
CONSTRUCTION CONTRACTS

Law and Practice

RICHARD WILMOT-SMITH QC



OXFORD

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To all who have helped me. They know who they are.

FOREWORD

This book is a welcome addition to construction law literature and will take its place amongst the standard textbooks on the subject. It is well structured, well written, and clear. I have read the manuscript with considerable interest. The author not only sets out the substantive law (with his own comments as appropriate) but also gives practical guidance on adjudication procedure, the Pre-action Protocol, court procedures, and so forth.

The construction industry accounts for about 10% of this country's GDP. It provides a vital service for public authorities, the private sector, and indeed all home owners. The swift and economic resolution of all disputes (a) within the construction industry, and (b) between the construction industry and building owners/end users is a matter of obvious importance. That importance will be underlined when construction work for the 2012 Olympic Games gets under way.

The vast majority of all construction disputes (including claims against construction professionals) are resolved—whether in favour of one party or the other—by agreement between the parties. A small minority of disputes proceed to some form of dispute resolution procedure: namely mediation, adjudication, arbitration, or litigation.

Whether a dispute is resolved privately between the parties or by means of some more formal procedure, it is vital that both the parties and their legal advisers have a clear understanding of the law and its practical application to their problem. That is where this book comes in. This book (like the other major textbooks in the field) provides a clear exposition of construction law and practice, written from the author's own particular standpoint. This author is an experienced construction silk, who writes from the background of that experience.

I predict that this book will go into many future editions and I wish it well.

Rupert Jackson
3 October 2005

PREFACE

It was a daunting task to be asked by OUP to produce a modern textbook on construction law and practice for the legal and construction professional practitioner. Whether there has been success in the aim is for others to judge. The objective has been to produce a book which combines an exposition of the modern law in relation to construction in a form which is accessible and relevant.

Construction law has been at the forefront of the development of both substantive and procedural law in this country. In relation to the substantive law this has been, partly, because of the enormous significance of the construction disputes which have arisen in the last twenty years and the fact that the amounts in issue have often justified extensive appellate argument. However it may be in the procedural aspects of the law and its development for which the construction lawyers in this country have made the most contribution. It is no accident that nearly all the modern techniques of case management have been pioneered by the TCC judges and practitioners and that many of the leading practitioners of ADR are construction professionals. There is more to do in this area, but we have come a long way from the tedious, expensive, and inefficient events which were called long trials in the 1970s and 1980s. Thus a significant part of the book deals with ADR and court procedures which have been developed over the years and which are still developing.

The largest single event of significance in the last ten years for construction professionals has been the advent of statutory adjudication and because of that it has been given extensive treatment and prominence in this book and forms an integral part of it. Whether you are for it (as I am) or against it (as many are) adjudication is here to stay and will, in future works on the subject of construction law, take up an even greater proportion of the space in them than the significant proportion which it does in this book.

The troubles of the TCC have been no secret to any practitioner in this field. This has been born of neglect by the powers that be over many years. There can be no justification for the undervaluation of the construction court by those who were ultimately responsible for it, and none has been made. The fact remains that the most significant disputes in terms of value over the last twenty to thirty years have been tried in that court. It is therefore with some relief that

Jackson J is, with support of the higher judiciary, commencing a series of reforms which will give that court the status it deserves both domestically and internationally. The exact effect of these changes on the law and procedure of construction contracts is impossible to predict, except it can be expected to be significant and possibly ground breaking.

It is therefore essential that the buyers of this book have speedy updates which not only correct errors as they are found but also keep abreast with changes in substantive and procedural law. Therefore this book will be updated on its website; which is at <<http://www.oup.co.uk/law/practitioner/cws/>> and click on the link for *Construction Contracts: Law & Practice*. There will be no supplements to this book, but practitioners can check the website against paragraph numbers in the book for the latest developments which affirm, modify, or change what is written. The website will also have space for contributions from readers on any topic covered in the book. I hope that this will enable debate on topics of interest.

I have received a great deal of help in the production of this book. First from Simon Nurney and his team at Macfarlanes, Doug Wass, Shy Jackson, and Andy Mather who made an enormous contribution to Chapter 18, Adjudication. Their detailed knowledge of the law and practice in relation to adjudication and enforcement is awesome. I could not have begun to have done this chapter on my own and, as it is, my contribution to it is embarrassingly small. The reason the chapter is so helpful to practitioners is entirely down to their excellence.

Secondly Adam Robb, my colleague in Chambers has done wonders with Chapter 6, The Law of Tort. His scholarship and attention to the proper analysis of where the law has been in this field and where it is going has been an inspiration and if, as is hoped, the chapter provides an up-to-date statement on the modern law of tort in relation to construction contracts, then the responsibility for that is entirely his.

Thirdly, my colleague in Chambers, Ben Williams, has been almost entirely responsible for Chapter 22 which deals with EC legislation, competition law both domestically and in the EC, and corruption and bribery. The research required was enormous in a field which is dry and hard to put into a form which is both accessible and accurate. The success of the chapter is entirely due to his hard work.

Fourthly, my colleague in Chambers, Alex Ruck Keene played an enormous part in the production of Chapter 19 which deals with ADR. He took my early draft and expanded it to make it relevant and up to date. His expertise in this field is remarkable.

Fifthly Richard Mumford, who was a pupil in Chambers at the time of the

writing of this book and Karim Ghaly, my colleague in Chambers, provided enormous assistance with those parts of Chapter 7 which deal with the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999. The backbreaking task of research was cheerfully completed by Richard and base narrative was excellently done by Karim.

Finally I would like to thank all at OUP who provided help, support, and encouragement throughout what must have been, for them, a long and frustrating project. Rachel Mullally and Wendy Lynch put up with a great deal from me and they were able to gently but firmly keep the project on track.

The errors contained within the book may be many, but they are all mine. If the website is notified of them, then they can be corrected. I hope the website will be a convenient and speedy method of updating the book.

The law is stated as at 3 October 2005.

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