whom operate in England and Wales. These three groups represent a cross-section of the industry operating on three separate tiers of the supply chain. These subsets each produced a similar sample size; thereby ensuring each subset is fully and equally represented. This method of sampling allows the researcher to focus on people and events believed to be the most relevant to the research being undertaken (Denscombe, 2010). A total of 134 questionnaires were sent out (5-20 September 2011) by electronic mail. The timing chosen was in the lead up to the effective date of the New Act (1 October 2011), during a time of heightened expectation and construction industry press coverage for the pending new statute. In total, 86 completed questionnaires were returned representing a response of 64 per cent, only 81 were used in the result analysis to achieve an equal balance (27 per cent each) between each subset (Taylor, 1998). It is worth noting that the total number of responses received in this research exceeded those received by the government in its second consultation on proposals to amend HGCRA (71 responses).

Results

Figure 1 illustrates that there was a good level of knowledge about HGCRA across the three subsets. This result supports the sampling approach taken in the methodology. The level of familiarity with HGCRA for the purposes of this question was judged on a scale of 1-10 where 10 was the most conversant with the terms of the Act. The results demonstrate half of the subcontractors were fully conversant; this figure then rose for the clients/main contractors and rose again for the advisors category.

The same question and technique was applied to the New Act. Other than the advisors category, where a substantial majority claimed to be fully conversant with its terms, the other two categories were less conversant with only around a quarter of subcontractors and even fewer clients/main contractors claiming a thorough knowledge of the New Act. The New Act was yet to become law at the time of the survey (September 2011).

The advisors generally believed they were (as at the date of the survey) ready for the New Act with over three-quarters claiming to have in place the necessary procedures to bring about a smooth transition for the New Act. The other categories were less well prepared. Under half of the clients/main contactors felt they were ready whilst only a small minority of subcontractors had yet to make the necessary changes.

When asked whether the respondents were aware of the government's consultation process, which ran from March 2005 to June 2007, the advisors claimed awareness in the greatest number (refer to Figure 1) with nearly three-quarters replying they knew about the process. A small minority of subcontractors and a greater minority of clients/main contractors were aware of the process. Although aware, just under half of the advisors claimed to have taken part in the consultation. The figure again dropped for the other two categories. No subcontractors claimed to have taken part in the consultation, whilst only a small minority of clients/main contractors had replied. A follow up question on this point asked why the stakeholders did not take the opportunity to respond. Reasons given included being short of time and thinking their views would be given minimal weight. However, several commented that they were aware their professional bodies were replying on their behalf and trusted them to influence, as far as that was possible, the process of consultation.

One of the more significant changes in the 2009 Act permits adjudication for contracts not fully formed in writing and/or oral contracts. The respondents were asked whether they were in favour of this change. The most supportive were the subcontractors. Under half of the clients/main contractors supported the move. The statistics in Figure 2 are a reflection of who has the most to gain and lose, in that it is

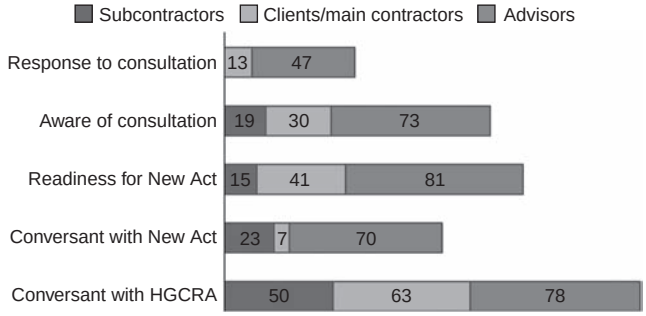

Figure 1.
Awareness, readiness and participation in consultation process represented in percentage figures of each subset

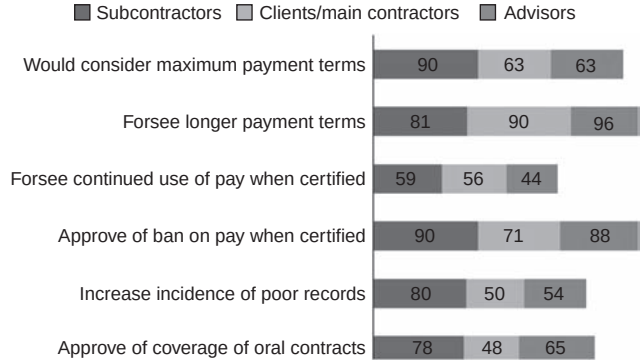

Figure 2.
Views on the content of the New Act and the stimulus towards improving industry practice represented in percentages of each subset

subcontractors who are more likely to commence work without a written contract. Applying the New Act's coverage to these incidences clearly benefits the subcontractors .

The downside of increasing the New Act's coverage is to make the incidence of finalising contracts and poor record keeping more prevalent. The subcontractors again lead the way; a large majority foresaw an increase in poor record keeping, with around half of clients/main contractors and advisors predicting this unintended outcome.

The respondents were then asked for their views concerning the ban on "pay when certified" clauses. A large majority of all three subsets approved of the change. Once again, the subcontractors (arguably the group with the most to lose under the old system) led the way, followed by the advisors. The clients/main contractors also generally approved of this change.

The previous question established that an expected consequence of the new payment regime would be extended payment terms. The next question explored with the respondents whether there was any appetite for statutory maximum payment periods within construction contracts to prevent this happening. A substantial majority were supportive of such a proposal. The subcontractors again recorded the highest level of support. The clients/main contractors and advisors were also broadly in favour.

The final two questions were designed to establish the industry's verdict on the HGCRA and whether the New Act was seen as a positive step. HGCRA was seen as a success by all of the subsets. The perception about whether the New Act was positive recorded even higher scores in support in particular by the subcontractors and advisors. The client/main contractors were more sanguine in their support of the New Act (see Figure 3).

Discussion

The results presented above provide insight into the views held at different levels of the construction industry supply chain towards the important changes in the New Act. Whether or not the New Act amounts to a missed opportunity to simplify and clarify a problematic legal area (Donohoe, 2009) is debatable. The issues selected for clarification in the New Act are highly complicated and divisive. The risk is that in seeking to clarify, Parliament has, despite its best intentions, simply muddied the waters further. The workings of the new regimes should become clearer over time. It is, after all, for the industry to make the best use it can of the statute.

Introducing new legislation involves a bedding down and familiarisation period, which can be unsettling for the stakeholders concerned. A similar exercise has recently been experienced by the construction industry in relation to anti-competitive procedures (Donohoe, 2011).

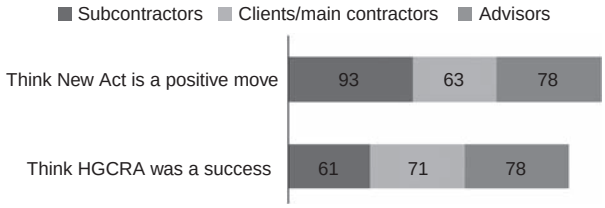

Figure 3.
Perceptions on the two Acts expressed in percentages of each subset

Returning to the findings, the subcontractor subset proved to be the least prepared, least consulted and least conversant with HGCRA, although half of them were conversant with its terms. The anomaly is that the subcontractors are more conversant with the New Act than the clients/main contractors, which is a promising sign in terms of their awareness of the new provisions, which can be used for their benefit.

The subcontractors led the way in terms of approving of the New Act's provisions. They recognised that banning pay when certified and the inclusion of oral contracts were beneficial. However, the subcontractors also displayed cynicism in terms of predicting the continued use of pay when certified and longer payment terms, which would be used to combat the effectiveness of these friendly provisions. As a response, the subcontractors demonstrated an appetite for tougher restrictions, particularly in terms of maximum payment terms to allow their contractual partners less "wriggle room" in this regard. The other downside the subcontractors could foresee with the New Act was the increase in poor contractual records, which was a likely consequence of the inclusion of oral contracts. A study in this journal discussing the merits of electronic communications recommended that it would be prudent to maintain paper records for certain contractual notices such as variations (Christensen *et al.*, 2007).

Analysis of the clients/main contractor subset underlines the notion that this subset is keenly aware of their contractual responsibilities and how to maintain a strong position with regards to their contractual partners. However, instances were recorded where a more collaborative attitude was discernible. A large minority of the subset took part in the consultation and were ready for the New Act. Although familiar with HGCRA, this subset had not yet come to terms with the New Act, which at the time of the survey was only a matter of weeks away from coming into force.

The clients/main contractors were less enamoured with the mechanics of the New Act, under half of them supported the inclusion of oral contracts and less than three-quarters thought that banning pay when certified was a good move. The subcontractors' prediction that the New Act would be exploited appear well founded with substantial majorities of this subset anticipating longer payment terms and the continued use of pay when certified. The appetite for maximum payment terms was less pronounced here, although a majority were in favour. The support for the two Acts was also at its lowest level for the three subsets but still both were heralded as good for the industry by the majority.

The advisors subset was the most conversant with both Acts, was prepared for the New Act and had participated the most in the consultation process. They, like the clients/main contractors, foresaw longer payment terms as a response to the banning of pay when certified clauses. Conversely, this subset displayed an altruistic side in approving of the ban in a greater number than the clients/main contractors and applauding the extension of the New Act to oral contracts. Nearly 80 per cent of the subset thought HGCRA a success and saw the New Act as a positive move.

The literature highlighted the series of practices that grew up around the last statutory intervention post 1998. "Bending" the rules in the manner of Tolent clauses and extending payment provisions (Choat, 2011) frustrated the last Act's purposes. Similar outcomes are predicted by these findings – further extensions of payment provisions and inclusion of pay when certified type clauses notwithstanding the ban appear likely. The level of familiarisation with HGCRA and the New Act are positive as is the levels of support for both Acts.

Perhaps too much should not be made about the need to amend and update legislation to meet current industry needs and the lacunae that have appeared. If the

longer view is taken that statutes are islands in a sea of case law (Sir Pollock, 1882), then these developments in statutory construction law seem entirely reasonable.

The findings of this study should serve as a benchmark of perceptions and views of the industry's stakeholders held at the New Act's introduction. The government's own planned follow-up of the Act's effectiveness may be compared with these findings to judge whether the first impressions did indeed prove correct.

Conclusions

The challenge for the New Construction Act is to deliver its improvements in the face of a vastly different industry to the one originally contemplated. The current recession is causing suffering in the construction industry (Hoxley, 2009).

The message for lawmakers is that notwithstanding the introduction of procedural requirements and banning of pay when certified provisions, non-compliance is being widely predicted. Another expectation is that payment periods will simply be extended to cover any shortfall, which would have otherwise been created by this provision. Despite the positive survey feedback, concerns remain about the relatively straightforward availability of ways around the well-intentioned provisions of the New Act. The indication is that most of the respondents do not believe the New Act will succeed in improving the operation of construction contracts.

The requirement that contracts need no longer be in writing to allow access to adjudicate received strong support from respondents. It was established that oral agreements were commonplace in the industry. In this regard, the indications are that the New Act will successfully promote adjudication to a wider audience and a prediction can be made that it will build on the success of HGCRA.

The New Act is intended to help speed-up the flow of payments and widen access to a quick method of dispute resolution. It is suspected that the New Act has arrived too late for many, given the depth and breadth of the current downturn. The evidence of the survey suggests statutory intervention is not going to be a panacea. Improvement across an industry as diverse and complex as the construction industry can only be delivered by a complimentary range of measures including encouragement towards best practice as well as statutory provisions.

Notes

1. Danways Ltd v FG Minter (1971), 2 All ER 1389.
2. Bridgeway Construction Ltd v Tolent Construction Ltd (2000), CILL1662.
3. Yuanda (UK) Ltd v WW Gear Construction (2010), EWHC 720 (TCC).
4. HH Coulson in the summing up of Tombs v Wilson Connolly Ltd (2004), EWHC 2809 (TCC).

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