

What have Oliver Twist, DOM/1, DOM/2 and the Housing Construction and Regeneration Act 1996 got in common?

No the answer I am looking for is not that they all contain the letter 'o'. The conceptual marriage of the above came to me whilst having one eye on the film production (of Oliver Twist not the Construction Act) and one eye on the payment terms of these two Sub-Contract Standard forms.

This occurred to me whilst watching the scene when young Master Twist is greeted by a bellowing denouncement of his request for 'More'. More I thought that is just what a Sub-Contractor wants after Practical Completion - More interim payments, more money, and better cash flow.

Why then, I asked myself, do Sub-Contractors under these two forms of sub-contract constantly issue Final Account Applications. This is not what the Contract allows and is certainly no way to go about achieving an interim assessment by way of Adjudication especially if you then word your Notice restrictively on the matter.

The problem is you see that whilst the DOM/1 and DOM/2 have become Act compliant and provide for payments to Sub-Contractors many Sub-Contractors feel uncomfortable at leaving the Main-Contractor to impartially and fairly value their Works. Thus many Sub-Contractors ignore the payment procedures, which are, as follows:

In respect of interim payment provisions clause 21.2.1 states that the first payment shall be due not later than one month after the Sub-Contractor's commencement of Works on site, or by agreement their off-site Works. Clause 21.2.2 further provides that interim payments shall be due at intervals not exceeding one month from due date of the first due date and clause 21.2.3 provides that the final date on the above shall be not later than 17 days after the due date.

Quite straightforward, yes? But what happens at Practical Completion of the Sub-Contract Works. Well both Standard Forms require payment of a half moiety of retention monies held, if any, by the end of the month in which Practical Completion occurred. So far so good, but then what? At this stage my thoughts ran concurrent with young Mr Twist picking up his now empty bowl in anticipation of receiving More.

Well I shall tell you it is at this stage that many go wrong. Contrary to popular folk law these Standard forms of Sub-Contract do not provide for you issue your Final Account and that thereafter Final Payment shall be payable within 14 days. No, the actual provisions state rather that, as per clause 21.9 the Final Payment shall be due not later than 7 days after the date of issue of:

(When under DOM/1) the Final Certificate issued by the Architect **under clause 30.8 of the Main Contract**. The final date for payment shall be **28 days after the due date**.

or

(When under DOM/2) the Date of Final Account and Final Statement Agreement between **Employer and Main Contractor**. The final date for payment shall be **28 days after the due date**.

Thus it appears that the chronology of events concluding in payment of the Final Account is for the DOM/1 and DOM/2 dependent on events under the Main Contract rather than the Sub-Contract. In summary the chronology is, as follows:

Summary of the Time Period under the Standard Form of Sub-Contract DOM/2 for FINAL PAYMENT

1. Practical Completion Date of Sub-Contract
2. Not more than 2 months later, Issue of documents to Main Contractor for Final Account
3. Date of Final Account and Final Statement Agreement between Employer and Main Contractor
4. Not later than a 7-day period the Payment of the Sub-Contract Final Account becomes **DUE**
5. Not later than a 21-day period the **Final Date for Payment**

Summary of the Time Period under the Standard Form of Sub-Contract DOM/1 for FINAL PAYMENT

1. Practical Completion Date of Sub-Contract
2. Not more than 4 months later, Issue of documents to Main Contractor for Final Account
3. Date of Final Certificate issued by the Architect under clause 30.8 of the Main Contract
4. Not later than a 7-day period the Payment of the Sub-Contract Final Account becomes **DUE**
5. Not later than a 28-day period the **Final Date for Payment**

Thus with my third eye on the Housing Grants Construction and Regeneration Act my thoughts drifted to the matter of adjudicating on the submitted Sub-Contract Final Account.

The Act does not provide the Adjudicator, in the absence of the parties agreeing to wider or indeed differ the terms to those in the contract, to rectify the contract. Thus if a party words his Notice of Adjudication restrictively such as to request a decision in respect of payment of his 'Final Account' unless under the Standard Forms either, a 35 day period after the Final Account and Final Statement Agreement between Employer and Main Contractor or a 35 day period after issue of the Final Certificate issued by the Architect under clause 30.8 of the Main Contract, has transpired the

period for payment shall not have expired and no such dispute so referred shall exist. This principle is supported by the case of *A&J Rogers -v- The Northern Ireland Executive*. This case says that you need a Notice of Arbitration and a dispute before there can be a Referral to Arbitration. The same will apply to Adjudication. In the absence of a dispute, as so described within the Notice of Adjudication, no dispute as so described exists for the purpose of adjudication.

Indeed since the Final Account is not a matter for ascertainment by the Sub-Contractor can a dispute under the terms of these Sub-Contracts in respect of such a submitted 'Final Account' ever exist? One might argue that in the absence of the Main Contract Final Account and/or Final Statement or Final Certificate since the due date let alone Final date for payment has yet to be reached no dispute can yet exist. Indeed to proceed to Adjudication in respect of the Final Account, rather than say an interim valuation, could be both premature and erroneous. Indeed if the Final Payment is not due, then no dispute can have crystallised and as such the adjudication is null and void and the Adjudicator has no jurisdiction to decide upon the matter. Moreover by reference to the case of *Ken Griffen and John Tomlinson (T/A K and D Contractors) -v- Midas Homes Ltd (21 July 2000 – Technology and Construction Court)*, if one proceeds in respect of such an adjudication one might find themselves liable for the fees and expenses of the Adjudicator in respect of time spent on the matter without jurisdiction.

Here the Court ruled that a Notice of Adjudication provided jurisdiction in regard only to the matter(s), suitably defined in accordance with the Scheme, and that the remainder of the Referral was outside the Adjudicator's jurisdiction. The Referring Party was thus liable for the Adjudicator's fees and expenses in respect of the matter(s) outside of his jurisdiction.

At this juncture young Mr Twist had asked for more and received a blustery rebuttal. It seemed that neither he nor the Sub-Contractors were going to get any more for a very long time.

Of course all stories should have a happy ending, so here is one. Under the DOM/1 and DOM/2 should you rather word your adjudication notice so as to request that the Adjudicator decides that the sum you ascertained as Due, or such other sum as the Adjudicator decides, was ascertainable as Due by the Main Contractor after Practical Completion of the Sub-Contract Works and at a period of not less that the period stated in the Sub-Contract for interim payments since the last payment by the Main-Contractor, you may well get More.

Like most things it is not what you ask for but how you ask for it. There is no necessity to issue a document headed Final Account. Rather why not simply issue to the Main Contractor 'interim assessments' at the appropriate intervals. There is after all nothing in the Sub-Contracts to say that at the date when the latest date for your Final Payment is to be made you should not already have been paid those sums if ascertainable at some earlier date.

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