

DANGEROUS INTENT

The Technology and Construction Court has recently given yet another warning of the dangers of not signing formal contracts.

In *Diamond Build v Clapham Park Homes*, Clapham issued a letter of intent to Diamond which stated that the parties intended to enter into a JCT contract and that Diamond's entitlement to fees under the letter of intent was capped. Diamond signed the letter of intent. Clapham later signed and sent a contract to Diamond but Diamond never signed the contract.

When relations broke down, Diamond argued that the parties had been acting on the basis that the JCT contract applied and that the cap (which had long ago been exceeded) no longer applied. The court disagreed and found that the provisions of the letter of intent governed the parties' relationship.

CALM DOWN, DON'T BE PARANOID

It is not unusual for contracts to provide for the appointment of an adjudicator by a nominating body. Sometimes, a party will try to influence the nominating body to appoint a particular adjudicator. In *Makers UK Ltd v Camden Borough Council*, Makers desired the appointment of a legally qualified adjudicator and contacted a particular adjudicator to find out his availability. RIBA appointed this individual following a request by Makers.

The adjudicator found against Camden who, suspicious of these pre-appointment shenanigans, challenged the validity of the decision. They argued that it ought to be implied into the contract that neither party would attempt to influence the selection of the adjudicator. They also alleged apparent bias in the adjudicator's decision.

The court felt that "the fact that individuals within Camden are subjectively concerned or distressed by what has happened is not in itself material". It was not necessarily wrong for parties to make representations to the nominating body as such representations might be helpful in highlighting the need for an adjudicator with particular expertise. The court suggested, however, that communications with potential adjudicators should be made in writing and that nominating bodies should consider their rules in relation to such representations.

REVERSING PLEURAL PLAQUES

Following last years' House of Lords' ruling that sufferers of the asbestos-related condition pleural plaques could not claim damages, the Scottish Government is seeking to reverse the position. The Damages (Asbestos-related Conditions) (Scotland) Bill aims to protect the rights of sufferers of pleural plaques and other asymptomatic asbestos-related conditions to claim damages in spite of the ruling.

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JCT – SUSTAINABILITY

The Joint Contracts Tribunal (JCT) last month announced that a series of new and extended 'sustainability' clauses will be introduced in its contracts from spring 2009. A working group is currently in place to produce guidance notes and finalise the provisions, which are expected to include specifications on waste reduction and the use of recycled materials. The move is aimed at raising awareness of environmental issues within the industry, and to encourage professionals to use green practices. It is not expected that any limits on energy consumption will be set.

Critics have argued that such provisions are unlikely to survive negotiations unless they are statutorily enforceable or linked to demonstrable incentives. However, the JCT has emphasised the opportunity to safeguard the environment which is created by the raising of the sustainability benchmark in its standard forms.

FIDIC GOLD BOOK

The International Federation of Consulting Engineers (FIDIC) has released the latest edition of their Conditions of Contract for Design, Build and Operate projects. Affectionately known as 'The Gold Book', the contract contains all of the contractor's obligations in relation to the design, construction, operation and maintenance of a plant, updates and replaces the 2007 Pre-Press Seminar Edition.

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EDITORIAL

Hello, and welcome to McGrigors' Inside Construction, a regular snapshot of what's happening in the world of construction law.

What passes for our summer has drawn to a close without the usual holiday hiatus on a number of fronts. In this edition, we have a further update on the progress and content of the draft Construction Contracts Bill and FIDIC's Gold Book.

The enactment of the Bill is likely to have a number of useful practical impacts, particularly in relation to adjudication. The *Makers UK v Camden Borough Council* is a case in point: we comment more fully in this bulletin.

Also in this bulletin, the case of *Diamond Build v Clapham Park Homes* serves as another reminder (if one is needed!) of the dangers of preceding works on the basis of a letter of intent.



“MORE ROBUST” COST ESTIMATES FOR NEW PROJECTS

Audit Scotland published a report earlier this summer which was the first systematic review of major public sector capital projects in Scotland. A total of 43 projects completed between April 2002 and March 2007 were examined. The value of these projects is £811 million. This pales into insignificance in relation to the Scottish Government’s 2008 Infrastructure Investment Plan which identifies £10.5 billion to be invested between 2008/2009 and 2010/2011. With this massive level of spend the key messages which emerge from the Review are of fundamental importance.

The central message of the Review is that early costs and time estimates at the approval stage were too optimistic for many major projects. Only around two-fifths of projects were completed within the cost estimated, and only a third of projects were completed by the forecast project completion date, at the initial approval stage. It was found that performance against cost and time-estimates

improves after contracts are awarded, as plans are more certain and risks clearer. This is unsurprising.

The Review sets out a number of recommendations such as ensuring that robust procurement strategies and cost estimates have been developed prior to awarding funding to projects and taking account of market conditions and construction inflation when developing capital programmes. However, what this essentially requires is achieving greater clarity around design and workscope in order to enable accurate prices and timescales to be arrived at. Alongside this is the requirement to get smarter in assessing risks which always exist and factoring in appropriate contingencies both in relation to cost and time.

(abridged version of an article by Brandon Nolan (Head of Construction & Engineering, McGrigors) which appeared in The Scotsman, 4 September 2008).

CAN’T GET NO SATISFACTION?

The idea that goods must be of “satisfactory quality” is well known to most consumers. In business-to-business contracts, the same implied term also applies unless excluded (reasonably) by the contract terms.

What some contractors may find surprising, however, is that even where an employer specifies the precise make of goods to be supplied and fitted, the contractor is still potentially liable for any failure of the goods or materials to be of satisfactory quality. Care should therefore be taken by contractors to ensure that they can pass any such liability down the contractual chain to their sub-supplier.

AFTER 10 YEARS IN FORCE, THE TIME IS ARGUABLY RIPE FOR ADJUSTMENTS TO THE CONSTRUCTION ACT.

Ripe for Review: Draft Construction Contracts Bill to tweak the 1996 Act

The Government’s recently proposed draft Construction Contracts Bill will amend the Housing Grants, Construction & Regeneration Act 1996. The 1996 Act radically altered the world of construction law when it introduced requirements for payment provisions in construction contracts and provided for statutory adjudication.

After 10 years in force, however, the time is arguably ripe for adjustments to some of the more problematic areas of the Act.

So, what issues are covered in the draft bill? Key points to note are:

- the requirement that the Act only applies to construction contracts made in writing will be removed – oral and partially written contracts will now be covered.
- it will no longer be possible to stipulate that payment under one contract is dependent upon steps taken (e.g. a certificate

being issued) under another contract further up the contractual chain, outlawing “pay-when-certified” clauses.

- withholding notices will be revamped and the right to withhold money in circumstances of insolvency of the payee, without issuing a withholding notice, will be introduced.
- third party certification of interim payments will no longer be capable of being “binding” unless the agreement to make them binding is made after the amount and basis of the interim payment is known.
- you won’t be able to allocate the costs of adjudications between the parties in advance of a dispute arising.
- the parties will have joint and several liability to the adjudicator for his fees (irrespective of any (valid) agreement between the parties to apportion those fees between them).

The time for review may be ripe but our advice would be: don’t hold your breath!

While the consultation on the draft bill ended on 12 September and the bill is scheduled to be placed before Parliament in the 2008/2009 Parliamentary Session, it is to form part of the wider Community Empowerment Bill and so its passage through Parliament is likely to prove slow.

Some commentators are speculating that it may well be several years before this reaches the statute books.

Watch this space for more details.

