MacRoberts on

# SCOTTISH CONSTRUCTION CONTRACTS

**Third Edition** 

mac ROBERTS

WILEY Blackwell

# MacRoberts on Scottish Construction Contracts

**Third Edition** 

**MacRoberts**Solicitors

Foreword by The Rt Hon Lord Hope of Craighead

WILEY Blackwell

This edition first published 2015 © 2015 by John Wiley & Sons, Ltd

Registered office

John Wiley & Sons, Ltd, The Atrium, Southern Gate, Chichester, West Sussex, PO19 8SQ, United Kingdom.

Editorial offices:

9600 Garsington Road, Oxford, OX4 2DQ, United Kingdom. The Atrium, Southern Gate, Chichester, West Sussex, PO19 8SQ, United Kingdom.

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Library of Congress Cataloging-in-Publication Data

MacRoberts on Scottish building contracts
MacRoberts on Scottish construction contracts / MacRoberts Solicitors;
foreword by The Rt Hon Lord Hope of Craighead, KT.-Third edition.
pages cm
Includes bibliographical references and index.
ISBN 978-1-118-27345-6 (hardback)
1. Construction contracts - Scotland. I. MacRoberts (Firm), author. II. Title.
KDC501.M33 2014
343.41107'8624 - dc23
2014016562

A catalogue record for this book is available from the British Library.

Wiley also publishes its books in a variety of electronic formats. Some content that appears in print may not be available in electronic books.

Cover images: iStockphoto © blackjake, iStockphoto © Martin McCarthy Cover design by Jeffrey Goh

Typeset in 10/12pt MinionPro by Laserwords Private Limited, Chennai, India Printed and bound in Singapore by Markono Print Media Pte Ltd

To David Henderson – without whom this book would never have seen the light of day. We are forever in his debt.

### **Foreword**

The Rt Hon Lord Hope of Craighead KT

A textbook of this kind, which seeks to serve the day-to-day needs of those who enter into and have to administer significant contractual relationships, must keep itself up to date if it is to do its work properly. This is no easy task, especially in a field such as that occupied by contracts entered into in the Scottish construction industry. There are many factors at work which promote changes in law and practice in this area. The standard forms are subject to constant revision to react to the demands of the marketplace. There are changes in the legislation, as it seeks to promote best practice in the industry, to react to the requirements of modern competition law and to combat the increasing menace of bribery. There is also a steady stream of case law, as the limits of existing rules and principles are constantly being tested to resolve the disputes that come before the courts. It was for this reason that I said in my Foreword to the first edition that I hoped that it might be possible for this book, like the forms, to be kept up to date by the issuing of revised editions at appropriate intervals. That indeed is what has happened and, as I welcome this third edition, I have not been disappointed.

As one would expect, the editors have been careful to take account of all these changes. But this has not just been a mechanical exercise. Several important editorial initiatives have been taken to keep pace with changes in practice. At the time of the first edition the standard forms that were most commonly used in the industry in Scotland were those published by the Scottish Building Contracts Committee (the SBCC). As was to be expected, the focus in that edition was on those standard forms. But the New Engineering (NEC3) forms of contract have grown in popularity throughout the United Kingdom, especially in the public sector. So it made sense for them to be given equal consideration in this new edition together with the SBCC forms. Also the focus in previous editions was on the With Quantities version of the Scottish Building Contract which was the version that was most frequently used at that time. This edition has broadened its outlook by including an analysis of important differences between that version and the Design and Build form of contract. This is to be welcomed, as design and build is being increasingly used as the preferred method of procurement in major projects. Chapter 1 also has an extended commentary on professional consultants, who have an increasing role in projects of that kind.

Chapter 17 on arbitration has been rewritten to provide a detailed commentary on the Arbitration (Scotland) Act 2010, and two new chapters have been added. One (Chapter 21) deals with the increasingly important matter of competition law in the

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context of the construction industry, to which the Office of Fair Trading is now paying close attention. It is plain from its enforcement activities that contractors and those engaged in the supply chain need to be aware of the rules and to conduct their own activities accordingly. The other (Chapter 22) deals with the far-reaching measures introduced by the Bribery Act 2010, which are of concern to everyone engaged in the construction industry both domestically and internationally. As the editors point out, the construction industry is one of the sectors which is likely to be the focus of investigating authorities because of the complex framework of contracts that it routinely uses and the cross-border and international nature of its activities. The penalties for those found guilty of offences are severe. This chapter is essential reading for those in positions of responsibility throughout the industry.

There is more than a hint of unfinished business. At the end of the chapter on procurement we are told that this area of the law is currently undergoing significant transformation as new Public Procurement Directives were adopted by the European Parliament in January 2014 and a Procurement Reform (Scotland) Bill, which will enable Scottish Ministers to make regulations as to the assessment of bidder suitability to tender for public contracts, has been introduced into the Scottish Parliament. The Courts Reform (Scotland) Bill, which will set out the framework for the implementation of the programme of reform of the Scottish Civil Justice system recommended in Lord Gill's Report, is currently passing through the Parliament also. So there are important changes on the way with which this edition cannot deal. Then there is the problem that has been created by differences in approach between the English and the Scottish Courts regarding the question whether a contractor is entitled to an extension of time where there are concurrent causes of delay. The editors express a clear preference for Lord Carloway's impressive dissenting judgment in the Inner House in the City Inn case, which is in harmony with the English approach. It would not be in the least surprising if the UK Supreme Court, by which the issue must surely now be resolved as soon as possible, were to agree with them.

The editors are, of course, entitled to a well-earned rest from their labours. Users of the book will no doubt hope that a fourth edition will be forthcoming before too long, so that it will continue to serve so well the needs of busy practitioners. For the time, however, they will be grateful for the practical approach that it takes to the many issues with which it deals, the broader coverage that it gives to the forms of contract and for the clear and accessible way that its guidance is presented.

David Hope

#### **Preface**

In the Preface to the second edition of this book published in 2007, we remarked upon the significant changes in the landscape of construction contracts since the first edition published eight years earlier. Predictably, exactly the same can be said about this third edition. It is, however, not only the law of construction contracts which continues to spin down Tennyson's ringing grooves of change, but also the practice of the users of such contracts. While the previous editions focussed on the SBCC With Quantities and Design and Build standard forms of building contract, the third edition gives equal prominence to the NEC3 Engineering and Construction Contract, an editorial decision made somewhat inevitable by the increasing use in Scotland of that contract. Perhaps not so inevitable was the decision to change the title of the book from *MacRoberts on Scottish Building Contracts* to *MacRoberts on Scottish Construction Contracts*, but we think that the latter reflects what has become the more commonly used terminology.

We are indebted to Lord Hope of Craighead for providing, as he did for the first edition, the Foreword. In that Foreword, he mentions a number of the other changes which have demanded substantial revisions to the relevant chapters, most notably to take account of the long-awaited (and welcome) Arbitration (Scotland) Act 2010 and the significant amendments to Part II of the Housing Grants, Construction and Regeneration Act 1996. Completely new chapters dealing with competition law and the Bribery Act illustrate the increasing impact on construction law of the expanding regulatory environment.

It is also interesting to note that while (as pointed out in the last edition) there remains a close relationship between the law of Scotland and that of England, the courts of the respective jurisdictions do not always reach the same result on the same point, as demonstrated by the schism between the 'English approach' and the 'Scottish approach' following the decision of the Scottish court in *City Inn v Shepherd Construction* (see Chapter 6).

In addition to those of the editors, individual contributions have been provided by our colleagues: David Arnott, Richard Barrie, Neil Kelly, Duncan Osler, Robin Fallas, Sarah Pengelly, Madeleine Young, David Wilson, Alison Horner, Julie Hamilton, Jennifer McKay, Ainsley MacLaren, Colette McGinley, John Reid, David Flint and Valerie Surgenor, and our now former colleagues Alexandra Lavery and

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Gavin Thomson. Alan McAdams, yet again, has provided invaluable support to many, if not all, of the contributors, and Jennifer Burns, Kate Moffett and Magdalena Urbanowska played an invaluable role in preparing tables and checking drafts.

Finally, our thanks to Paul Sayer and all of his colleagues at Wiley for their patience and support.

We have endeavoured to state the law as at 1 July 2014.

David Henderson Craig Turnbull Shona Frame

MacRoberts LLP 60 York Street Glasgow

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#### Chapter 1

## **Construction Contracts in General**

#### 1.1 Introduction

Numerous books have been written on the subject of construction contracts. However, many of those are of a specialist nature and most are written from the perspective of English law. The aim of this book is to provide a practical guide to construction contracts governed by the law of Scotland.

There is no doubt that the construction industry not only in Scotland, but throughout the UK, is currently being presented with continuing challenges of an almost unprecedented nature. In the first quarter of 2013, the construction industry suffered a contraction of 2.5% compared with the same period in the previous year, despite a growth in overall Scottish gross domestic product (GDP) of 1.2%. While some major public sector infrastructure projects have lessened the impact of the economic downturn on the Scottish construction sector, the lack of external funding has been a major factor in the sharp reduction in the number of new private commercial development projects.

However, the very size of the construction industry means that it is of huge significance to the economy. According to figures contained in the report by Construction Scotland, *Building for the Future: The Scottish Construction Industry's Strategy, 2013–2016*, the construction industry generates £27.4 billion (GDP) to the Scottish economy every year, contributing 10% of Scotland's total economic output, and 170,000 people work in construction in Scotland, around 10% of the total Scottish jobs.

#### 1.2 Definition of a construction contract

#### 1.2.1 General

The definition of a construction contract is not straightforward. The construction industry encompasses building and engineering projects which differ enormously in nature, size and complexity. The terms 'building contract' and 'construction contract' are often used interchangeably. The term 'construction contract' was given a statutory meaning for the first time by section 104 of the Housing Grants, Construction

and Regeneration Act 1996 ('the 1996 Act') and the breadth of the definition illustrates the wide-ranging nature of construction contracts. The 1996 Act has been amended by the Local Democracy, Economic Development and Construction Act 2009 in relation to contracts entered into in England and Wales from 1 October 2011 and in Scotland from 1 November 2011. One of the key amendments was the repeal of the requirement that a construction contract for the purposes of the 1996 Act must be in writing. The following sections summarize the principal requirements of the statutory definition of 'construction contract'. However, it is important to bear in mind that this statutory definition is relevant only for the purposes of the 1996 Act and for determining whether the provisions of Part II the 1996 Act, such as adjudication and payment requirements, will apply to a particular contract. The fact that a contract is not a 'construction contract' for the purposes of the 1996 Act does not mean that it may not be a construction contract in the commonly understood sense of the term, and indeed some contracts falling with the statutory definition, such as for architectural services, would not be described as a construction contract in everyday terms. An English court has recently held that a collateral warranty may, depending on its terms, be a construction contract for the purposes of the 1996 Act and thus subject to the statutory adjudication provisions, see Parkwood Leisure Ltd v. Laing O'Rourke Wales and West Ltd (2013) and the discussion of this case in Section 13.4. The 1996 Act has no relevance in determining whether a contract exists in the first place since this will be determined by a matter of law and evidence; putting it at its simplest, whether there was sufficient consensus as to the essential terms and sufficient proof of such consensus.

It should also be noted that the Scottish Government's legislative programme for 2013–2014 includes the Conclusion of Contracts, etc. Bill, which is intended to allow contracts to be concluded by email and to provide a simpler process for formal execution (signing) of contracts.

#### 1.2.2 Construction contracts under the 1996 Act

Part II of the 1996 Act applies to 'construction contracts', being agreements in relation to 'construction operations'. These terms are defined respectively by sections 104 and 105.

Section 104 provides as follows:

- 1. In this Part a 'construction contract' means an agreement with a person for any of the following
  - (a) the carrying out of construction operations;
  - (b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;
  - (c) providing his own labour, or the labour of others, for the carrying out of construction operations.
- 2. References in this Part to a construction contract include an agreement
  - (a) to do architectural, design or surveying work, or

- (b) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape, in relation to construction operations.
- 3. References in this Part to a construction contract do not include a contract of employment (within the meaning of the Employment Rights Act 1996).
- 4. The Secretary of State may by order add to, amend or repeal any of the provisions of subsection (1), (2) or (3) as to the agreements which are construction contracts for the purposes of this Part or are to be taken or not to be taken as included in references to such contracts ...

It will be noted that the 1996 Act applies to matters beyond the carrying out of building works. It applies to architectural, design and surveying works and to advising on building, engineering, interior or exterior decoration or on the laying-out of landscape in relation to construction operations.

The definition of 'construction operations' is central to Part II. This term is defined by section 105(1) which provides as follows:

- 1. In this Part 'construction operations' means, subject as follows, operations of any of the following descriptions
  - (a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land (whether permanent or not);
  - (b) construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land, including (without prejudice to the foregoing) walls, roadworks, power-lines, electronic communications apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;
  - (c) installation in any building or structure of fittings forming part of the land, including (without prejudice to the foregoing) systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems;
  - (d) external or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration;
  - (e) operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site clearance, earthmoving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works;
  - (f) painting or decorating the internal or external surfaces of any building or structure.