Construction Focus 2020

Welcome

Welcome to our annual Construction Focus seminar.

Content

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What's Next for UK Construction?

Looking back over 2019 for the construction industry in Scotland, the old chestnuts of challenges remained prevalent: low margins, cash flow, debt levels, the need to stabilise balance sheets, passing of risk and the race to the bottom on price. However, despite that, and evidencing the resilience of the contracting sector, we still detect optimism and a reasonable degree of confidence in the sector as we move into 2020.

It has been difficult to avoid Brexit with its unquantifiable, but nevertheless real, risks and discussions about their allocation amongst the contracting parties, but with the 31 January 2020 exit having taken place, we may now start to see increased certainty in this area as negotiations with the EU 27 progress.

One key theme over the last year has been the push for improved build quality. In Scotland, a Building Regulations and Fire Safety Report was published which criticised both fire safety standards and the Scottish building verification process more generally. In response, the Scottish Government amended the Building (Scotland) Regulations 2004 and published an updated Building Standards Technical Handbook. The New-Build Homes (Buyer Protection) (Scotland) Bill was proposed to increase consumer protections for purchasers of new-build homes in Scotland.

The focus on payment practices remains and in March 2019, in an attempt by the Scottish Government to make Project Bank Accounts (PBAs) more accessible to sub-contractors, the threshold for use of PBAs was halved. The Scottish Government also launched a Consultation in relation to retention exploring the potential impact of introducing legislation in this area.

Moving forward, indications are that the pace of change is set to continue, particularly in relation to technology, cultural change and education.

The impact of technology is increasingly to be felt, with many taking the view that the construction industry is ripe for disruption. It is some time now since the 2016 Farmer Review of the UK Construction Labour Model found that the industry must `*modernise or die*´ and there have been various announcements by government on this theme, such as the £420m UK wide partnership for `bytes and mortar smart construction´, the UK Government £72m Core Innovation Hub, and the Construction Scotland Innovation Centre which is looking at emerging technologies and digital transformation.

A recently published Scottish Government paper: Under Construction: Building the future of the sector in Scotland concluded that `*Only with leadership, collaboration and cultural change will the construction sector be able to realise its full potential contribution to Scotland's economy.*´

In this context, the UK Government's pledge to `*implement the biggest infrastructure revolution in living memory*´ and the Scottish Government's Infrastructure Investment Plan (IIP) earmarking projects with a capital value of £5bn put both Governments in prime position to show leadership in the areas of collaboration and cultural change and there is a real opportunity for them to `walk the walk´ in this area.

If this level of infrastructure investment is to be delivered, it will focus the spotlight on both short and medium term demand for labour. The lack of sufficient skilled labour has been cited as a factor driving the increasing cost of HS2, and the UK Government's recent announcements on post-Brexit curbs on immigration increase concern that this problem will become more acute. However, the need for a skilled labour force goes far beyond traditional technical skills and encompasses technological skills to make best use of the avalanche of new technology. The announcement of an additional £3bn of funding for a National Skills Fund will undoubtedly assist, but it will take time for this to manifest in `boots on the ground´ or indeed in specialist design team and quantity surveying offices.

The climate change agenda will continue to feature heavily and the COP 26 summit in Glasgow in November will bring the debate to our doorstep in Scotland. It is another area where the industry will continue to be asked to respond with a focus on the whole life cycle of projects.

All in all, a lot on the radar for the industry in the year ahead.

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Trends 2019

2019 saw another year of disruption and change across the construction industry.

Collaborative Working - In recent years the construction industry has experienced a desire to move away from the traditional forms of construction to avoid or reduce conflict and seek to ensure an alignment of interests for both Clients and Contractors whether through contract terms or in a framework arrangement.

Collaborative working encourages parties to work together for the life of a project. The contracts seek to ensure that the parties act in the project's best interests with an aspiration to reduce costs or programme without sacrificing the quality of the end product.

Offsite manufacture and Technology – last year saw a significant investment in offsite manufacture and the use of technology in the industry. This reflected the need for the construction industry to `catch up´ with other industries and move towards a more flexible, modern way of working as well as using technology to address the skills shortage faced by the industry.

The Government backed this by creating the Core Innovation Hub (CIH) to support and develop the use of technologies, with the ultimate aim of making the UK a world leader in the latest construction techniques.

Brexit – 2019 saw numerous discussions regarding drafting in an effort to address an uncertain future. Concerns remained regarding availability of labour and the potential imposition of tariffs on imported goods. Now that the UK has officially left the European Union and entered the transition period, the matter remains no clearer, and the recent indications from the government regarding potential imposition of tariffs add no further clarity.

Regulations – there were a variety of regulatory changes last year directly impacting on the construction industry: updates to payslips, Salary Reporting Regulations and VAT being just a few. Brexit will likely bring a raft of new changes in either 2020 or 2021 given the Prime Minister's recent assertion that the Government will reject the requirement for the UK to adopt Brussels-made rules `on competition policy, subsidies, social protection, the environment, or anything similar´.

Grenfell – the fall-out from the Grenfell tragedy continues to have a significant impact on the industry. It is not only the impact on regulations, design changes and costs on contractors, but there have been recent examples of the impact on private individuals. Recent articles in the press have highlighted the problems that flat owners are experiencing as a result of new guidelines from mortgage lenders. It is hoped that the EWS1 form, agreed between chartered surveyors, lenders and other industry professionals will see a way through this, but only time will tell.

Payment – with the increased use of offsite manufacture and concerns about the cost of Brexit, 2019 saw an increase in the requirement for advance payment by contractors. The concern with advance payment for goods and materials has raised numerous questions regarding protection of advance payments and the need to ensure that goods and materials that are bought and paid for in advance of delivery to the site are properly identified and protected.

Ultimately the construction sector remains a vitally important one to our economy. In 2019, according to government figures, it contributed £117 billion to the UK economy with 2.4 million jobs and there will continue to be significant changes as the industry adapts to new technologies and markets.

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Legal Update

Our legal update covers recent changes in the areas of:

— Class Actions
— Prescription
— ADR; and
— Adjudication

Class Actions

Through their aggregation of numerous claims (which on their own may well have been too small value to pursue individually); class actions threaten to open up companies to significant liabilities and of course negative publicity.

Perhaps the most important point in respect of class actions is the different procedures through which they can arise; opt-in vs opt-out. Historically, most European litigation procedures require a claimant to make an active choice to bring a claim or participate in a claim; thus opting-in. An opt-out system reverses this – claimants are included in the class unless they make a conscious decision to opt-out.

Consistent with what you expect; data shows that opt-out actions generally result in substantially higher participation in class actions and as such result in much higher potential exposure for those on the receiving end. By way of example, the supermarket Morrisons suffered a data breach resulting in the exposure of 100,000 employee's personal data. Only 5% of the employees participated in the class under an opt-in procedure. In contrast, there is currently an attempt to build an opt-out class under the Consumer Rights Act 2015 against Mastercard that is going to the Supreme Court[1]. Should the Supreme Court side with the class builders, it paves the way for a class which starts out as 46 million consumers and is worth an estimated £14bn.

Class actions are already available in a limited form in the UK by virtue of the Consumer Rights Act 2015. However, developments in Scotland and England mean they are likely to become more widely available.

Scotland

In Scotland, the *Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018* set out the framework for class actions (called `group proceedings´ in the Act) in Scotland for the first time. The key provisions include:

— The Act allows for either opt-in or opt-out procedure, or both. The Court will decide which procedure to introduce.

— The group proceedings must be brought in the Court of Session and the Court must give permission to raise the group action. It will only do so if it is satisfied that the issues raised by the group are the same or sufficiently similar, and that all reasonable efforts have been made to notify all potential members of the group about the proceedings.

The Act does not set out how group proceedings are to be funded, nor the extent to which defenders can recover costs where the litigation is unsuccessful. We expect these issues to be elaborated on in the rules set by the Court. We understand that the work on the rules is currently in progress and we would expect developments at some point this year.

England

Not to be outdone, the English Court of Appeal has recently expanded the Court's ability to hear group litigation under CPR Part 19. CPR Part 19 allows group proceedings if the litigants have the `same interest.´ Historically, the Courts have strictly interpreted the `same interest´ requirement, resulting in it rarely being used.

In *Lloyd v Google*[2] Mr Lloyd sought damages from Google for infringement of data protection rights. It was alleged that over a period of six months in 2011-2012, iPhone customers had their internet activity tracked by Google. The headline grabbing element of this case is that Richard Lloyd's claim was not merely filed on his own behalf; he used CPR Part 19 to file on behalf of an estimated 4 million iPhone users.

The Court of Appeal overturned the lower court's decision and rejected the previous *`stringent… same interest´* test. In holding there was a class, the Court have opened up a potentially new stream of liability where previously there wasn't one.

It's been reported that Google will seek permission to appeal to the Supreme Court.

Application to the Construction Sector

Data protection breaches may spring to mind as an area likely to attract class actions but it's not difficult to imagine that a potentially sizeable class of litigants could be built for construction claims. Any area in which work is done for or to benefit a number of people may open a party up to the risk of a class action. Public sector organisations, for example, have a wide range of statutory and regulatory obligations – alleged breach of which may expose them to a class action. In turn the public sector organisation may well bring in contractors and consultants involved, looking for a right of contribution or relief.

[1] Walter Merricks v MasterCard [2] [2019] EWCA Civ 1599

Prescription

If a claim has not been made within a certain time, most often five years, after the relevant date it generally cannot be made as prescription operates to extinguish the obligation, to pay damages for example. What the relevant date is depends, among other things, on the date of knowledge of the relevant loss.[3] Recent Court[4] decisions on prescription have interpreted the date on which the party has knowledge in a manner acknowledged as harsh on claimants seeking redress. Significant decisions include *Midlothian Council* and *Loretto*. Additionally, we had an important decision on prescription in the context of collateral warranties in *British Overseas Bank*.

Midlothian

In *Midlothian*[5] the Council had commissioned site investigations in preparation for a residential project. The project was built, relying on those site investigations, between 2007 and 2009.

On 7 September 2013, one of the tenants at the development became ill. The Council claimed that subsequent investigations revealed that all homes in the development were uninhabitable due to the levels of gases from former mine workings entering the properties and breaching health & safety standards. Based on the Council's findings, they vacated their tenants and demolished the development.

The Council raised a £12million claim against several companies, including Blyth & Blyth as the consulting engineers on the project. The Council claimed that Blyth & Blyth should have advised the Council to install a ground gas defence system and that their failure to do so had caused the loss. Blyth & Blyth argued that the claim against them was time barred, the five year period having expired prior to the Council becoming aware of the problem in September 2013.

In making that argument, Blyth & Blyth relied on two recent Supreme Court referred to above – (i) David T Morrison and (ii) Gordon's Trustees, which had overturned the approach of the courts to cases where a claimant was not immediately aware that *`loss, injury or damage caused as aforesaid had occurred´* (per section 11 of the 1973 act governing prescription).

The Courts had interpreted that section 11 as requiring awareness (subject to a *`reasonable diligence´* qualification) of both fault and loss before the five year period would start running. However, the Supreme Court said the legislation had been wrongly interpreted and that once the claimant was, as a matter of fact, aware of the *`loss, injury or damage´* (e.g. because he had incurred costs in reliance on advice received) the five years began to run, even if the claimant only discovered the loss had been caused by another party's fault at a later date.

Blyth & Blyth therefore argued that the Council had incurred expenditure constructing the development based on Blyth & Blyth's allegedly negligent design. The construction costs constituted *`loss, injury or damage´* for the purpose of starting the five year period running. Accordingly, the five years had, at the latest, started running upon completion of the development in June 2009.

The Council sought to differentiate their position from that of the claimant in *Gordon's Trustees*; pointing out that their damages claim was not based on recovery of the costs of constructing the development the first time but on the later incurred costs of demolition and rebuilding. They said this would delay time running until the demolition of the properties in 2015.

The Court though agreed with Blyth & Blyth that the action against them was time barred. In reaching this decision, Lord Doherty accepted that the Council had been unaware until 2013 that there was a problem with the development. However, following *Gordon's Trustees*, it did not matter - as a matter of fact, and with the benefit of hindsight, it was clear that the Council had suffered wasted expenditure and so the claim must fail on the basis of prescription.

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[3] Prescription and Limitation (Scotland) Act 1973 s.11

[4] *David T Morrison & Co Limited t/a Gael Home Interiors v ICL Plastics Limited & others* [2014] UKSC 48 and *Gordon and others, as the Trustees of the Inter Vivios Tust of the late William Strathdee Gordon (Appellants) v Campbell Riddell Breeze Paterson LLP (Respondent) (Scotland)* [2017] UKSC 75

[5] *Midlothian Council v (1) David Anderson Keith, Samuel Anthony Sweeney, Allan D Rennie, and Stephen Blennerhassett as former partners of the now dissolved partnership of the firm of Bracewell Stirling Architects; (2) Raeburn Drilling and Geotechnical Limited; (3) RPS Planning And Development Ltd; (4) Blyth & Blyth Consulting Engineers* [2019] CSOH 29

Loretto Housing Association

There was, and still is, much interest in this case to see if it might provide some relief for claimants from some of the acknowledged harsh effects of *Midlothian*.

In *Loretto* it was argued that the certification of works by the architect, as well as the engineer's inspection and supervision of the contractor's work, meant claims were not pursued when they otherwise would have been – and thus a large amount of time should not be counted towards the prescriptive period.

The Housing Association said that it was led into error by the conduct of the engineer who had inspection obligations as well as obligations to advise the architect prior to issue of certificates allowing payment to the contractor. The Housing Association said it understood from the issue of the certificates that the contractor was entitled to payment because the work had been done properly. It said that, if the engineer had carried out its obligations properly (i)the architect would not have issued the certificates; and (ii) proceedings were not raised because the Housing Association wasn't aware there was anything wrong with the works as a result of it being led into error.

The Court didn't decide the point, allowing the argument to go forward to a hearing later this year when it could consider the argument against the available evidence.

British Overseas Bank

In this case the contractor successfully argued that the claim against it under a collateral warranty was time barred due to a no greater liability clause. It argued that although the collateral warranty had been granted less than five years before, the time limit attaching to it was that attached to the original building contract.

When interpreting the terms of the collateral warranty, the Court focussed on what it believed to be the underlying commercial purpose of a collateral warranty - putting the beneficiary in the same position as the Employer under the original building contract, not a more favourable position. The Court found that the existence of both a *`no greater liability´* clause and an *`equivalent rights of defence´* clause within the warranty supported this approach and showed that that the objective intention of the parties was to restrict the prescriptive period to that contained in the building contract.

The decision means that parties who are buying, letting or entering into funding agreements in respect of properties which are more than 5 years old may not be able to rely on collateral warranties to make claims in respect of defects which are already known. It will put greater emphasis on technical reports and commercial agreement with the vendor/landlord/developer.

Prescription (Scotland) Act 2018

When (if) brought into force, the Prescription (Scotland) Act 2018 will bring much welcome clarity to the law; rebalancing the interests of pursuers and defenders. The 2018 Act will introduce changes so that the prescriptive clock will only begin to run when the injured party knows:

`(a) that loss, injury or damage has occurred,
(b) that the loss, injury or damage was caused by a person's act or omission, and
(c) the identity of that person.´

Until then, parties need to be more alive to potential prescription issues than they otherwise would have been.

Alternative Dispute Resolution

Dispute Escalation Clauses

It is important to ensure that your escalation clauses are clearly drafted so that a clear, workable process is established. In the recent case of *Ohpen Operations UK Limited* [2019] EWHC 2246 (TCC) the Court set out that mandatory ADR provisions such as dispute escalation clauses needed to:

- create an enforceable obligation requiring the parties to engage in alternative dispute resolution;
- be expressed clearly as a condition precedent to court proceedings or arbitration; and
- be sufficiently clear and certain by reference to objective criteria, including machinery to appoint a mediator or determine any other necessary step in the procedure without the requirement for any further agreement.

The Court also noted that it has the power to stay/sist proceedings commenced in breach of an enforceable dispute resolution agreement. In exercising its discretion, the Court will have regard to the public policy interest in upholding the parties' commercial agreement and furthering the overriding objective in assisting the parties to resolve their disputes.

Mediation

Mediation has received particular attention this past year due to developments on the national and international stage.

Nationally, the Mediation (Scotland) Bill was published; a bill to increase the use and consistency of mediation services in Scotland and to introduce a new process of court-initiated mediation. The Bill does not propose making mediation mandatory; however it does propose requiring parties to attend a meeting with a mediator for a Mediation Information Session to discuss the benefits of mediation and the suitability of the case for mediation. It is proposed that this would apply to all civil actions.

The Mediation (Scotland) Bill is currently a private members bill and does not necessarily have the Scottish Government's support. However, the Scottish Government have recently responded positively to a major report[6] on mediation and is clearly taking a pro-mediation stance. Given this, we expect some reform of civil procedure to push parties to at least give greater consideration to mediation.

Internationally, the recently introduced Singapore Convention seeks to make international settlement agreements resulting from commercial mediations easily, quickly, and cheaply enforceable. The agreement has been signed by 51 states, including the US, China, India, Korea, Singapore, Turkey, Saudi Arabia, and other nations from all continents. The UK and other EU states have not yet signed the convention because they are apparently still debating whether they will need to sign as a regional economic entity or as individual states. While no state has yet ratified the convention, based on the number of signatories it is going to have a wide geographic and economic reach.

Adjudication case law update

Dickie & Moore Ltd v the Trustees of The Lauren McLeish Discretionary Trust

In this case,[7] the Court of Session considered the extent to which new items of claim included within an adjudication will affect an adjudicator's jurisdiction. The case also considers the extent to which adjudicator's decisions can be severed in such circumstances.

In upholding a jurisdictional objection in relation to these new items of claim, the case helps to identify the limits of ambush tactics but is tempered by the court's broad approach to severance in allowing partial enforcement of the adjudicator's decision.

Dickie & Moore Ltd (`D&M´) were engaged by the Trustees to construct a large house near Armadale. The contract was a Standard Building Contract with Quantities for use in Scotland (2011 Edition) and contained provisions permitting either party to refer any *`dispute or difference´* under the contract to adjudication. D&M constructed the house and a dispute arose as to the sums due. D&M issued an interim valuation setting out sums they believed were due. The Architect issued a Final Adjustment Statement on behalf of the Trust, differing as to the amount due. D&M subsequently challenged it and, without responding to that challenge, the Architect issued a Final Certificate reflecting the Final Adjustment Statement amount. The contract provided that the Final Certificate would be *`conclusive evidence´* of the matters contained within it, unless challenged by arbitration or adjudication within 60 days. D&M therefore referred the disputed account to adjudication and were awarded £324,492.60 plus interest across several heads of loss.

Ambush thwarted

The Trust sought to resist enforcement of the award on several grounds, one of which was that certain items of claim advanced by D&M in the adjudication were either substantially different or not those at issue between the parties prior to the issue of the Notice of Adjudication. Accordingly, they argued that no *`dispute or difference´* had yet crystallised between the parties. As such, the referral to adjudication was premature.

The court noted that the general position is that *`a robust, practical approach…with a commercial eye´* should be taken in determining whether or not a dispute had crystallised prior to the service of the Notice. An overly legalistic approach and nit picking should be avoided. However, in this instance, the court noted that:
`[e]ven looking at the matter broadly, the claims in the Notice for extensions of time and loss and expense appear to me to be of a different nature and order of magnitude to the previous disagreements about extensions of time, prolongation and loss and expense.´

As a result, the court agreed that part of the dispute had not crystallised.

The court rejected D&M's argument that the issuance of a Final Certificate avoided the need for a dispute to crystallise. The court also rejected the argument that the Final Certificate was akin to a *`claim´* being made by the Trust which would then permit D&M to defend it – including raising the new and increased items of claim advanced in its Notice.

But the decision is severed

The case was soon back before the court[8] with D&M seeking to enforce the award insofar as it related to matters which had crystallised prior to the referral to adjudication, and accordingly over which the adjudicator did have jurisdiction. Enforcement was resisted on the basis that the court's earlier decision meant that the adjudicator did not have jurisdiction to hear the entire dispute referred and separately that the decision of the adjudicator was not binding given it was only partially enforceable.

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[6]`Bringing Mediation into the Mainstream in Civil Justice in Scotland´ by the Expert Group on Mediation in Civil Justice in Scotland.

[7]*Dickie & Moore Ltd v McLeish* [2019] CSOH 71

[8]*Dickie & Moore Ltd v McLeish [2019] CSOH 87*

After an extensive review of previous case law, the court declined to follow early authorities which had suggested that the referral of a single dispute to adjudication was determinative of whether severance was permissible. Most contracts only permit a single dispute to be referred to adjudication and these authorities would preclude severance in such cases. The court preferred to take a broader approach focusing on the extent to which any jurisdiction or natural justice issues might have affected the adjudicator's decision. In the court's view: *`the critical question ought not to be whether there is a single dispute or difference, but whether it is clear that there is a core nucleus of the decision that can safely be enforced´*.

Conclusions and implications

This decision provides a rare example of a `no dispute´ or `different dispute´ argument being upheld by a court. Whilst the requirements for the crystallisation of a dispute are easily met, this case will assist in marking out the limits of what is permissible. As always, parties must be careful when drafting their Notice of Adjudication that the matters to be referred have been set out in prior correspondence or contractual notifications. The magnitude of the sums claimed should be comparable to the sums notified prior to the adjudication. Should there be doubt, parties may wish to delay issuing adjudication proceedings so as to clearly communicate their claim to the other party to avoid arguments as to crystallisation.

Parties should also be mindful of the effect of final certificate deeming provisions, such as those found in the SBCC and JCT forms of contract. The need for parties to commence adjudication proceedings within the short period of time provided by these provisions may make it more difficult to establish a crystallised dispute, particularly where new claims are sought to be advanced. In such scenarios, parties may wish to consider either court or arbitral proceedings as an alternative to adjudication.

The court's findings as to severability add to a growing weight of authority in favour of a broader approach. The court noted that the narrower approach would be likely to, *`encourage unsuccessful parties in single dispute adjudications to scrabble around for grounds to resist enforcement, because success on any ground (even if it relates only to a relatively small part of the decision) will suffice to invalidate the entirety of the decision.´* Whilst that may be true, parties seeking to resist enforcement already face considerable challenges. The broader approach may also encourage the use of ambush tactics, with Referring Parties comforted in the knowledge that if those tactics overstep the mark any decision may still be partially enforced.

It remains to be seen whether the broad or narrow approach to severance will be supported at appellate level (in Scotland or the rest of the UK). The limits of the broad approach are also yet to be tested, with parties needing to ensure that a decision can be separated out into distinct parts, and a `core nucleus´ preserved, in order to benefit from severance.

We understand this case is currently being appealed, so watch this space.

Field Systems Designs Limited v MW High Tech Projects

In this case[9] the defender sought to resist enforcement because the adjudicator (i) was said to have failed to address a material line of defence before him and accordingly exhaust his jurisdiction and (ii) insofar as he did address the line of defence, the adjudicator failed to provide adequate reasons for his decision.

Lord Clark noted the difference in treatment between a deliberate and inadvertent failure of the adjudicator to deal with a defence; when a failure is inadvertent it will only render the decision unenforceable if it is material. Lord Clark makes specific note of how rare it is for an inadvertent failure to render a decision unenforceable.

Turning to the facts of the case, Lord Clark held the adjudicator had at least implicitly dealt with the line of defence in his decision. However, he also held it was clear that the adjudicator failed to give adequate reasons for the view he reached on the line of defence. Despite this, Lord Clark still held the decision enforceable due to the relevant defence not having a significant effect on the overall result of the adjudication. This was due to it relating to a relatively small portion of the overall sum awarded and the merits of the defence being advanced.

The court also held that if it had been mistaken on materiality, it would have severed that part of the decision and enforced the remaining award. Lord Clark specifically endorses the position in Dickie & Moore as *`flexible and pragmatic´*.

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[9] *Field Systems Designs Limited v MW High Tech Projects UK Limited* [2020] CSOH 17

Future Trends for 2020

We kick each year off with a summary of key points for Contractors to be aware of in the forthcoming year. Please see page 15 for the 2020 Summary. There are always a wide array of upcoming changes and 2020 is no different. These will require changes to working practices, in procurement, in specification and in contract terms.

The changes vary from **business-wide changes** which also affect the construction sector, **political and socially influenced changes** which impact on construction and **construction sector-specific changes**.

Business-wide change – IR35

In April 2017, the government amended the legislation on recovery of income tax and National Insurance contributions for individuals providing services to a public sector client through an intermediary. The new rules (referred to as the off-payroll working rules) meant that the public sector client, rather than the intermediary, became responsible for deciding whether the individual should be deemed to be an employee for income tax purposes. From 6 April 2020, the public sector reforms are to be extended to the private sector and take precedence over CIS. Clients will need to be aware of the additional potential responsibility for determining the individual's employment status and notifying the Fee-payer and appropriate agencies.

Political and Socially influenced changes – Sustainability/Climate Change

In September 2019 the Scottish Government introduced a Programme for Government setting out `*the next steps on Scotland's journey to net-zero [greenhouse gas] emissions [by 2045].*´ Whilst much of green construction focuses on housing this Scottish Government paper includes statements on other construction projects. These include -

— An ambition to phase in renewable and low carbon heating systems for new non-domestic building consented from 2024;
— A new Net Zero Carbon Standard for new public buildings;
— 100% renewable electricity on Scottish public estates;
— Scottish Water to become a zero-carbon user of electricity by 2049; and
— Assessing the impact of tackling climate change on projects procured under the City Deal and Schools for the Future programme.

The Scottish National Investment Bank is to open for business this year and with an initial £130million being funded by the Scottish Government it will have a focus on driving to net zero. Likewise, the Scottish Low Carbon Heat Funding Invitation is targeting £30M for projects including heat pumps that demonstrate innovative and low carbon ways of heating buildings.

This political and social pressure to achieve sustainability has already had and will continue to have an impact not just on the type of projects going ahead but also on procurement processes and the content of contracts. Procurement processes can be structured to allow Clients to include selection criteria which demonstrates how important a commitment to sustainability is. Bidders can be required to demonstrate how they have minimized carbon dioxide emissions in their supply chain. Then comes the tougher nut to crack – contract terms can be created to ensure that sustainability good practice is encouraged and rewarded.

This year from 9 – 20th November, Glasgow will host COP 26, the 26th annual Conference of the Parties (**COP**) of the United Nations Framework Convention on Climate Change (**UNFCC**). The conference will bring together over 30,000 delegates from all over the world to negotiate an international response to the climate emergency. Our colleagues in foreign jurisdictions are already seeing construction projects affected by severe flooding and wind damage in a way that they were not previously and this has required close consideration on what weather conditions in these times are actually `exceptionally adverse´ or `unforseeable´.

Specifically to address construction sector issues – RIBA Plan of Work

Having been substantially redrafted in 2013 (creating a digital version and new stages 0 and 7 instead of A-L) an updated version reflecting 6 years of use is to be issued in 2020. As well as new RIBA Plan of Work showing some stage name changes – Stage 3 Developed Design becomes Spatial Coordination; Stage 5, and Construction becomes Manufacturing and Construction, it is also reflective of sustainability and focuses on end use. A series of sustainability guides will be issued to support to the Plan of Works and a sustainable outcome is to be considered at Stage 1, monitored and then verified at Stages 6/7.

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> If anything is certain, it is that change is certain. The world we are planning for today will not exist in this form tomorrow.
>
> *Phil Crosby*

Legal Issues 2020

What should UK contractors be aware of?

Building Safety Reforms

Legislation reforming safety standards for high-rise residential buildings is to be proposed following the Hackitt Report. An independent safety regulator is likely to be created, providing greater accountability for building safety. Before these proposals are made, a protection board will identify and inspect all high-risk and known buildings with ACM cladding by 2021.

Future Homes Standards

A consultation is looking to improve Building Regulations for new build homes in England, and a new 'Future Homes Standard' will be operable by 2025. These new standards will include: increased energy efficiency requirements, high fabric standards and low-carbon heating system requirements.

Sexual Harassment in the Workplace

Following an industry consultation, the government hopes to introduce a new code of conduct in late 2020. The code will specify steps that employers should take to prevent and respond to sexual harassment and introduces a new "Preventative Duty".

Employment Contracts

New statutory rules affecting employment contracts for new employees starting on or after 6 April 2020 will change the information to be included in the employment contract and requires the contract to be issued to workers and/or employees on or before they commence employment. From 6 April 2020 there will also be statutory changes to holiday pay calculations and the reference period for determining an average week's pay will be lengthened. Changes to confidentiality clauses are also afoot.

Domestic Reverse VAT Charge

The "Reverse Charge" means companies in the construction supply chain will no longer receive a 20% VAT payment on their bills but instead the recipient of the services must account for the VAT due. Initially due October 2019, the Reverse Charge will now be introduced 1 October 2020.

'Off-Payroll' Working

A new tax regime for "off-payroll" working (IR35 rules) is likely in 2020. These rules will bring major changes for off-payroll contractors working through a Personal Service Company, recruitment agencies or large/medium sized private sector organisations. Small, private sector organisations will be exempt.

Pensions

The UK Government has confirmed it will proceed with a Pension Schemes Bill in 2020. A key objective is to discourage mismanagement of pension schemes by strengthening the Pensions Regulator's powers and the existing sanctions regime, which will include new criminal offences and civil penalties of up to £1 million.

Ring-Fenced Cash Retentions on Projects

The Scottish Government has launched a consultation (closing 25 March 2020) on cash retentions, existing payment measures and alternative payment measures in projects, with a view to introducing legislation in this area.

Opt-out class actions

New Scottish legislation has introduced a process whereby all potential claimants will be included in a claim without having to elect to participate, significantly increasing the risk profile of the claim. A trend towards the class action approach was also seen in the Court of Appeal recently, where a data breach claim affecting 4 million claimants was allowed.

Brexit

Although there is still uncertainty surrounding Brexit, the recent General Election result means that UK withdrawal from the EU (with or without a deal) on or before the 31 January 2020 deadline is more likely than not. We have seen an increasing number of Brexit provisions in contracts to provide for risks and uncertainties arising.

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