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JCT & SBCC 2011 EDITIONS LAUNCHED

JCT & SBCC have issued the 2011 Editions of the standard building contracts. As has been the case since the 2005 editions, the SBCC forms only make the changes necessary to bring them in line with Scots law and terminology. They do not change the risk profile or make other substantive amendments.

The principal purpose of the new editions is to make the contracts comply with the amendments to the 1996 Act made by the 2009 Act. It is important to note that the 2011 Editions of the JCT and SBCC contracts comply with the 2009 Act. This means they are only suitable for use for contracts after the 2009 Act comes into force. Until then, contracts need to comply with the 2006 Act, so the 2011 Editions of the standard forms will not be suitable for them.

Key changes in the 2011 Editions are:

Payment provisions - section 4 - new mechanism for payments including new defined terms: Interim Application, Interim Payment Notice, Final Payment Notice and Pay Less Notice. For outline of new procedures see below.

Insurance - section 6 - revisions to Terrorism Cover provisions to reflect insurance available in the market.

Arbitration (in SBCC forms in Scotland only) - section 9 - revised to take account of the Arbitration (Scotland) Act 2010. Default position is still court so, as before, parties would require to opt in to Arbitration.

Some clause numbering changes - this is one to watch out for if preparing or checking a Schedule of Amendments. Note particularly revised numbering of Relevant Events in clause 2.29 and Relevant Matters in clause 4.24.

New clauses (4.14.2 & .3) to deal with Contractor's right to be paid costs and expenses related to suspension and replacing the Relevant Matter providing for loss and expense to be paid for periods of suspension.

Insolvency - section 8 - new provisions as to when parties of various types become Insolvent.

Bribery Act 2010 - commission by the Contractor of an offence under this Act, which came into force on 1 July 2011, is a new ground for termination.

Termination - section 8 - revision to consequences of termination in terms of no payment becoming payable on insolvency of the Contractor whether or not there is a Pay Less Notice.

New Payment Procedures:

- Due dates for interim payments are to be monthly up to Practical Completion and bi-monthly thereafter.
- Interim Certificates are to be issued within 5 days after the due date.
- Contractor can issue Interim Applications not less than 7 days before the due date.
- If a Certificate is not issued, then either the Interim Application becomes the Interim Payment Notice or, if there was no Interim Application, the Contractor can issue an Interim Payment Notice.
- Final date for payment is 14 days from the due date.
- Sum payable is that stated as due in Interim Certificate or, where there is none, the sum stated in the Interim Payment Notice (subject to Pay Less Notice).
- Where there is an Interim Payment Notice issued by the Contractor due to failure to issue an Interim Certificate, the final date for payment is 14 days from the date of the Interim Payment Notice.
- If the Employer intends to pay less than the sum in the Interim Certificate or Interim Payment Notice, a Pay Less Notice is required no later than 5 days before the final date for payment.
- Pay Less Notice can be issued by the Employer or on their behalf by the Architect, QS, Employer's representative or other person notified by Employer as being authorised to do so.
- Final Certificate - no change to timing of issue. Due date is date of issue of Final Certificate or, if later than the 2 months allowed, the last day of the 2 months. Final date for payment is 28 days thereafter. Pay Less Notice required no later than 5 days before final date for payment.
- If no Final Certificate is issued, the Contractor may issue a Final Payment Notice and that shall set the amount of the final payment (subject to any Pay Less Notice). In that case, the final date for payment is 28 days from the date of the Final Payment Notice.

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DESIGN LIABILITY & APPORTIONMENT

The recent case of *Carillion JM Limited v Phi Group Limited & Robert West Consulting Limited* (June, 2011) considers the issue of apportionment of design liability, where more than one party had contractual responsibility for design.

Carillion were employed by M40 Trains to carry out works in relation to a train servicing depot near Wembley Stadium. The works involved substantial excavation which left steep slopes. Carillion sub-contracted the necessary soil nailing works to a specialist design and build contractor (Phi). They also employed consulting engineers who had overall design responsibility for the works (Robert West Consulting - "RWC"). The system ultimately failed and substantial (and expensive) works, which would cause disruption to the train operator, were required in order to remedy the problem. Carillion brought proceedings against Phi and RWC.

Phi's contractual obligation was to design and construct the soil nailing and to do so with reasonable skill and care. RWC's contract was to execute and complete the design, which the judge said meant design of all the works - albeit that there was an understanding between RWC and Carillion that Phi would carry out the detailed soil nailing design. RWC ended up in the role of Lead Consultant involving taking a lead role in relation to all the design work, including liaison and co-ordination with other designers including Phi. This was not simply a checking or reviewing function. It included advising on the need for further site investigation, including considering the available site investigation reports as well as information from site.

RWC tried to argue that Carillion should have picked up on the error in Phi's design, but the Court rejected this. No one within Carillion was charged with checking Phi's design and, in any event, RWC had overall responsibility for it. Carillion had employed Phi as a specialist contractor and had employed RWC to check Phi's design. Accordingly, RWC were on the hook for any problems with Phi's design, notwithstanding Carillion's knowledge and experience.

RWC also tried to argue that it should



not be held wholly responsible because no-one else had picked up on the instability of the slopes. There had been a serious slip during construction that RWC claimed should have alerted Phi and Carillion to the problem. The Court did not accept that RWC could avoid liability on this basis, even where the client was a knowledgeable contractor.

The judge found that both RWC and Phi failed to spot the potential for two types of instability. Although it could be said the negligence was in the detail of the Phi design, the design deficiencies were in essence fundamental misconceptions in design approach. Both Phi and RWC had a responsibility to Carillion to pick up the types of instability and guard against these in the design and installation. Phi had selected design criteria which were erroneous. RWC did not adequately query the Phi design. The judge had to consider the allocation as between Phi and RWC and considered previous authorities setting out how to approach this. The starting position was that each party was 100% liable for Carillion's loss and damage. However, in terms of the

Civil Liability (Contribution) Act 1978, a person liable can recover a contribution from another person liable - that contribution being at a level considered by the court to be just and equitable having regard to the extent of the respective responsibilities. This involved taking account of the seriousness of parties' respective faults but also their relevance as factors causing the loss (referred to as their "causative potency"). Ultimately, apportionment would be a matter for the judge's discretion. In this case the judge felt that both parties had a responsibility to Carillion to have regard to the same matters. However, it was considered that although they had equal responsibility at the pre-construction phase, RWC's role had less "causative potency" and they were less blameworthy at the later stages. On that basis the judge split the liability 60% to Phi and 40% to RWC.

The case gives some guidance on the basis of apportionment where more than one party is to blame, but is also a warning shot for designers to be clear on where their responsibilities begin and end.

WITHOUT PREJUDICE DOCUMENTS IN ADJUDICATION

Ellis Building Contractors v Goldstein was an action for enforcement of an Adjudicator's award in which issues arose about without prejudice documents being submitted to the Adjudicator. This was a practice the judge described as "not wholly uncommon" but one that "should be discouraged".

The solicitors for Goldstein (the Respondent) sent a without prejudice letter to the solicitors for Ellis (the Referring Party) shortly after receiving the Notice of Adjudication. In it, they commented on the contractual position and offered a sum in settlement. During the Adjudication, Ellis submitted the without prejudice letter to the Adjudicator. The settlement sum was blanked out but the Adjudicator was advised that the sum offered was substantially below the sum subsequently admitted to be due.

No objection was made to the use of this letter during the Adjudication. However, Goldstein then raised it as a ground for opposing enforcement of the Adjudicator's award by the court. They argued that it amounted to apparent (as opposed to deliberate) bias by the Adjudicator as he had allowed the letter to be included, but not raised it with the parties. The test of apparent bias is whether the material facts give rise to a legitimate fear that the Adjudicator might not have been impartial. To decide this, consideration should be given to all of the facts.

The judge commented that the use of without prejudice material in adjudication gives rise to unease amongst parties that the Adjudicator may be influenced by it rather

than putting it out of his mind. He strongly discouraged parties from relying on such material. He said that lawyers who submit such material to an Adjudicator may face disciplinary action and also that, where an Adjudicator decides a case primarily on the basis of wrongly received without prejudice material, his decision may not be enforced.

In this particular case, the judge considered it relevant that no objection was made by Goldstein during the Adjudication. Also, the Adjudicator's decision stated that he had taken account of all submissions whether specifically mentioned by him or not (therefore including the letter). It was considered clear, however, that the Adjudicator had not based his decision on the contents of, the existence of, or inferences drawn from, the without prejudice letter.

On the basis of this, the judge did not consider that there was a legitimate fear of a lack of impartiality by the Adjudicator. The letter only raised a peripheral point, already supported by open evidence. The lack of any mention of the letter by the Adjudicator suggested that it was not part of, and did not influence, his reasoning.

Although the decision was enforced by the court, the case gives clear warnings as to the consequences of use of without prejudice material. Any perceived tactical advantage of producing it may be short-lived if the end result turns out to be an unenforceable decision.



LOCAL DEMOCRACY, ECONOMIC DEVELOPMENT AND CONSTRUCTION ACT 2009

The 2009 Act is in force on 1 October 2011 in England and 1 November 2011 in Scotland. It makes amendments to the Housing Grants Construction & Regeneration Act 1996.

There are also new Scottish and English Schemes which will come into force on the same date.

Some standard form contracts have already been revised to make them Act compliant and others will be available shortly. If you have your own conditions, these will require to be updated.

Any non compliant conditions will be ousted and replaced with the Scheme provisions.

Take care to ensure you use the correct contract terms for contracts tendered or being negotiated before the coming into force dates but entered into after - the new regime applies to contracts entered into after these dates.

Also look out for main contracts under the old regime but subcontracts under the new one.

If possible, be clear as to the date of "entering into" the contract so there is no dubiety.

CONTRACTS UPDATE



- NEC3 have issued the revisions to their suite of contracts required as a result of the 2009 Act. These are available for free download at www.neccontract.com
- JCT has launched a new Public Sector Supplement for use in conjunction with the JCT standard forms. It includes provisions to align the contracts with the Government's Fair Payment Guidelines, a clause authorising disclosure by public sector clients under the Freedom of Information Act and the Government's Transparency Policy and reference to any agreed Building Information Modelling (BIM) protocol. A free pdf copy can be obtained by emailing stanform@jctltd.co.uk

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INFRASTRUCTURE CONDITIONS OF CONTRACT

ACE and CECA have launched The Infrastructure Conditions of Contract (ICC). This is a suite of standard form contracts which replaces the ICE Conditions. The following contracts are available in the suite:

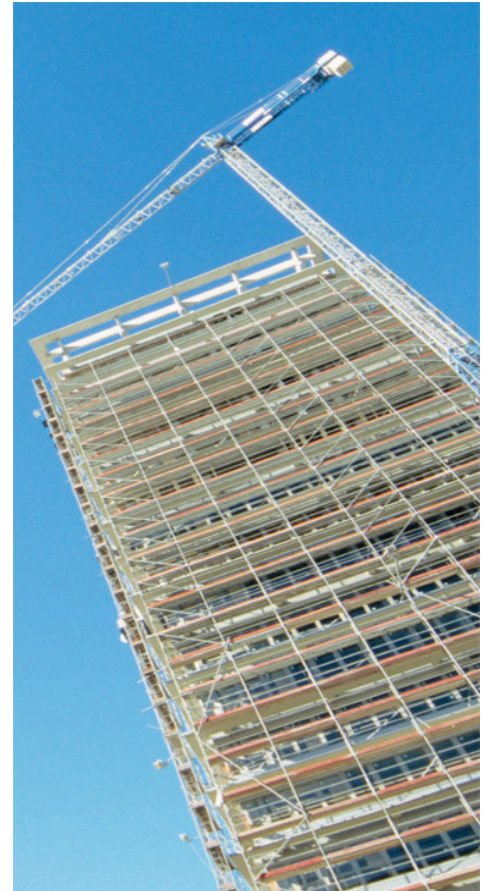
- Term version (plus guidance notes);
- Measurement version (plus guidance notes);
- Minor works version;
- Partnering addendum;
- Design & construct version (guidance note);
- Target cost version (plus guidance notes);
- Ground investigation version (plus guidance notes).

The ICC suite contains all previous relevant amendments to the ICE conditions, but unlike the ICE suite, it is also compliant with the payment provisions of the Local Democracy Economic Development and Contracts Act 2009 which amends the Housing Grant Construction and Regeneration Act 1996. These amendments are in effect in England from 1 October 2011 and in Scotland from 1 November 2011.

Although there are no ICC standard form sub-contracts in place yet, there will be very shortly. The CECA forms of sub-contract, which are currently produced for use with the ICE 6th and ICE 7th, are being amended to make them compliant with the new Construction Act. These will then be used with the "Measurement" and "Design and Construct" ICC contracts.

The Infrastructure Conditions of Contract Development Forum (ICoCDF) have also produced a book ("Tendering for Civil Engineering Contracts") giving their views on what constitutes good practice in the conduct of civil engineering and infrastructure construction projects. The book is designed specifically to assist users of the ICC with the procedure between the start of the tender process and the award of the contract.

It should be noted that this suite of contracts is drafted under English Law. If an ICC contract is to be used in Scotland, it will need to be adapted to comply with Scots Law.



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