

INTRODUCTION TO FIRST ISSUE

This newsletter is produced by the Construction Team at Paris Smith & Randall LLP, which divides itself into two: the non-contentious Project Documentation side (James Snaith and Daniel Wilmot) which, as might be expected, concentrates on providing advice and bespoke documentation for building, construction and civil engineering projects, and the litigation side (David Eminton, Peter Chainey and Simon Pestell) which advises in contentious cases i.e. in adjudication, arbitration and litigation.

The intention is to produce comment on topical issues relevant to the construction law field: that is to say primarily commentary on new legislation, contract forms, adjudication/litigation procedures, case law and the like.

It is intended to provide a reminder and/or aide memoir for practitioners of developments in the area of construction law. Items will be brief and to the point: they will not provide a detailed and comprehensive commentary on the matters in question.

Comments and suggestions on current or future topics are welcome, although you will appreciate that we are unable to advise on specific matters - at least not without coming to a specific arrangement!

Design and Build: JCT 2005 and JCT 1998 Compared and Contrasted

This article identifies the most significant changes made to this form of building contract in the latest 2005 edition. The Design and Build Contract is chosen because, in our experience, it is the procurement method most in use today. The 2005 changes to the other contracts in the JCT suite are often along similar lines, but clearly each form differs in its details. There is insufficient space here to consider every change that has been made in the 2005 form (and many detailed changes have been made) and this commentary will concentrate on the major changes. The author does intend, however, to return to comment in greater detail in a later edition of this newsletter on one of the most significant developments, the incorporation of warranties and third party rights provisions, in order to provide a more detailed evaluation of those provisions.

1 The organisation of the Contract Form

The 2005 contracts have adopted a new layout. The Recitals and the Articles remain at the front of the document but are now followed by the 'Contract Particulars' (which replaces, amongst other things, the old Appendices) and then the Contract Conditions, and the Schedules. The clauses are grouped into sections which purport to include all areas covered by a particular topic and the Schedules deal with: the Contractor's Design Submission Procedure; certain supplementary provisions (site manager, persons named as sub-contractors, Bills of Quantities, valuation of change instructions and loss and expense; the Insurance Options; Code of Practice regarding opening up; Third Party Rights; Forms of Bonds and Fluctuation Options). The grouping of the clauses under

sectional headings, whilst frustrating for practitioners used to working with the 1998 contract, follows generally logical principles. A destination table is set out at the end of this article. Some (fairly obvious) changes have been made to terminology and in most cases the 2005 form provides for a default position to apply in the event that the parties do not stipulate a particular option.

2 Payment Process

The 2005 form follows the procedure under the Construction Act and provides for the possibility of the Employer issuing two certificates after the issue of an interim certificate: a payment notice and a withholding notice (although the payment notices, if carefully drafted, may fulfil the role of the withholding notice). The most significant change, in respect of the payment provisions, however, is that, if the Employer does not issue a payment notice or a withholding notice, then he is not obliged to pay the amount of the Contractor's request (it is currently unclear whether this is what is required under JCT 1998, but it is certainly the position argued for by Contractors) but instead is only obliged to pay the amount due.

3 The Retention

This is reduced from 5% to 3% (although this is of course a default position which may be modified).

4 Dispute Resolution

The default position is changed from arbitration to litigation, which perhaps reflects the fact that, with the advent of adjudication, the parties are often now keener to go straight to law, as that is the process by which intervening adjudication decisions are in any event enforced. The adjudication process is now carried out under the Construction Act Regulations, rather than under the JCT's own adjudication rules. The 2005 form contains a clause suggesting that the parties consider mediation to settle disputes - but this is non-binding.

5 Design Liability Insurance

The 2005 form contains provisions which, if they are stated to apply, oblige the Contractor to take out and maintain professional indemnity insurance in respect of design. Most Employers will look at these provisions carefully, not least the 'get out' if the insurance is not available at 'commercially reasonable rates' (most Employers will prefer the more objective term 'market rates').

6 Cost of Design

Specific provision is now made for the costs of any variations which require more or less design work to be undertaken to be taken into account when valuing or allowing for changes.

7 Contractor's Design Submission Procedure

All design documents prepared by the Contractor must be issued to the Employer before they are used. The Employer has 14 days to consider the documents and if he fails to act the Contractor may proceed to use them. Use of the documents does not absolve the Contractor from liability for the design.

8 Insolvency

The contract does not terminate automatically in the event of the insolvency of one of the parties: notice has to be served by the other. The definition of insolvency has been widened.

9 Third Party Rights/Warranties

If the contract so states the Third Parties Act may be applied so as to provide rights to purchasers/tenants and/or funders which are akin to warranties. The rights are set out in the back of the contract form. The advantage of this is that it avoids the need to 'chase down' warranties. The disadvantage is the likely reluctance of the warrantees to accept this form of provision. As an alternative, clauses providing for the provision of standard form collateral warranties may be brought into operation. Neither of these processes (third party rights or collateral warranties) apply unless specifically made to apply. Clearly, the third party rights could be drafted to suit potential warrantees, and the question therefore arises as to whether this would be an advantageous method of proceeding, given the nuisance that chasing down or procuring warranties presents to both Employers and Contractors, if warrantees (in particular funders) begin to accept the principle of not receiving a document specifically addressed to themselves - a warranty - in their hands. Similar provisions could also, of course, be introduced into professional appointments.

10 Matters not covered by JCT 2005

Novation (amongst others).

NEW CIS

All contractors (which includes employers with an average annual spend of £1 million or more on construction, over a three year period) are aware of the new Construction Industry Scheme which comes into effect in April. Under the new Scheme, CIS cards, certificates and vouchers are abolished and instead contractors must verify new sub-contractors with HMRC, and they will be monthly CIS returns showing payments to sub-contractors, rather than annual returns.

DISABILITY DISCRIMINATION (PREMISES) REGULATIONS 2006

These regulations came into effect on 4 December 2006 and add detail to the provisions affecting let premises introduced by the Disability Discrimination Act 2005. The landlord of let premises is not expected, as a consequence of the duty to comply with the disability discrimination legislation to alter physical features (that is features arising from design or construction, approaches or exists to/from premises, fixtures and other physical features) but may be expected to alter furniture, fittings or other chattels (for example by replacing signs, tabs, door handles, doorbells, door entry systems or changing colours). Landlords of premises must take reasonable steps to provide auxiliary aids or services where a request is made by a person to whom premises are let, or by a disabled person who is considering taking a letting of premises.

GC contract falls foul of the HGCRA 1996

The Housing Grants, Construction and Regeneration Act 1996 ("the Act") contains many mandatory requirements for construction contracts and those that have had the greatest effect on relations between employers and contractors are surely those relating to adjudication.

On 1 February 2007 in Epping Electrical Company Limited v Briggs and Forrester (Plumbing Services) Limited, the Technology and Construction Court ("the TCC") which made it clear that the TCC (or at least the one judge on this occasion) does not consider it possible to add contractual provisions to the statutory mechanisms for adjudication, in the way in which construction practitioners have previously.

The Act stipulates that any adjudication procedure detailed in a written construction contract must contain certain specified terms and if it does not then the procedure in the Scheme for Construction Contracts set out in a statutory instrument accompanying the Act ("the Scheme") will apply. The mandatory terms include requirements that the contract shall :

(1) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred

and

(2) allow the adjudicator to extend the period of 28 days by up to 14 days with the consent of the party by whom the dispute was referred

In Epping Electrical the TCC considered a contract that contained the above provisions but then went on to water them down by stating that "...the adjudicator's decision shall nevertheless be valid if issued after the time allowed". The TCC declared that this added flexibility was not compliant with the requirements stipulated in the Act and that as a consequence the adjudication procedure specified in the contract was invalid and the Scheme would apply. The decision is of interest in itself but more so given that the contract in question was a government contract, the standard form of GC/Works

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subcontract (and by extension the decision must equally effect the GC/Works main contract).

It remains to be seen whether there is a challenge to this decision. Clearly a government form of contract should not contain an adjudication procedure which does not comply with the Act and either the decision will be overruled or the contract will have to be changed.

The GC contracts are not the only contracts that have attempted to stipulate adjudication procedure at variance with the Scheme. Some other standard forms of contract may and inevitably numerous bespoke contracts will have adjudication procedures that do not comply with the Act with the result, according to Epping Electrical, that the Scheme will be applied in lieu of the written contract procedure.

Many in the construction industry resent this imposition on their freedom to contract and consider that they should be able to agree an alternative dispute resolution procedure even if it does not comply with the Scheme. Critics of the Act may take some, but probably little, comfort from the TCC's comments in Epping Electrical to the effect that the contractual procedure could co-exist with the Scheme provided that there was provision in the contract as to how the two differing procedures were to co-exist.

It was suggested by the TCC that a procedure not compliant with the Scheme could be stipulated as being an alternative to the Scheme so that the parties to the contract, at the point in time that a dispute arose, would be in the position of being able to elect whether to follow the contractual scheme or the Scheme. No such choice was available in the Epping case, there was just one procedure specified which was not compliant and therefore the Scheme had to apply.

So Contract draughtsmen may still have total freedom to specify how adjudication is to be conducted under their contractual procedure but they must ensure that if any aspects of it are not compliant with the mandatory requirements that the contractual procedure is expressly stated as being an alternative and not in place of that contained in the Scheme which the parties can still elect to use if they wish.

In practice it is unlikely that draughtsmen will be keen to stipulate alternative procedures given that the contractor will be able to choose which procedure it wishes to follow and inevitably will shun bespoke procedures which might be considered to be advantageous in some way to the employer that drafted them.

Some questions in relation to adjudication under the Scheme and its interrelation with contractual procedures remain unanswered. What if the parties begin resolving a dispute using a procedure under the contract which is not compliant with the Act and then the contractor sensing that the adjudication is not going its way or perhaps aggrieved at the decision of the adjudicator serves a referral notice under the Scheme. What status does the contractual procedure have in these circumstances? Can the contractor effectively seek to overturn the decision under the contractual procedure in the event that an adjudicator under the Scheme makes a contrary decision?

One view is that if a decision has already been made under the contractual procedure that there is no longer a dispute for an adjudicator to rule on under the Scheme but the position is not at all clear.

We will keep you posted on developments in this area. The message, whether you are an employer or contractor involved in a dispute, is to consider the adjudication procedure under the contract and establish if it is void for not being compliant with the Act. If the contractual procedure is void then this is something which might be used to your tactical advantage or it might simply be something you should be aware of as the opposition might be planning to use it to their advantage. If you are a draughtsman, or you have a standard or bespoke contract that you regularly use, then you should be satisfied as to the validity of any adjudication procedures and ideally make any necessary changes now. If you find your contractual adjudication procedure is invalid then take solace in the fact that you are in good company along with the Government draughtsmen!

NEW CONSTRUCTION (DESIGN AND MANAGEMENT) REGULATIONS 2007

The Construction (Design and Management) Regulations 2007 are scheduled to come into force on 6 April 2007. They will replace the current 1994 Regulations and the Construction (Health, Safety & Welfare) Regulations 1996 so that there will be just one set of construction management regulations.

The new regulations are more detailed than the 1994 Regulations but would appear more user friendly. They are intended to result in each person involved in the project having a clear idea of what their responsibilities and legal obligations are.

The driving force behind the new Regulations is very much health and safety with the main emphasis being about putting health and safety procedures into working practice. In addition, the participant's roles in the new Regulations should be more pro-active and less administrative.

The Regulations have been extended to encompass risks arising out of design and construction to the ultimate users of the structures to which the construction works relate if designed as places of work such as schools and offices. This is a radical extension of the responsibility of project participants.

Gone is the client's ability to delegate his role as a client (and thereby transfer statutory liability) to an agent (although multiple clients may elect in writing that one of them is treated as the client in a project on behalf of all clients). Under the new Regulations the client is now accountable for taking reasonable steps to ensure that suitable arrangements to manage the project are made, and maintained, to ensure that the construction work can be carried out without risk to health and safety. Such steps include:

- Adequate allocation (so far as the client can reasonably determine) of resources to design, planning and preparation for the work and to construction;



- Arrangements for review of designs, appointment of suitable persons as Co-ordinator and Principal Contractor;
- Planning and monitoring of the works; and
- Ensuring cooperation between CDM participants and compliance by the Principal Contractor with its responsibilities

The main points to note in the new Regulations are:

- There is a general duty on all people involved in the management of a construction project to co-operate with others to comply with the obligations imposed by the Regulations.
- Any person who is working under the control of another person will have a duty to inform that person of anything that poses a threat to the health and safety of that person or others.
- Work on projects should be co-ordinated as far as is reasonably practicable to assist the health and safety of those carrying out the work and those affected by it.
- Domestic projects no longer need to be notified.
- Projects are divided up between “notifiable” and “non-notifiable” projects. Notifiable projects are the same as before. Duty holders of notifiable projects have additional requirements imposed on them. The provision relating to 5 or more workers on site has been removed.
- No contractor is to carry out construction work unless the client is aware of his duties under the regulations.
- Duty holders may not appoint anyone to design, manage or construct anything unless they are competent or under competent supervision
- The role of planning supervisor no longer exists in the new regulations. Instead, a new role of “CDM Co-ordinator” has been introduced for notifiable projects to support and advise the client. A Co-ordinator must be appointed before any design work, planning or other preparation for the works is begun.

The new regulations would appear to impose greater accountability on clients. A key provision for example is for the client to assess or have a suitable method of assessing the competency of the workforce, including designers and contractors. This means making reasonable enquiries to check that the organisation or individual is competent to do the relevant work and the Approved Code of Practice (which accompanies the new Regulations) (ACoP) sets out a two-stage process by which this competency should be assessed. There are different competency assessment requirements for designers, co-ordinators and site workers.

WHAT TO DO

There is only a short time before CDM 2007 comes into force (expected 6 April 2007). Organisations whose primary business is not in the construction industry are most at risk of committing inadvertent breaches of CDM 2007.

Now that the Regulations have been published, the following action should be taken:

- Comply with the new Approved Code of Practice immediately from 6 April 2007, even if operating under the transitional provisions of the CDM 2007 relating to an existing project.
- If an agent has been appointed to act as client, expressly extend or terminate this arrangement. In any event, would election of a single client help? If yes, elect in writing.
- Determine how draft regulation 47 of CDM 2007 ("transitional provision") will affect principal contractors and planning supervisors appointed prior to 6 April 2007 on current projects.
- Review existing procedures relating to the health and safety plans given the revised ACoP

ENERGY PERFORMANCE OF BUILDINGS

The EU Energy Performance of Buildings Directive was agreed by members of the European Union in January 2003 in order to promote the improvement of energy performance of buildings. The UK is required to put the Directive into practice through its own law. Partial implementation is expected for June 2007 to coincide with the new legislation relating to Home Information Packs (HIPs).

It has significant implications for developers, owners and managers of buildings.

THE DIRECTIVE

The principal requirements of the Directive are:

- The UK is required to set minimum energy performance requirements for buildings. All new buildings and large buildings (those with a total usable floor area of over 1000 square metres) which are subject to major renovations, must meet these requirements.
- A full feasibility assessment of alternative heating and energy supply systems must be carried out before a new large building is constructed.
- Energy Performance Certificates (EPCs) must be made available to prospective buyers and tenants whenever a building is constructed, sold or rented.

The deadline for the implementation of the Directive into national law was 4 January 2006. Although the requirements in respect of minimum energy performance have been implemented into UK law (through changes to the Building Regulations), the requirements in respect of EPCs will be partially implemented in June 2007 through the Home Information Pack (HIP) legislation. The requirements for an EPC for public buildings, as well as non-residential buildings and lettings, are to be implemented later at a date to be set by the UK Government.

WHY WAS THE DIRECTIVE INTRODUCED?

In order to implement the greenhouse gas emission reduction targets set by the Kyoto Protocol. Buildings (both residential and commercial) are a major source of greenhouse gas emissions both in their construction and energy usage during their lifetime (accounting for approximately 50% of the UK's total CO₂ emissions). Making more efficient use of energy in buildings is one of the most cost effective ways of reducing greenhouse gases as well as energy costs.

WHAT BUILDINGS WILL BE AFFECTED?

All residential, public and commercial buildings including offices, hotels, schools, hospitals and leisure organisations will require EPCs in due course.

Every time that any of these buildings is constructed, sold or let, an EPC no more than 10 years old must be shown to prospective buyers or tenants.

The certification process will cover the current level of a building's energy efficiency (similar to labels on domestic appliances), its CO₂ emissions, as well as recommending measures for cost effective energy performance improvements.

WHO DO THE REGULATIONS AFFECT?

All landlords and property developers will need to have an EPC available next time they wish to sell or rent a property.

REVISIONS TO BUILDING REGULATIONS

The 2006 Regulations require buildings to be better insulated and to make more use of efficient heating systems. They also require that new buildings meet energy performance standards so as not to exceed the target carbon dioxide emission rates set by the Government. They also require that existing large buildings undergoing major renovations be upgraded to meet the new minimum energy performance standards but only insofar as is 'technically, functionally and economically feasible'.

Although the Building Regulations set minimum standards, there is flexibility on how to meet them. For example, energy standards for a residential building can be met by improving the existing fabric of the building (through better insulation and draught proofing); improving the efficiency of heating and lighting and the use of low carbon fuels and heating appliances.

RESIDENTIAL PROPERTY (HIP) REQUIREMENTS

From June 2007, the HIP Regulations will require a HIP to be produced whenever a **residential** property is **sold** (but not when it is constructed or leased). The HIP Regulations will require HIPs to contain an Energy Performance Certificate.

The energy performance of homes is measured using the Standard Assessment Procedure (SAP) ratings. SAP ratings provide a simple indicator of the efficiency of energy used for space and water heating in new and existing dwellings on a scale of 1 (poor) to 100 (excellent).

Future revisions to Building Regulations may impose minimum energy standards for the installation of appliances to new homes to complement changes being introduced with respect to boilers.

Critics are concerned that the increasing emphasis, however, in the Building Regulations on insulation and heating will lead to problems in terms of ventilation and over heating of buildings in the summer months.

THE NEW FIRE REGULATIONS

On 1st October 2006 the Regulatory Reform (Fire Safety) Order 2005 became law. This repealed over 70 separate pieces of legislation and created a new one-stop-shop for fire regulation.

Not only is the new Order represents a change in approach: it is not prescriptive, but instead emphasizes fire prevention based on assessment. Hence, there are no more Fire Certificates and instead employers, landowners and occupiers will assume statutory responsibility for assessment and reduction of fire risk.

Those who fail to meet the new standards of compliance (including company directors) may face either a fine or up to two years imprisonment.

Who is responsible?

Is it an Order or is it Regulations?

The Order applies to virtually all commercial property in England and Wales. Notable exceptions include building sites, dwellings, military sites and anything that floats. (Even the common parts of domestic blocks of flats are caught!) The new provisions do not depend upon the size of a business or the number of staff employed.

Under the Regulations, responsibility for compliance falls to the “Responsible Person” in whose hands the safety of the premises and its occupants will rest. In a workplace this will usually be the employer. Where premises are not a workplace but are used for business the responsible person is the person who has control of them (i.e. has

responsibility to repair and maintain). For vacant premises the responsible person is the owner.

The Responsible Person may delegate duties, but he cannot escape liability for any breach of them. One or more "Competent Persons" must be appointed to assist the Responsible Person in adopting preventative and protective measures. The Competent Person(s) must be competent, and have "sufficient training, experience and knowledge" in fire control. This person can be directly employed by the Responsible Person, or can be a subcontractor, though the Order provides that an employee must be chosen in preference.

What are the duties of the Responsible Person?

The new provisions provide that the responsible person is to carry out a risk assessment and record the results of. He must consider risks to "relevant persons" and not just employees, namely anyone lawfully on the premises or in its vicinity.

The risk assessment must identify the general fire precautions needed to:

- minimise the risk of fire;
- reduce the risk of the spread of fire; and
- provide a means of escape.

The findings of the assessment must then be recorded (including the preventative and protective measures which have or will be taken) as must details of any persons identified by the assessment as being specifically at risk.

The responsible person must also ensure that the premises are equipped with appropriate fire fighting and detection equipment and alarms; that escape routes are established and that any non-automatic equipment is easily accessible, simple to use and indicated by signs. A Competent Person must be nominated to implement these measures.

The risks identified must be communicated to the employees along with the corresponding preventative and protective measures. Staff must also be properly trained and given refresher training when required. This obligation also extends to the provision of information to contractors.

There are increased duties for premises storing or containing dangerous materials or substances used by children. Small businesses (fewer than 5 employees) are offered some dispensations or recording information.

Failure to Comply May Mean...

Compliance with the Order will be regulated by the "enforcing authority" which is likely to be the local fire brigade (but could in some cases be the MOD, Health & Safety Executive, or Local Authority).

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Enforcing Authorities monitor compliance through inspectors who have rights to inspect premises, inspect records and copies and take samples of articles at the premises. Inspectors have a number of options in cases of suspected breach including:

- Serving an alterations notice to impose tighter controls on the premises
- Serving an enforcement notice requiring remedial action
- Restricting access to the premises altogether
- Criminal proceedings can be brought - breach is punishable by a fine and/or imprisonment

As well as a potential prison sentence, failure to comply with the Order may well mean that an insurance policy will be vitiated upon renewal as insurers will no doubt require an assessment to be carried out before agreeing to cover reinstatement after fire.

Conclusion

The shift in responsibility to the employer/owner or occupier may give rise to compliance costs in terms of time (and therefore money), effort and potential penalties. Beware!

NEED SOME GUIDANCE? PLEASE CONTACT US ...

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