



Construction Seminar Autumn 2009

Bell & Scott LLP

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PROPERTY LAW

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- ▶ Contracts update;
- ▶ Statute update;
- ▶ Any common themes?
- ▶ Looking forward?

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- ▶ JCT Amendment No 2:
- ▶ Achieving Excellence in Construction:-
- ▶ Good management practice;
- ▶ Simplification of procedures
- ▶ Recognise sustainability issues.

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- ▶ **JCT Amendment 2 Revisions:**
- ▶ The new Supplementary Provisions include:
 - Acceleration Quotation;
 - Collaborative working;
 - Cost savings and value improvements;
 - Performance indicators and monitoring;
 - Good faith negotiations re potential disputes.

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Revised Payment and retention provisions:-

New interim payments applications:-

- ▶ after practical completion applications to be made at two monthly intervals rather than as and when further amounts are ascertained.
- ▶ if the Employer fails to issue a Certificate or issues it late, an entitlement for the Contractor to be paid interest from what would have been the final date for payment if a Certificate had been issued on time.

Retention bond:-

in lieu of retention deduction, a new form of retention bond is included.

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- ▶ Further changes:-
- ▶ Revision of notice provisions;
- ▶ Termination for Contractor default - increased notice period from 14 days to 21 days;
- ▶ Seriously consider Mediation provisions.

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- ▶ JCT chairman, Peter Hibberd: "With almost half of all CO2 Emission coming from buildings, and the construction process itself being particularly wasteful, JCT recognised a need, and an opportunity, to help improve the performance of the construction and property industries".

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- ▶ new provisions to enable the Contractor to suggest “*economically viable amendments*” to the works which if instructed may result in an **improved environmental performance**; and to provide information regarding the **environmental impact of the supply** and use of materials and goods selected by the Contractor.

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- ▶ Sample clauses

“The Contractor is encouraged to suggest economically viable amendments to the Employer’s project requirements which, if instructed as a change, may result in an improvement in environmental performance in the carrying out of the works or of the completed works.”

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- ▶ Sample clauses:

“The Contractor shall provide to the Employer all information that he reasonably requests regarding the environmental impact of the supply and use of materials and goods which the Contractor selects.”

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- ▶ JCT clauses not prescriptive:-
- ▶ Projects vary from to another;
- ▶ Sustainability strategies still progressing;
- ▶ Clauses really guidance/indicators as to way forward;
- ▶ JCT not ruling out revisiting clauses when/if methods become fixed.

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Still to impact:-

- ▶ Code for Sustainable Buildings;
- ▶ Carbon Reduction Commitment;
- ▶ Climate Change (Scotland) Act;
- ▶ Environmental Damage (Prevention and Remediation) Regulations 2009;
- ▶ The Environmental Liability (Scotland) Regulations 2009.

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- ▶ Bespoke style green clauses:-

“The Contractor shall not transport to use generate dispose of or install at the Site any Hazardous Substances except in accordance with Environmental Laws applicable at the time of performing the Works. The Contractor shall not cause any release of Hazardous Substances into or contamination of the environment including the soil the atmosphere any water course or ground water except in accordance with Environmental Laws applicable at the time of performing the Works.”

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- ▶ Bespoke style green clauses:-
“The Contractor shall ensure that a Site Waste Management Plan (the "Plan") complying in all respects with the Site Waste Management Plans Regulations 2008 (the "SWMP Regulations") is prepared and a copy submitted to the Employer before work begins on the Site. The Contractor shall update the Plan in accordance with the SWMP Regulations and perform his other duties under the SWMP Regulations.”

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- ▶ Bespoke green clauses:-
“The Contractor shall ensure that a Site Waste Management Plan (the "Plan") complying in all respects with the Scottish Environment Protection Agency Guidelines (the "SWMP Guidelines") is prepared and a copy submitted to the Employer before work begins on the Site. The Contractor shall update the Plan in accordance with the SWMP Guideline and perform his other duties under the SWMP Guidelines.”

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- ▶ Bespoke green clauses:-

“Prior to Practical Completion, the Contractor shall provide the Employer with an Energy Performance Certificate and recommendations report in accordance with the The Energy Performance of Buildings (Scotland) Regulations 2008 2008 (the "EPC Regulations") for each "building" (as defined in the Regulations, taking into account Regulations 11(7) and (8)) comprised in the Works and notify Building Control that this has been done.”

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- ▶ **Conclusion**
- ▶ JCT Amendment 2 2009
- ▶ Intro of sustainability provisions ;
- ▶ Linked to growth in legislation both green and otherwise;
- ▶ Impact, contractors/developers are going to see much more regulation in this area.

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- ▶ Further contract news to note:
- ▶ ICE endorses the NEC suite of contracts as
- ▶ “the best practice contract form for construction projects, in the UK and overseas.”
- ▶ JCT revised warranties published 2009;
- ▶ ACE 2009 Agreements have been published replacing the 2002 editions.

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- ▶ **Local Democracy, Economic Development and Construction Bill**

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- ▶ Housing Grants Construction and Regeneration Act 1996 has been in force since 1998
 - ▶ Introduced statutory adjudication;
 - ▶ Statutory payment provisions
 - Right to interim payments
 - Payment notices
 - Notices of withholding
 - Right to suspend payment
- Act's Scheme applied in default.

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- ▶ Problems with the 1996 Act
 - Contracts ‘in writing’
 - ‘Tolent’ clauses
 - ‘Pay when certified’ clauses
 - Payment notices/Notices of Withholding
 - Right to suspend not used

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- ▶ Contracts ‘in writing’
 - s.107 of the 1996 restricting the application of the Act to contracts ‘in writing’ is to be repealed
 - Bespoke adjudication clauses must be ‘in writing’ failing which the default provisions ‘the Scheme’ will apply

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- ▶ 'Tolent' Clauses
 - Any clause that seeks to apportion costs between the parties will be ineffective unless agreed in writing after the appointment of the adjudicator
 - Where parties make an effective allocation of legal costs (one made after the appointment of the adjudicator), the adjudicator can alter that if it is unreasonable

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- ▶ Pay when certified clauses
 - ‘Pay when paid’ clauses were banned by the 1996 Act
 - Pay when certified clauses have the same effect
 - A clause making payment conditional on performance under another contract (e.g. a main contract) will be ineffective

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- ▶ Right of suspension
 - The right of suspension provided by the 1996 Act was not a very effective remedy due to the high costs of demobilisation and remobilisation
 - The Bill provides for reasonable costs associated with the same to be paid where the right has been exercised

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- ▶ Payment Notices/Withholding Notices
 - Payee can now give notice if no payment notice is given by the Payer;
 - A “third party” can serve notices in lieu of the Payer.
 - More control of payment process for payee.

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- ▶ Bill likely to be an Act early next year;
- ▶ Standard form payment provisions will need to be amended;
- ▶ All appointment documentation will need to be amended
- ▶ New Scheme unlikely until Winter 2010/11.

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- ▶ **Conclusion**
- ▶ New amends to Housing Grants Act, to speed up /release of cashflow;
- ▶ Hoped protection for sub contractors;
- ▶ Wider use of adjudication as method of DRP
- ▶ Full impact, wait and see!

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- ▶ **Recurring themes:-**
- ▶ Sustainable construction
- ▶ Fairer payment practices
- ▶ **Looking forward:-**
- ▶ Growth in Sustainability and
- ▶ Environmental issues



Practical Lessons to be learned from Case Law 2009

Sara Lannigan

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Barr Ltd v Klin Investment UK Ltd

- ▶ When is the same, not the same?
- ▶ What makes a dispute the same or substantially the same as a dispute already referred to adjudication?

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Adjudication 1

- ▶ Interim Application 22
- ▶ Were the notices served timeously?

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Adjudication 2

- ▶ Liquidated Damages
- ▶ Were the LAD's as provided for in the contract a penalty?

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Adjudication 3

- ▶ Interim Application 23
- ▶ Was the basis for withholding common law damages flawed?

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Decision

- ▶ Disputes should be interpreted narrowly
- ▶ Same problem, different angle

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Adonis Construction Limited v O'Keefe Soil Remediation

- ▶ Letter of Intent:-

“We confirm our intention to enter into a sub-contract with you”

- ▶ **Draft Sub-contract Order**

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Issues for the Court

- ▶ Was there a contract in writing?
- ▶ Was the contract capable of acceptance by conduct?
- ▶ Did O'Keefe act in such a way as to indicate its acceptance of the order?
- ▶ Did the Letter of Intent constitute a contract?

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Decision

- ▶ Importance of a contractual framework

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R&D Construction Group v Hallam Land Management

“The Missives shall be essentially conditional upon:-

4.1.10 the Seller [Hallam] agreeing a purchase price for the Subjects with the current proprietor [Mrs Kerr] in terms wholly acceptable to the Seller (the Seller being required to use all reasonable endeavours in this regard)”

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Decision

- ▶ The court will give effect to the intention of the parties
- ▶ It is not only what is said and recorded in writing but what is done that defines the contract

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Donal Toner v Kean Construction and CRGP Architects

- ▶ Rare to see copyright cases in Scotland
- ▶ Procedural Step – Debate on the legal merits of the case

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- ▶ 2-Dimensional and 3-Dimensional copies arguably result in two separate breaches of copyright
- ▶ Serves as a warning in instances where one architect has taken over from another

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What lessons have we learned?

- ▶ In serial adjudications, try to use the same adjudicator
- ▶ The court will try to give effect to the intention of the parties in interpreting a contract
- ▶ Contractor's must be aware of where plans have originated from, especially where there has been a change of architects in a project

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Thank You



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22 October 2009

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Outline

Environmental Liability (Scotland) Regulations 2009

- ▶ What do the Regulations do?
- ▶ Who is affected by the Regulations?

Corby Borough Council Case

- ▶ What did the Case say?
- ▶ What might it mean for you?

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Environmental Liability (Scotland) Regulations 2009

- ▶ Introduced on 24 June 2009
- ▶ EU Environmental Liability Directive
- ▶ Equivalent Regulations for England and Wales and Northern Ireland

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Environmental Liability (Scotland) Regulations 2009 continued

What do the Regulations do?

▶ “Significant” damage (or threat of damage) to:

- protected species;
- natural habitats;
- water;
- land;

▶ “Activity” – all commercial enterprises including “not for profit” undertakings.

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Environmental Liability (Scotland) Regulations 2009 continued

Who is affected by the Regulations?

- ▶ “Operators”
 - Owners or occupiers
 - Contractors/Professionals ?
- ▶ Negligence/strict i.e. no fault liability depending on “activity”.
- ▶ “prevention”, “notification” and “remediation”.

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Environmental Liability (Scotland) Regulations 2009 continued

What else?

- ▶ Criminal sanctions
- ▶ Third party involvement
- ▶ Not retrospective

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Environmental Liability (Scotland) Regulations 2009 continued

Summary

- ▶ Be aware of the Regulations (and make sure the rest of the Team are similarly aware)
- ▶ Do your due diligence

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Corby Borough Council Case

Facts of the Case

- ▶ Corby Borough Council
- ▶ British Steel site in Corby
- ▶ Judgement - Common law duty of care
- ▶ Environmental Protection Act 1990
- ▶ Public Nuisance

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Corby Borough Council Case continued

What can we take from the case?

- ▶ The Council “bit off more than it could chew”
- ▶ “Extensively negligent in its control and management”
- ▶ Standard of Care drawn very highly
- ▶ “Does highlight the need to give careful consideration of appropriate risk assessments for current projects”
- ▶ All industry standards met/insurance cover adequate

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Corby Borough Council Case continued

Summary

- ▶ Unique Case – but could apply to other circumstances (albeit on a more limited scale)
- ▶ Council as Defender but may also apply to developers.



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