



Legal developments in construction law

1. Omitting work to give to other subcontractors – Scottish court looks at the consequences under NEC3

An amended NEC3 subcontract in an Aberdeen harbour expansion project included soft dredging works. The contractor subsequently instructed the omission of some of the soft dredging and caisson filling and gave it to two other subcontractors. But was that a breach of the subcontract? If it was, did the subcontract deal with that and, if so, how?

The Scottish court deciding these questions referred to the 2003 case of **Abbey Developments Ltd v PP Brickwork Ltd** and Judge Humphrey Lloyd QC's conclusions, in summary that:

- a contract for the execution of work confers on the contractor not only a duty to carry out the work, but a corresponding right to complete the contracted work;
- a clause entitling the employer to vary the works must be construed carefully, so as not to deprive the contractor of its contractual right to complete the works and realise such profit as may then be made. Clear words are needed if the employer is to be entitled to remove work from the contractor in order to have it done by somebody else;
- there is no principle of law that says that in no circumstances may work be omitted and given to others without incurring liability to the original contractor. The test is whether, on a proper interpretation of the contract read as a whole, the clause relied upon by the employer is wide enough to permit the change that was made;
- the employer's motive or reason for instructing the omission of the work is irrelevant.

In this Scottish case, the court decided that, under the amended subcontract, an instruction to omit the work was a breach of contract but that the subcontract specified the only remedy for breach, that it was a compensation event. Did, however, the application of the subcontract compensation event provisions result in a reduction of the bill rate for the remaining work?

The court said that the fact that an instruction amounted to a breach of contract did not prevent it from being a change to the Subcontract Works Information. A calculation under clause 63.1 therefore had to be made, it was common ground that the calculation produced a reduction in the Defined Cost, and under clause 63.13, a change in the Prices was given effect by changes to the bill of quantities, the practical consequence being to reduce the rate payable for the remaining work.

[Van Oord UK Limited against Dragados Uk Limited \[2020\] ScotCS CSOH 87](#)

2. Court sets out guidance on assignment and novation and highlights a main contract termination issue

The employer on a power plant project terminated the main contract and, as required under the main contract, the main contractor assigned a key subcontract to the employer. But had the main contractor assigned all its rights against the subcontractor, or just future rights? This was important because the employer claimed damages

of the order of £133 million from the main contractor in respect of delay, the cost consequences of termination, and defects. The main contractor wanted, in turn, to pursue its claims against the subcontractor but could not do so, under the subcontract, if it had assigned all its rights. In deciding preliminary issues on the effect of the assignment and whether, as the main contractor alternatively claimed, it might be a novation, the court summarised the relevant principles.

Assignment

- subject to any express contractual restrictions, a party to a contract can assign the benefit of a contract, but not the burden, without the other contracting party's consent;
- in the absence of any clear contrary intention, reference to assignment of the contract by the parties is understood to mean assignment of the benefit, that is, accrued and future rights;
- it is possible to assign future rights under a contract without the accrued rights but clear words are needed to give effect to such intention.

Novation

- occurs when an original contract between A and B is extinguished and replaced by a new contract between A and C;
- requires the consent of all parties to the original and new contract;
- this consent can be given in the original contract but clear words are needed to express such an intention and the new contract's terms must be sufficiently certain to be enforceable;
- the principle of conditional benefit can apply so as to impose on the contractual assignee a positive obligation where this obligation is inextricably linked to the benefit assigned;
- in every case the court must construe the contractual arrangements to give effect to the expressed intentions of the parties;
- the court must not confine the interpretation exercise to a semantic analysis of the contractual provisions and other material documents; despite the descriptions or labels used by the parties, the established rules of construction apply, as set out in **Arnold v Britton**.

The court said that, on a true construction of the main contract and subcontract, the assignment was effective to assign all accrued and future rights under the subcontract to the employer. It also ruled that there was no novation. Which left the main contractor to pursue its secondary case, that it was entitled to claim contribution from the subcontractor under the Civil Liability (Contribution) Act 1978.

[Energy Works \(Hull\) Ltd v MW High Tech Projects UK Ltd & Ors \[2020\] EWHC 2537](#)

3. Court rules on main contract and subcontract "same damage" contribution issues

In **Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd**, after termination of the main contract by the employer, the main contractor assigned a key subcontract to the employer. Because the court ruled that the contractor had assigned all its rights against the subcontractor and that there had been no novation, the main contractor, faced with the employer's £133 million damages claim, could not pursue recovery against the subcontractor, unless it could do so under the Civil Liability (Contribution) Act 1978. To do that, the damage for which it was potentially liable to the employer had to be the same damage for which the subcontractor was potentially liable to the employer. But was it?

In deciding a further preliminary issue, the court had to consider, on assumed facts, three potential claims for contribution in respect of delay, losses flowing from the termination and defects. If the employer had sued both the main contractor and subcontractor in respect of delay, the compensation claimed in each case would be for the same type of harm, late completion of the project. Because, however, there were different obligations as to completion under the two contracts, where there was no overlap in the periods of delay suffered by the employer, the claims against the main contractor and subcontractor would concern the same type of harm but not the same harm. Where the periods of delay for which each was responsible did overlap, there would be a common liability to the employer for the same harm. There would therefore be liability, at least in part, for the same damage.

Although the main contractor's contribution claim in respect of termination losses (any additional costs of completing the works and associated losses) was on the basis that the defects for which the subcontractor was responsible caused the delays which gave rise to the employer's entitlement to terminate, it was unable to identify any ground on which the employer could claim compensation from the subcontractor for its termination losses. The harm suffered by the employer resulting from termination of the main contract, which it could claim from the main contractor, was therefore not the same damage as any subcontractor liability to the employer arising out of late delivery of, or alleged defects within, the plant.

In contrast, a claim by the employer for defective works would also be common to both the main contractor and subcontractor. The same damage or harm would be defective plant.

[Energy Works \(Hull\) Ltd v MW High Tech Projects UK Ltd & Ors \[2020\] EWHC 2537](#)

4. CLC Site Operating Procedures: version 6 issued

The Construction Leadership Council Site Operating Procedures have been updated to reflect recent changes in government guidance. While there are no significant changes to site social distancing requirements, the CLC has streamlined the SOP and changes include:

- referencing current requirements, such as social distancing, on page 1;
- inclusion of the CLC statement on [The Use of Face Coverings](#);
- updated guidance on shielding, self-isolation, testing and action if a worker develops COVID-19 symptoms, or has to self-isolate;
- confirmation that canteens serving food must display an NHS QR Code;
- wording update to recognise that social distancing is no longer exceptional, and to reflect more detailed government guidance in key areas or updated terminology.

See: <https://www.constructionleadershipcouncil.co.uk/news/site-operating-procedures-update-version-6-now-available/>

5. Report sets out proposed competence requirements for new Building Safety Manager role

A new report "*Safer people, safer homes: Building Safety Management*" sets out competence requirements for the new role of Building Safety Manager proposed under the draft Building Safety Bill. That role is to look after the day-to-day management of fire and structural safety in higher-risk buildings and establish a clear point of contact for residents for fire and safety related issues.

The report sets out a comprehensive framework for the role, focusing on the competences and job functions for individuals and the skills, knowledge, experience and behaviours outlined in the report will be used by the British Standards Institute to develop a national standard, that Building Safety Managers will be expected to meet.

The full report also makes recommendations on the responsibilities and role of the Accountable Person (a landlord or owner legally responsible for the safety of the building), calls for occupiers to play their part in improving their and their neighbours' safety, to have access to relevant information and to be clear on their obligations to relevant stakeholders and the need for an extended "Fire Kills" campaign to inform occupiers about potential fire safety risks and how to mitigate them.

See: <http://cic.org.uk/news/article.php?s=2020-10-05-competence-requirements-set-out-for-new-role-of-bsm>

6. Government PPN 07/20 raises prompt payment bar

New government Action Note PPN 07/20 has raised the bar on prompt payment. The PPN will apply (other than in exceptional circumstances) to all central government departments, their executive agencies and non-departmental public bodies procuring goods and/or services and/or works, with an anticipated contract value above £5 million per annum (excluding VAT), which are subject to the Public Contracts Regulations 2015 and advertised on or after 1 April 2021.

PPN 07/20, replacing PPN 04/19, increases the threshold bidders have to meet to demonstrate they have effective payment systems in place to ensure the reliability of their supply chains. Contracting authorities are to determine whether a bidder has an effective and reliable supply chain

management system in place by looking at whether it has paid its suppliers in accordance with the supply chain contractual terms and whether, overall, the bidder has paid its suppliers promptly; payment of 95% of invoices within 60 days is considered an appropriate measure of overall payment promptness.

See: <https://www.gov.uk/government/publications/procurement-policy-note-0720-taking-account-of-a-bidders-approach-to-payment-in-the-procurement-of-major-government-contracts>

7. CLC materials for Brexit

The Construction Leadership Council has published materials for the UK construction industry post Brexit, from 1 January 2021, including guidance on the movement of people and workers into the UK and the movement of goods and materials into and between Great Britain and Northern Ireland.

See: <https://www.constructionleadershipcouncil.co.uk/wp-content/uploads/2020/10/List-of-Brexit-News-V1.0.pdf>

See also this update on points-based immigration: <https://www.mayerbrown.com/en/perspectives-events/publications/2020/09/postbrexit-immigration-introducing-the-pointsbased-immigration-system>

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