



SBCC 2024 Breakfast Seminar

Thursday 5 September 2024

Welcome





SBCC Chair

Ysella Jago





About the SBCC

Scottish Building Contract Committee (SBCC) produce building contracts designed to meet the needs of the construction industry in Scotland.

We are the Scottish College of the Joint Contracts Tribunal Ltd. (JCT) and adapt JCT contracts to produce contracts compliant with Scottish law and practice.





JCT 2024 and SBCC 2024 Update

Pat Loftus

Partner, Anderson Strathern LLP

Anderson Strathern are appointed to provide the SBCC Contract Drafting Services. Pat Loftus sits on SBCC Board and Committee representing Build UK and chairs the SBCC Drafting Sub-Committee.





JCT/ SBCC 2024 Edition of Contracts Update

September 2024





Role of JCT/SBCC

- The Joint Contracts Tribunal is an industry body made up of several interest groups within the construction industry
- JCT contracts are for use in **England, Wales and Northern Ireland, i.e. based on English law and practice.**
- The Scottish Building Contract Committee (SBCC) are the **Scottish “College” of JCT and adapt JCT contracts to produce contracts compliant with Scottish law and practice.**
- Subject to jurisdictional/ Scottish law issues, the SBCC and the SBCC contracts do NOT seek to move away from the risk profile, processes found in the JCT Contracts.
- Therefore @ 95% of the changes* introduced by the JCT in their 2024 suite of contracts will find their way into the SBCC 2024 suite of contracts.
- The other @5% will be issues in relation to the differences in English and Scottish law.

*to flag what is meant by “changes” these are amendments to the JCT 2016 suite of contracts.





Overview of JCT 2024 changes

- The JCT 2024 changes are categorised by JCT within the 3 strands:-
- **“Legislative Changes”**;
- **“Future Proofing”**;
- **“Modernised and Streamlined”**.

Plus

- Introduction of a new contract to the JCT suite of contracts:-
the **JCT Target Cost Contract 2024** (“TCC”).





JCT 2024

First Category

Legislative Changes





JCT 2024 Legislative Changes

- **Building Safety Act 2022 and related legislation** – Updates to accommodate new Part 2A of the Building Regulations 2010.
- Part 2A of the Building Regulation 2010 introduces a new “**duty holder regime**” in relation to high risk buildings (HRBs)
- HRBs being buildings of:-
 - 18m high/or 7 storeys which contain at least 2 residential units; and/or
 - Hospitals or care homes.





JCT 2024 Legislative Changes

- The “duty holder regime” requires a
- “Principal Designer” and
- “Principal Contractor”
- To be appointed where the works involve HRBs.
- JCT have inserted the following in the 2024 suites:-
- A new Article; Article 7 (D&B reference);
- Expanding clause 3.16 to include the Part 2A Building Regulations/





JCT 2024 Legislative Changes

Article 76

Building Regulations – Principal Designer and Principal Contractor

For the purposes of the Building Regulations:

- the Principal Designer is the Contractor

- (or)^[5] _____

- of _____

- _____

- or such replacement as the Employer at any time appoints to fulfil that role;

- ~~the~~ the Principal Contractor ~~for the purposes of the CDM Regulations~~ is the Contractor

(or)^[5] _____

of _____

or such replacement as the Employer at any time appoints to fulfil that role.





JCT 2024 Legislative Changes

CDM Regulations and Part 2A of the Building Regulations

3.16 CDM Regulations and Part 2A of the Building Regulations

Without limiting either Party's statutory and regulatory duties and responsibilities, each Party undertakes to the other that in relation to the Works and site it will duly comply with applicable CDM Regulations and as applicable Part 2A of the Building Regulations, and in particular but without limitation:

- 3.16.1 where the Contractor is not the Principal Designer, the Employer shall ensure that the Principal Designer carries out its duties and, where the Contractor is not the Principal Contractor, shall ensure that the Principal Contractor carries out its duties under those regulations;
- 3.16.2 where the Contractor is and while it remains the Principal Designer, it shall comply with the duties of a Principal Designer and (where it is the Principal Designer for the purposes of the CDM Regulations) it shall without charge prepare, and deliver to the Employer, the health and safety file;
- 3.16.3 the Contractor shall comply with:
 - 3.16.3.1 regulations 8 to 10 and 15 of the CDM Regulations and, where it is the Principal Contractor for the purposes of the CDM Regulations, with regulations 12 to 14 of those regulations; and
 - 3.16.3.2 regulations 11F, 11J, 11K and 11L of the Building Regulations and, where it is the Principal Contractor for the purposes of the Building Regulations, with regulation 11N of those regulations;
- 3.16.4 if the Employer appoints a replacement for any Principal Designer or Principal Contractor, the Employer shall immediately upon that appointment notify the Contractor with details of the new appointee.





JCT 2024 Legislative Changes

- However, the Building Safety Act 2022 section 169 confirms that **Part 2A does not apply in Scotland**
- “(1) Subject as follows, **this Act extends to England and Wales only.**”
- But the following provisions extend to England and Wales, **Scotland** and Northern Ireland—
 - (a) Part 1;
 - (b) paragraphs 87 and 88 of Schedule 5 (and section 55 so far as relating to those paragraphs);
 - (c) sections 136 to 143 and Schedule 9 (new homes ombudsman scheme);
 - (d) section 146 and Schedule 11 (construction products);
 - (e) sections 152 to 155 (costs contribution orders);
 - (f) section 157 to 159 (architects);
 - (g) this Part except section 161, 164 and 167.
- (2) Section 2(2) and Schedule 1 (amendments of the Health and Safety at Work etc Act 1974) extend to England and Wales and Scotland.
- (3) The amendments made by Schedule 10 (amendments in connection with the new homes ombudsman scheme) have the same extent as the provision amended.
- (4) Sections 147 to 149 (liability relating to construction products) extend to England and Wales and **Scotland.**
- (5) Section 151 (liability relating to construction products: limitation in Scotland) **extends to Scotland only.**





JCT 2024 Legislative Changes

- So although elements of the Building Safety Act 2022 apply to Scotland, the new Part 2A “duty holder regime” does not.
- Therefore the SBCC 2024 will not include Part 2A “duty holder regime”.
- In relation to elements of the Building Safety Act 2022 which are applicable to Scotland, following JCT’s lead here, these obligations will be covered by compliance with the “Statutory Requirements”.
- The definition of “Statutory Requirements” remains @ the same as per the 2016 suite of contracts.





JCT 2024 Legislative Changes

- **Construction Act 1996** - Termination accounting and payment provisions added to section 8.
- revisions to the section 8 termination accounting and payment provisions to provide expressly for the payment and payment-related notice requirements of the Housing Grants, Construction and Regeneration Act 1996, as amended ('the Construction Act').
- How the "Termination Payment" has been calculated remains the same, save that said payment is expressly subject to payment notices.
- Amendments to clause 8.12 to reflect this and new clause 8.13 (D&B reference).





JCT 2024 Legislative Changes

8.13 Termination Payment – final date, notices and amount

8.13 Termination Payment – final date, notices and amount

8.13.1 Subject to clause 8.13.5, the final date for payment of the Termination Payment shall be 14 days from its due date, as fixed in accordance with clause 8.7.5, 8.8.2 or 8.12.4.

8.13.2 **Not later than 5 days after the due date** for the Termination Payment the Employer shall give a notice to the Contractor, stating the sum that it considers to be or have been due at the due date, calculated in accordance with clause 8.7.6, 8.8.3 or 8.12.5, and the basis on which that sum has been calculated (the 'Employer's Termination Payment Notice'). Such notice shall show the difference or amount referred to in clause 8.7.6, 8.8.3 or 8.12.5 as a balance due to the Contractor from the Employer or vice versa.

8.13.3 If the Party by which the Termination Payment is stated to be payable ('the payer') intends to pay less than the stated balance, it shall not later than 5 days before the final date for payment give the other **Party a Pay Less Notice** in accordance with clause 4.10.1.

8.13.4 Where a Pay Less Notice is given under clause 8.13.3, the payment to be made on or before the final date for payment shall not be less than the amount stated in it as due.

8.13.5 If an Employer's Termination Payment Notice is not given in accordance with clause 8.13.2:

8.13.5.1 the Contractor may at any time **after the 5 day period** referred to in clause 8.13.2 give a notice to the Employer, stating the sum that the Contractor considers to have become due under clause 8.7.6, 8.8.3 or 8.12.5 at the due date and the basis on which that sum has been calculated (the 'Contractor's Termination Payment Notice') and, subject to any Pay Less Notice given under clause 8.13.5.3, the Termination Payment shall be the sum stated as due in the Contractor's Termination Payment Notice;





JCT 2024 Legislative Changes

- 8.13.5.2 *if the Contractor gives a Contractor's Termination Payment Notice, the final date for payment of the sum specified in it shall for all purposes be regarded as postponed by the same number of days as the number of days after expiry of the 5 day period referred to in clause 8.13.2 that the Contractor's Termination Payment Notice is given;*
- 8.13.5.3 *following the Contractor's Termination Payment Notice the Employer **may not later than 5 days before the final date for payment give a Pay Less Notice in accordance with clause 4.10.1** and, if it gives such notice, the provisions of clause 8.13.4 shall correspondingly apply.*
- 8.13.6 *If the payer fails to pay the Termination Payment, or any part of it, by the final date for its payment, the payer shall, in addition to any unpaid amount that should properly have been paid, pay the other Party simple interest on that amount at the Interest Rate for the period from the final date for payment until payment is made. Acceptance of a payment of any such interest shall not in any circumstances be construed as a waiver of any right to proper payment of the principal amount due. Any such unpaid amount and any interest under this clause 8.13.6 shall be recoverable as a debt.*
- 8.13.7 *In relation to the requirements in this clause 8.13 for the giving of Employer's Termination Payment Notices, and Pay Less Notices, it is immaterial that the amount then considered to be due may be zero."*





JCT 2024 Legislative Changes

- **Corporate Insolvency and Governance Act 2020** - New insolvency grounds added to section 8.





JCT 2024 Legislative Changes

“8.1.4 a person also becomes Insolvent if:

8.1.4.1 it he enters into an arrangement, compromise or composition in satisfaction of its his debts (excluding a scheme of arrangement as a solvent company for the purposes of amalgamation or reconstruction); or

8.1.4.2 (in the case of a partnership) each partner is the subject of an individual arrangement or any other event or proceedings referred to in this clause 8.1;

8.1.4.3 (in the case of a company) a moratorium pursuant to Part A1 of the Insolvency Act 1986 comes into force with respect to it; or

8.1.4.4 (in the case of a company) an order is made sanctioning a compromise or arrangement pursuant to Part 26A of the Companies Act 2006 with respect to it.”





JCT 2024
Second Category
“Future Proofing”





JCT 2024 Future Proofing

- **Better, faster, greener, safer**
- JCT Contracts 2024 allow for more emphasis now given to:-
 - Collaborative working;
 - Sustainable development and environmental considerations;
 - Notification and negotiation of disputes.

as a reflection of key industry focus areas, supplemental provisions for collaborative working, sustainable development and environmental considerations, and notification and negotiation of disputes, **and the removal of optionality** in relation to the applicability of those provisions.

- **These 3 previously optional Supplemental provisions are now a contract condition:-**





Future Proofing: JCT Collaborative working

- **Previously Supplemental provision 5 in JCT DB**
- Wording has not changed but now appears at **Article 3:**

'The parties shall work with each other and with other project team members in a co-operative and collaborative manner, in good faith and in a spirit of trust and respect. To that end, each shall support collaborative behaviour and address behaviour which is not collaborative.'

- Core duty to act honestly and not in bad faith
- Depending on contractual context, likely to prohibit conduct that reasonable and honest people would regard as commercially unacceptable, but not necessarily dishonest.





JCT sustainable development and environmental considerations

- Previously Supplemental provision 8 in JCT DB
- Wording amended and now a contract condition:

Clause 2.1.5:

*'The Contractor is encouraged to suggest economically viable amendments to the Works which, if instructed as a Change, may result in an improvement in environmental performance **and sustainability** in the carrying out of the Works or of the completed Works **and a reduction in environmental impact**, provided that no such instruction shall extend the Contractor's obligations in relation to design under this Contract.'*

Clause 2.2.2:

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





Future Proofing :JCT notification and negotiation of disputes

- **Previously Supplemental provision 10 in JCT DB**
- Wording has not changed but now appears at **Clause 9.1:**

‘With a view to avoidance or the early resolution of disputes or differences (subject to Article 8) each party shall promptly notify the other of any matter that appears likely to give rise to a dispute or difference. The senior executives nominated in the Contract Particulars (or if either is not available, a colleague of similar standing) shall meet as soon as practicable for direct, good faith negotiations to resolve the matter’
- Corresponding entry in contract particulars to be completed
- **Not expressed as a condition precedent but that does not mean the Court will not enforce it?**





Third Category

JCT 2024: Modernising and Streamlining





JCT 2024: Modernising and Streamlining

- A. Extensions of Time and Unforeseen Conditions
- B. Liabilities
- C. Communications
- D. Other updates





JCT 2024 EoTs: Relevant Event Epidemic

New Relevant Event

“2.26.7 an epidemic:

2.26.7.1 first occurring after the Base Date which affects the execution of the Works; or

2.26.7.2 first occurring before the Base Date whose effects change after the Base Date and any such change affects the execution of the Works

by limiting the availability or use of labour or the availability of persons engaged in providing services for the Works where such labour and/or persons are necessary for the proper carrying out of the Works, or preventing the Contractor from, or delaying the Contractor in, securing such goods or materials or such services as are necessary for the proper carrying out of the Works;”

- JCT do not define “epidemic”, it is the impact on the Works which is key.





JCT 2024 EoT Relevant Event updated change in law

Updated Relevant Event re change in law.

“2.26.8 the occurrence after the Base Date of any of the following which affects the execution of the Works:

2.26.8.1 the passing into law of any statute, statutory instrument or other subordinate legislation, regulation or bye-law, whether to make a new law or change or repeal an existing law;

2.26.8.2 the exercise of any statutory power, except to the extent caused or contributed to by any default, whether by act or omission, of the Contractor or any Contractor’s Person; or

2.26.8.3 the publication of any guidance,

by the United Kingdom Government or any of the devolved administrations, or any Local or Public Authority or any equivalent authority governed by public law in any of the devolved administrations, or in the case of guidance by the Construction Leadership Council or its successor.”

Old clause 2.26.12 replaced for the above.





JCT 2024 EoT Relevant Event updated re clause 3.15 discovery of antiquities etc

2.26.4 compliance with clause 3.15.1 or with the Employer’s instructions under clause 3.15.2 or (except to the extent that the presence of **asbestos or contaminated material** has been identified in the Contract Documents and/or any such material has been brought on to the site by the Contractor or any Contractor’s Person) compliance with clause 3.15.3 or with Employer’s instructions under clause 3.15.4;”





JCT 2024 clause 3.15 widened re certain unforeseen ground conditions asbestos etc

- 3.15 **Antiquities, asbestos, contaminated material and unexploded ordnance**
- 3.15.1 All fossils, antiquities and other objects of interest or value which may be found on the site or in excavating it during the progress of the Works shall become the Employer's property. Upon discovery of any such object the Contractor shall forthwith:
- 3.15.1.1 use its best endeavours not to disturb the object and cease work if and insofar as continuing work would endanger the object or prevent or impede the object's excavation or removal;
- 3.15.1.2 take all steps necessary to preserve the object in the exact position and condition in which it was found; and
- 3.15.1.3 inform the Employer of the object's discovery and precise location.
- 3.15.2 The Employer shall issue instructions as to action to be taken concerning any object reported under clause 3.15.1, which (without limiting its powers) may require the Contractor to permit the examination, excavation or removal of the object by a third party.
- 3.15.3 **Upon discovery of any asbestos, contaminated material or unexploded ordnance on the site or in excavating it during the progress of the Works the Contractor shall forthwith:**
- 3.15.3.1 use its best endeavours not to disturb the material or item and cease work if and insofar as continuing work would endanger health and safety and/or life and property or prevent or impede the disposal or removal of the material or item; and
- 3.15.3.2 report the discovery of such material or item and the steps it is taking under clause 3.15.3.1 to the Employer.
- 3.15.4 The Employer shall issue instructions with respect to any material or item reported under clause 3.15.3, which (without limiting its powers) may require the Contractor to permit the investigation, disposal or removal of such material or item by a third party.





JCT 2024 EoT Relevant Event process

Timescales for an employer to request more information re an EoT claim:-

“2.24.4 If, on receiving the particulars under clause 2.24.2, or any notification under clause 2.24.3, the Employer requires such further information as is reasonably necessary to enable it to reach a decision under clause 2.25.1, then, not later than 14 days from receipt of the particulars or notification, it shall notify the Contractor stating the further information required, and the Contractor shall supply such further information.”

Previously no timescale for request for further information.





JCT 2024 EoT Relevant Event process

Shortened timescale re Employer's determination of an interim EoT.

2.25.2 Whether or not an extension is given, the Employer shall notify the Contractor of its his decision in respect of any each notice and particulars under clauses 2.24.1 and 2.24.2 and each notification (if any) under clause 2.24.3, whether or not an extension is given, as soon as is reasonably practicable and in any event not later **than 8 weeks** from the later of:

2.25.2.1 the date of receipt of the particulars or notification; or

2.25.2.2 the date of receipt of the further information required under clause 2.24.4.

Where the period from receipt to the Completion Date is less than 8 weeks, it shall endeavour to do so prior to the Completion Date.”

Previous period for granting/deciding to grant an interim EoT was 12 weeks.





JCT 2024 Potential new Relevant Matters

NEW Relevant Matter (Optional) re epidemic

4.21.6 (where the Contract Particulars state that clause 4.21.6 applies) an epidemic:

4.21.6.1 first occurring after the Base Date which affects the execution of the Works; or

4.21.6.2 first occurring before the Base Date whose effects change after the Base Date and any such change affects the execution of the Works

by **limiting the availability or use of labour or the availability** of persons engaged in providing services for the Works where such labour and/or persons are necessary for the proper carrying out of the Works, or preventing the Contractor from, or delaying the Contractor in, securing such goods or materials or such services as are necessary for the proper carrying out of the Works;”





JCT 2024 Potential New Relevant Matters

NEW Relevant Matter (Optional)

4.21.7 (where the Contract Particulars state that clause 4.21.7 applies) the occurrence after the Base Date of any of the following which **affects the execution of the Works**):

4.21.7.1 the passing into law of any statute, statutory instrument or other subordinate legislation, regulation or bye-law, whether to make a new law or change or repeal an existing law;

4.21.7.2 the exercise of any statutory power, except to the extent caused or contributed to by any default, whether by act or omission, of the Contractor or any Contractor's Person; or

4.21.7.3 **the publication of any guidance**

by the United Kingdom Government or any of the devolved administrations, or any Local or Public Authority or any equivalent authority governed by public law in any of the devolved administrations, or in the case of guidance by the Construction Leadership Council or its successor;”





JCT 2024 Potential New Relevant Matters

D&B 2024 Contract Particulars

- **4.21.6 and 4.21.7 Relevant Matters**
- *(in the case of each clause referred to below ,where neither entry against the clause is deleted, that clause does not apply.)*
- Clause 4.21.6 *(the effects of an epidemic on the extension of the Works etc)* **applies/does not apply.**
- Clause 4.21.7 *(exercise of a statutory power)* **applies /does not apply.”**

- Need to apply/disapply in the Contract Particulars.





JCT 2024: Modernising and Streamlining

B Liabilities

- Clause 2.17 Level of Duty of care for design and exclusion of Fitness for Purpose (D&B suite).





JCT 2024: Modernising and Streamlining

“2.17 Design Work – liabilities and limitation

- 2.17.1.1 Insofar as its design of the Works is comprised in the Contractor’s Proposals and in what it is to complete in accordance with the Employer’s Requirements and these Conditions (including any further design that it is required to carry out as a result of a Change), the Contractor warrants, subject to clause 2.17.1.2, that it shall use the reasonable skill and care in such design to be expected of a qualified and experienced architect (or other appropriate professional designer) undertaking the design of works similar in scope and character to such design of the Works.
- 2.17.1.2 To the extent permitted by the Statutory Requirements, the Contractor shall have no greater duty, obligation or liability than to exercise reasonable skill and care as provided in clause 2.17.1.1 in respect of such design and under no circumstances shall the Contractor be subject to any duty, obligation or liability which requires that any such design shall be fit for its purpose.”





JCT 2024: Modernising and Streamlining

- **B. Liabilities**
- Overall cap on liability. JCT have NOT introduced drafting in relation to a cap on liability into the JCT 2024 suite.
- But in the JCT 2024 Guidance Note(s) (D&B Guide: Para 33), JCT provide a draft **cap on liability clause**, should the parties agree capped liabilities.





JCT 2024: Modernising and Streamlining

- **C. Communications**
- New provisions and guidance on service of notices by email.





JCT 2024: Modernising and Streamlining

- **D. Other updates:-**
- Gender neutral language applied across all contracts;
- with respect to the Adjudicator nominating bodies and Arbitrator appointor bodies listed for selection in the Contract **Particulars, includes an adjustment to allow the Parties to specify a nominating body or appointor of their own choosing** as an alternative to making a selection from the bodies listed;
- introduces minor updates to references and terms: the 'Statutory Undertaker' term is superseded by 'Statutory Provider' and has been revised;
- includes revisions to the wording in clause 2.29 (Payment or allowance of liquidated damages); and
- Fluctuations Options are incorporated by reference rather than within the JCT Schedule.





New for JCT 2024 Target Cost Contract





The Target Cost Suite

- The Target Cost main contract (TCC 2024).
- A Target Cost Sub-Contract (TCCSub 2024) – encouraged but not mandatory.
- Flexibility to use any form of Sub-Contract.
- A Guide.
- Based on JCT Design & Build – yes, it is possible to have design.
- The calculation of cost follows the model from the Prime Cost Contract.
- All the other changes to the suites overall are incorporated in this suite.





How does it work?

- Target Cost is equal to the Contract Sum in other contracts. It is adjusted in the traditional way that all other contracts are. e.g. Changes are dealt with the same way they are in the D&B form.
- Payment is made of the Allowable Cost, the Contract Fee and the Difference Share.
- The Difference is the amount determined by deducting the Allowable Cost plus the Contract Fee from the Target Cost.
- The Difference Share is then distributed in the proportions stated in the Contract Particulars.
- The parties are risk sharing hopefully resulting in savings to the project overall.





Published JCT 2024 contracts to date are:-

- D&B Suite*;
 - Traditional Family Suite*;
 - Minor Works Suite*;
 - Intermediate Contract Suite*
 - All style collateral warranty agreements;
 - Pre-Construction Services Agreement;
 - Consultancy Agreement; and
 - Contract Administration forms.
- * Suite= relevant subcontract/relevant user guides.





SBCC 2024 updates

- SBCC will be “kilting” the most popular/used forms of JCT 2024 contracts currently used in Scotland.
- The SBCC 2024s will follow the terms of the JCT 2024.
- At present SBCC will not be kilting for the following JCT 2024 the following:-
- The Intermediate Contract Suite;
- Major Project Construction Contract Suite;
- The Management Building Contract Suite;
- The Prime Cost Building Contract Suite; and
- Repair and Maintenance Suite.

***Simple reason being, there is little or no demand for these contracts in the Scottish market.**





SBCC 2024 updates

- In relation to the JCT Target Cost Contract, SBCC have not made a decision as yet as to “kilt” the same or not. SBCC await to see the uptake /use of the same in England.
 - In relation to the JCT contracts that SBCC currently do not “kilt”, if there is a demand for the same in the Scottish market, then SBCC are open to publishing the same.
 - In terms of the current publishing programme for the SBCC 2024:-
 - The intention is for the Minor Works Suite* to be published later this year, with the D&B and Traditional Suite early in 2025.
- * SBCC are producing the Minor Works Suite first, as these are the most popular form of SBCC contract used.**





Find out more...

SBCC Website scottishbuildingcontracts.com

LinkedIn  **Scottish Building Contract Committee**

JCT 2024 Edition Hub corporate.jctltd.co.uk/jct-2024-edition/

JCT Network corporate.jctltd.co.uk/jct-network





Legal Case Update

Neil Kelly

Partner, Construction, Morton Fraser MacRoberts LLP

Neil has over 40 years' experience advising employers, contractors, subcontractors, consultants, suppliers and their insurers in the construction sector. He is accredited as a specialist in Construction Law by the Law Society of Scotland and sits on the Society's accreditation panel.





MORTON
FRASER
MACROBERTS

LLP

Scottish Building Contract Committee Breakfast Seminar 5 September 2024

Neil Kelly

Partner, Construction

Providence Building Services Ltd
v
Hexagon Housing Association

English Court of Appeal

15 August 2024

MFMA

Providence Building Services Ltd v Hexagon Housing Association

Is it now easier for a Contractor to terminate its employment under JCT/SBCC contracts where the Employer has repeatedly failed to make timeous payment?

Providence Building Services Ltd v Hexagon Housing Association

- JCT 2016 Design and Build Contract
- Termination by the Contractor
- Clauses 8.9.1, 8.9.3 and 8.9.4

Providence Building Services Ltd v Hexagon Housing Association

- Clause 8.9.1 of the contract provides [among other things] that if the Employer does not pay an amount due to a Contractor by the final date or payment, the Contractor may give the Employer a notice specifying the default (the specified default).

Providence Building Services Ltd v Hexagon Housing Association

- Clause 8.9.3 provided that if the specified default continues for [28 days] after the receipt of the default notice under Clause 8.9.1. the Contractor can on or within 21 days from the expiry of the [28-day] period give a further notice terminating the Contractor's employment (the termination notice).

Providence Building Services Ltd v Hexagon Housing Association

- Clause 8.9.4 provided that:
- ‘If the Contractor for any reason does not give the further notice referred to in Clause 8.9.3 but (whether previously repeated or not):

... the Employer repeats a specified default... then upon or within [a reasonable time] after such repetition, the Contractor may by notice to the Employer terminate the Contractor’s employment under this Contract.”

Providence Building Services Ltd v Hexagon Housing Association

- Sum due by 15 December 2022. Not paid .
- On 16 December 2022 Contractor gave notice under Clause 8.9.1 (specified default)
- Sum paid on 29 December 2022
- Sum due by 17 May 2023. Not paid.
- On 18 May 2023 Contractor gave notice under Clause 8.9.4 terminating its employment
- Sum paid on 23 May 2023
- Challenge to lawfulness of termination/repudiatory breach

Providence Building Services Ltd v Hexagon Housing Association

Main issue:

Whether a Contractor was entitled to terminate its employment under Clause 8.9.4 in a situation where there had been a repetition of a specified default but the earlier specified default had been remedied by the Employer within the period allowed by the contract which meant the Contractor had never had the right to give the termination notice under Clause 8.9.3.

Providence Building Services Ltd v Hexagon Housing Association

- Adjudicator and court at first instance found in favour of the Employer essentially on the basis that Clause 8.9.4 only came into operation if the Contractor had previously accrued the right to issue the termination notice referred to in Clause 8.9.3 based on the earlier default but for whatever reason hadn't issued it.

Providence Building Services Ltd v Hexagon Housing Association

Court of Appeal:

- On a proper interpretation of the contractual provisions, there was nothing in the words used which meant that the right to give a termination notice under Clause 8.9.3 had to have arisen at some point in the past (but for some reason the Contractor decided not to give it) before the Contractor could rely on Clause 8.9.4.

Providence Building Services Ltd v Hexagon Housing Association

Right to terminate upon the repetition of a specified default extended to when the termination notice referred to in Clause 8.9.3 had not been given because no right to give it had arisen.

In this case, the earlier specified default had been remedied by the Employer before the Contractor had any right to serve the termination notice.

Providence Building Services Ltd v Hexagon Housing Association

- JCT/SBCC try to strike a difficult balance on termination rights given the nature and effects of termination
- Supreme Court or JCT/SBCC may have the last word
- Meantime, Employers will have to make sure they pay on time if they want to avoid the possibility of termination by the Contractor for non-timeous payments

FES Ltd
v
HFD Construction Group

Commercial Court of the Court of Session

27 February 2024

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FES Ltd v HFD Construction Group

The issue:

Is complying with the notice provisions in Clause 4.21 of JCT/SBCC 2016 a condition precedent to reimbursement of direct loss and expense under Clause 4.20?

FES Ltd v HFD Construction Group

The contract terms:

"Matters materially affecting regular progress.

4.20.1 *If in the execution of this Contract the Contractor incurs or is likely to incur any direct loss and/or expense..... because regular progress of the Works or any part of them has been or is likely to be materially affected by any Relevant Matter, he shall, **subject to** clause 4.20.2 and **compliance with the provisions of clause 4.21** be entitled to reimbursement of that loss and/or expense.....*

MMæ

FES Ltd v HFD Construction Group

4.21.1 The Contractor shall notify the Architect/Contract Administrator as soon as the likely effect of a Relevant Matter on regular progress or the likely nature and extent of any loss and/or expense arising from a deferment of possession becomes (or should have become) reasonably apparent to him.....

4.21.2 That notification shall be accompanied by or, as soon as reasonably practicable, followed by the Contractor's initial assessment of the loss and /or expenses incurred and any further amounts likely to be incurred.....”

MMæ

FES Ltd v HFD Construction Group

- Dispute re. Contractor's entitlement to extension of time and loss and expense
- FES referred to adjudication
- Adjudicator found that giving notice under Clause 4.21 was a condition precedent for reimbursement of loss and expense
- No proper notice given and thus no entitlement

FES Ltd v HFD Construction Group

- Adjudicator mis-interpreted the contract
- Notice was not a condition precedent
- Clause 4.20.1 did not spell out the consequences of non-compliance
- Parties cannot have intended that the clause creates a condition precedent

FES Ltd v HFD Construction Group

Court decision:

- FES arguments failed to take account of the fact that the Contractor's entitlement is dependent upon compliance.
- Far from not spelling out the consequences of non-compliance the wording made clear that without such compliance, the Contractor is not entitled to loss and expense.

FES Ltd v HFD Construction Group

- Although these had been some bespoke amendments to the JCT/SBCC Standard Form, the relevant wording of Clause 4.20.1 had not been changed.

FES Ltd v HFD Construction Group

- Wording is clear
- No need to address other arguments of FES based on ‘business common sense’
- If language clear, not for court to “second guess what business common sense might have otherwise dictated”
- Even if such factors were taken into account, did not assist FES as Clause 4.20.1 served an intelligible purpose – contemporaneous investigation of Relevant Matters and their effects

FES Ltd v HFD Construction Group

- If the relevant wording has been changed by the parties that may lead to a different result but clear on standard JCT/SBCC wording
- Irrespective of strict legal position, normally good practice to give notice

Abbey Healthcare (Mill Hill) Ltd
v
Augusta 2008 LLP
(formerly Simply Construct (UK) LLP)

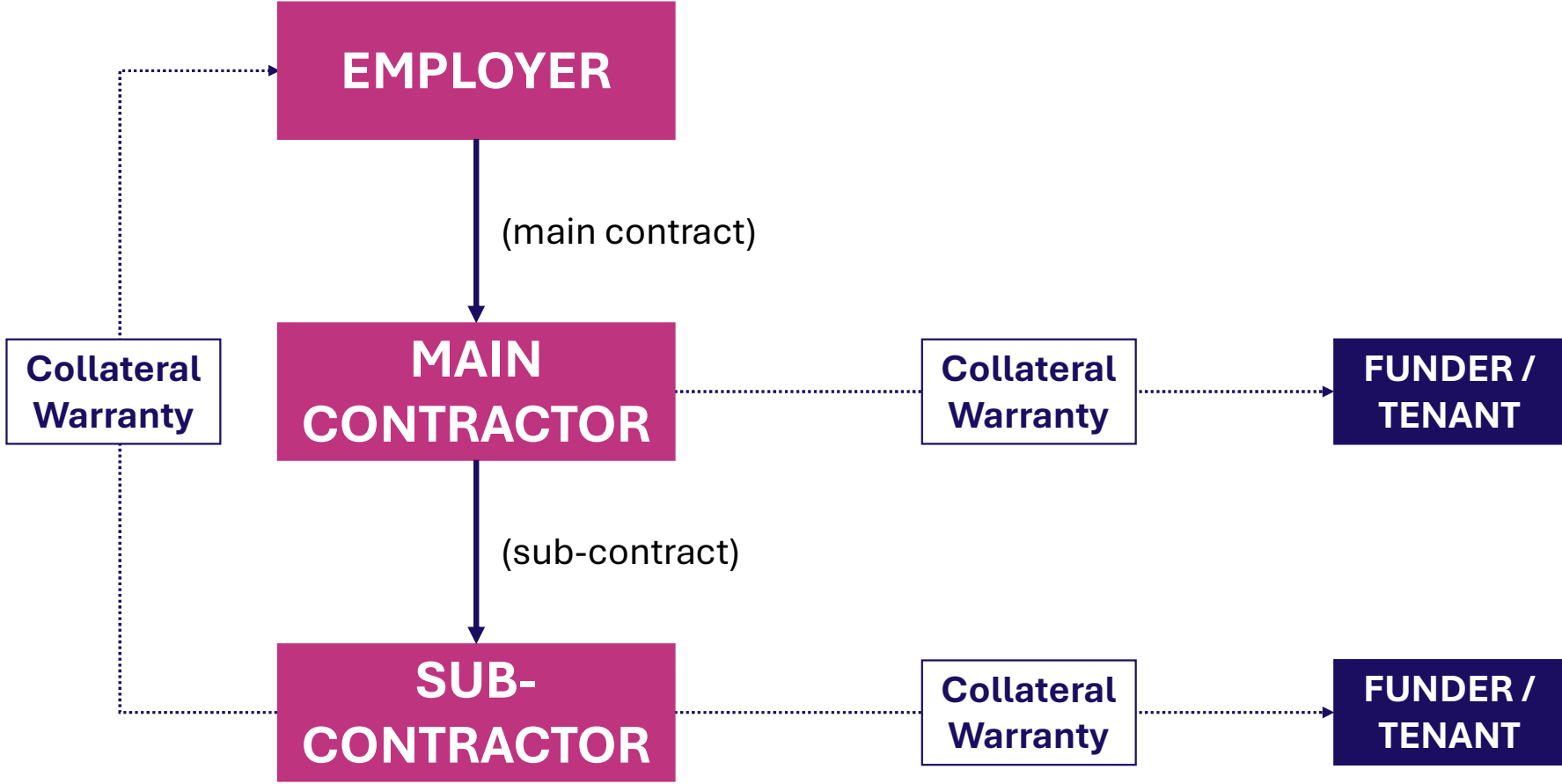
UK Supreme Court

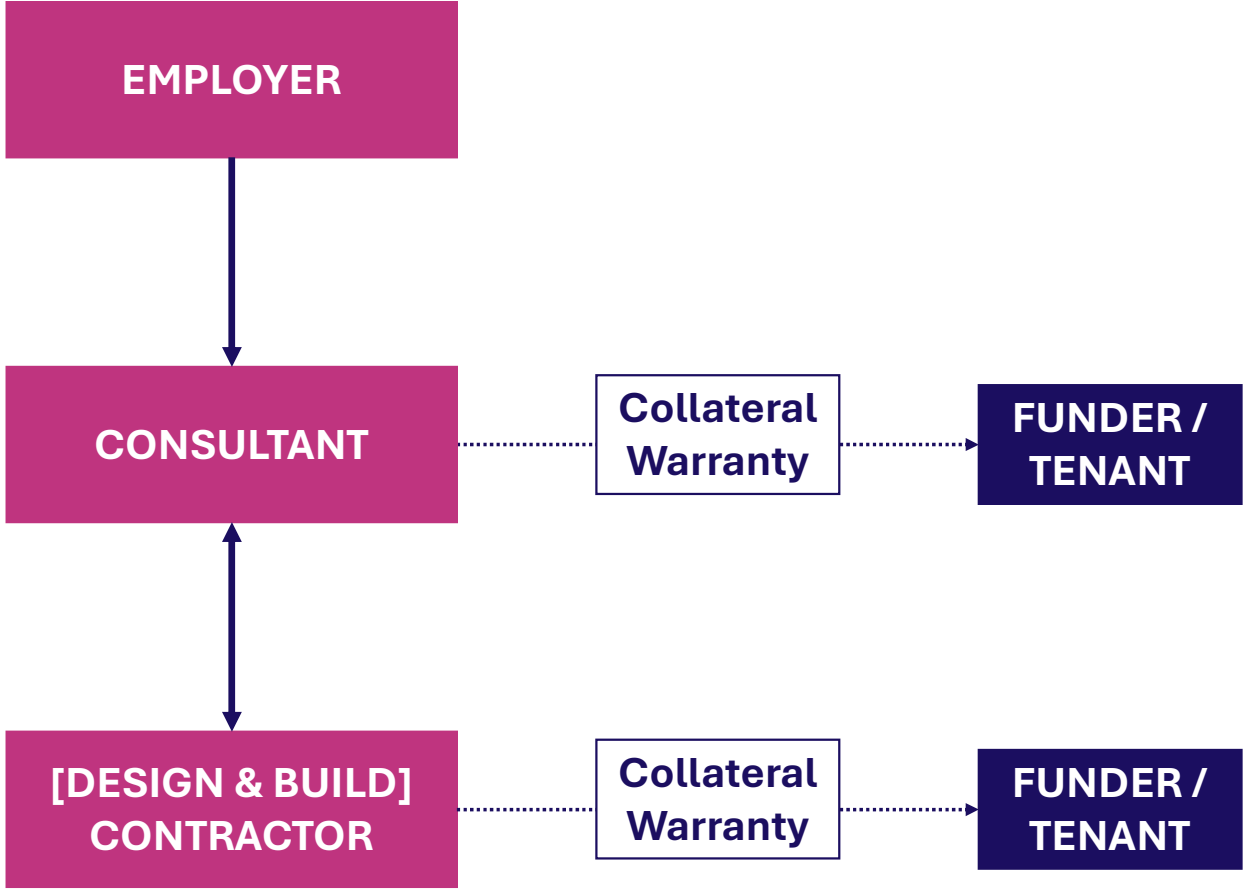
9 July 2024

MFMA

The interaction of certain provisions of the Housing Grants, Construction and Regeneration Act 1996 and Collateral Warranties

Whether disputes under Collateral Warranties can be referred to adjudication





Historical Background

- When the 1996 Act came into force in 1998, many commentators thought collateral warranties were **not** construction contracts for the purposes of Section 104 .
- In 2013, in the case of *Parkwood Leisure Ltd v Laing O'Rourke Wales West Ltd*, a court was required to determine, for the first time, whether a collateral warranty was such a “construction contract”.
- Akenhead J. decided that the collateral warranty granted by Laing to Parkwood could be, and as a result of the wording of it was, such a “construction contract”.
- **Parkwood** is expressly over-ruled by the UK Supreme Court.

Basic Background

- Contractor – Simply Construct (UK) LLP
- Tenant – Abbey Healthcare
- Contractor (Simply) granted collateral warranty to Tenant (Abbey)
- Alleged defects in work carried out by Simply
- Founding on collateral warranty, Abbey claimed £5.5 million from Simply

Background (contd.)

- Simply denied liability and Abbey raised adjudication proceedings seeking £5.5 million.
- Simply argued Abbey was not entitled to adjudicate because the collateral warranty was not a “construction contract”.
- Adjudicator rejected Simply’s argument and awarded Abbey c.£900,000.
- Simply refused to pay and Abbey raised court proceedings to enforce the adjudicator’s decision.

Background (contd.)

“The Contractor warrants that:

- (a) the Contractor has performed and will continue to perform diligently its obligations under the contract.

Section 104 of the 1996 Act

- (1) In this Part, a “construction contract” means an agreement with a person for any of the following –
 - (a) the carrying out of construction operations;
 - (b) arranging for the carrying out of construction operations by others....

Section 104 of the 1996 Act

- (2) Reference in this Part to a construction contract includes an agreement
 - (a) to do architectural, design or surveying work, or
 - (b) to provide advice on building, engineering, interior or exterior decoration or on the laying out of landscape in relation to construction operations.

Section 108 of the 1996 Act

“A party to a construction contract has the right to refer a dispute arising under the contract for adjudication....”

- Decision of Adjudicator binding until the dispute is finally determined in court or arbitration proceedings.
- Adjudication a “quick and dirty” process where a decision can be reached within 28 days unless the period is extended.

Overturning the decision of the English Court of Appeal:

The collateral warranty was not a “construction contract” within Section 104.

– accordingly, no right to refer any dispute to adjudication.

Reasoning of the Supreme Court

- section 104 required an assessment of “...whether the object or purpose of the agreement is the carrying out of construction operations....”

Reasoning of the Supreme Court

- such a warranty does not give rise to the carrying out of construction operations themselves, it is the building contract which does so.
- A collateral warranty will not be an agreement

“...for...the carrying out of construction operations..... if it merely promises to perform obligations owed to someone else under the building contract”.

Reasoning of the Supreme Court

- There needs to be a separate or distinct obligation to carry out construction operations for the beneficiary under the collateral warranty.... ‘not one that is merely derivative and reflective of obligations owed under the building contract’.
- Critical to the decision of the Court of Appeal was their interpretation of the common provisions of the collateral warranty under which Simply undertook to Abbey that Simply “had performed and will continue to perform its obligations under the building contract” BUT

Reasoning of the Supreme Court

- Supreme Court described that as “... an entirely derivative promise. The contractor is not thereby promising anything that is not already promised to the employer under the Building Contract. It does not in itself give rise to any construction operation”.

What did this mean?

- the collateral warranty was not a “construction contract” as defined in Section 104;
- if that was the case, it was not a “construction contract” which gave rise to a right to adjudicate on a dispute arising under the collateral warranty;
- Abbey were not entitled to adjudicate;
- the Adjudicator’s decision was invalid;
- the decision would not be enforced by the court

Some take-away points

- (i) Existing collateral warranties: consider the terms of the particular warranty very carefully – some may be worded differently from the one in this case;
- (ii) Thought that most collateral warranties will reflect very similar wording to that in this case;
- (iii) If so, it will not be a “construction contract” under Section 104 and adjudication will not be possible;
- (iv) If the warranty contains express adjudication provisions the issue doesn’t arise **BUT** many including the standard forms produced by JCT/SBCC and the CIC (Construction Industry Council) don’t.

Matters for consideration

- (i) Re existing collateral warranties – what is the effect? Will adjudication not be possible where previously it was considered possible to adjudicate?
- (ii) New collateral warranties – do both parties to a collateral warranty want adjudication to be available in the event of disputes arising? Are some granters of collateral warranties going to resist adjudication?

Matters for consideration (contd.)

- (iii) If adjudication is the objective, appears two ways of achieving that:
 - (a) use words in the warranty which make it clear that the granter is carrying out construction operations for the beneficiary ;
 - (b) include express reference to a contractual right to adjudicate which may be the best way of doing it because it avoids arguments about whether the wording used under (a) meets the requirements of Section 104.

Matters for consideration (contd.)

- (iv) What position will the insurance market want to adopt in relation to whether it wants adjudication available under collateral warranties and particularly claims against consultants?

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SBCC wish to thank
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Thank you for attending!





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