

Construct Scotland

NOVEMBER 08

This edition of **ConstructScotland** sees an unusual focus on legislation ranging from that with green credentials to that intended to assist with the age old issues of payment and dispute resolution. We make no apology. There seems to be a raft of government plans which will certainly impact upon and hopefully assist the industry.

To assist in the credit crunch we are offering a contract review service to Funders, Employers and Contractors to assist in spotting potential issues before they become problems. Please contact the team for more information.

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Retro Dispute Resolution

Will the Scottish Government's Consultation on the Arbitration (Scotland) Bill (the Bill) send us back to those pre-Adjudication days?

Adjudication was perceived to be the answer to the ills of Arbitration. Arbitration was commonly criticised for being lengthy, costly and overly reliant on written pleadings, whereas Adjudication was a 28 day quick fix. However, Adjudications will usually take longer than the minimum 28 day period and are rarely cheap. The fees of the Adjudicator may be in excess of £10,000 and whilst they may not require to be borne by you, your own legal fees (likely to be of a similar level) cannot be recovered in a statutory adjudication. Whilst Adjudication is unlikely to be ousted as the favourite forum perhaps reformed Arbitration could be complementary as this case study shows:

Contractor A has been on site for 12 months and is days from completion. The Final Account detailing is with the Employer. The Employer has already said that he doesn't accept that Contractor A has counted each screw properly and he thinks that the 25 different types of bolts haven't been properly priced. He thinks that Contractor A has already been overpaid by £10,000. The Employer wants to deduct £50,000 because Contractor A has finished 6 months late. Contractor A says the Employer caused the delay and in addition to payment of £3,000 for the works he is entitled to payment of £13,500 as a result of the Employer delay. Both Contractor A, the Employer and the site are based in Edinburgh.

Contractor A is fed up talking and wants payment. If we assume that there is a choice of post-Bill Arbitration, Adjudication and Court then what is best?

The dispute is not sizeable so there is potential for the irrecoverable costs to outstrip the value of the Contractor's claim. This puts Contractor A off Adjudication. Also the delay aspect of the dispute is fairly complicated and it seems unlikely that 28 days will be enough to get a good decision.

Court is an option given that there can be an award to the successful party of their judicial expenses thus reducing the irrecoverable costs. The only available courts to Contractor A are the Court of Session or Edinburgh Sheriff Court. The sums in dispute make the Court of Session unsuitable and the lack of commercial procedure at the Sheriff Court may cause difficulty – we need good case management which is something the ordinary procedure cannot always accommodate.

In the pre-Bill days the Arbiter's powers in relation to expenses would have been uncertain. However, the Bill provides that the Arbiter has the power to make awards of expenses and as such the Arbiter can, like the court, reduce the successful party's irrecoverable expenses. Also he is a QS of old so knows exactly the principles which are important in bolt counting disputes. Further the Arbiter has been earning his crust as an Adjudicator and is keen to flex his case management muscles. He may just use his powers in respect of expenses to prevent the delaying tactics that almost killed Arbitration before. . . .

Construction Standards

Energy Performance Certificates

On 1 May 2007, regulations made under the Building (Scotland) Act 2003 came into force in Scotland to implement the EU Energy Performance of Buildings Directive.

These regulations require Energy Performance Certificates ("EPC's") to be produced in respect of newbuilds, and by January 2009 EPC's will also be required in respect of existing buildings being sold or rented out to new tenants.

EPC's display the overall energy efficiency rating of a building. The certificates can only be issued by an

accredited person and they must contain certain information prescribed by the Scottish Building Standards Agency (who have produced a model form of certificate). Inspections will encompass a wide variety of factors such as heating and ventilation systems, energy efficiency generally and positioning of the building etc. The certificates remain valid for 10 years, unless modifications during that period require the property to be reassessed.

Given the potential implications of a failure to comply with the requirements (up to a £5,000 fine,

and the inability to complete deals with purchasers and tenants) it is worth thinking ahead – particularly as it seems that the industry is somewhat behind the legislature in terms of getting certifiers accredited. Of course, the green movement will not end here, so encouraging designers and tenants towards energy efficient measures will no doubt reap rewards in the coming years.

The HBJ Gateley Wareing Climate Change Team are hosting a series of autumn seminars. Please visit www.hbjgateleywareing.com for further information.

Construction Act Bill

More than 10 years after its implementation, the Housing Grants, Construction and Regeneration Act 1996 is expecting a facelift and it seems that some time late next year long heralded amendments will be put in place.

The Bill is designed to adjust the existing terms of the Act and proposes to deal with the following issues:

1. Extension of the right to adjudicate to all construction contracts not just those in writing.
2. Clarification of the requirements for payment and withholding notices.
3. Prohibition of "pay when certified clauses".
4. Giving contractors who properly suspend, the right to claim for the delay caused thereby.

It has been suggested that these changes will be unfavourable to the employer/developer in a construction project. However, if the overall result is an improvement in the general relationship between developer and contractor then, eventually, the results will be seen to be beneficial to the whole industry.

The approach of the legislation is welcomed. Maintenance of a UK wide Act is critical. The construction industry is national. Consistency of application should enhance the benefits of the proposed amendments which build on an existing understanding and case law.

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