

MacRoberts on
**SCOTTISH
CONSTRUCTION
CONTRACTS**

Third Edition

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WILEY Blackwell

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**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

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

Contents

<i>Foreword</i> by the Rt Hon Lord Hope of Craighead KT	<i>xiii</i>
<i>Preface</i>	<i>xv</i>
1 Construction Contracts in General	1
1.1 Introduction	1
1.2 Definition of a construction contract	1
1.3 Parties involved in a construction project	5
1.4 Types of construction contract	15
1.5 The SBCC forms of building contract	23
1.6 The NEC3 forms of contract	25
1.7 Building Information Modelling (BIM)	27
1.8 Soft Landings	29
2 Procurement	32
2.1 Introduction	32
2.2 The EU public procurement regime and EU economic and legal principles	33
2.3 Beyond the EU	35
2.4 Conditions for application of the procurement rules	36
2.5 Who must comply with the Regulations?	36
2.6 Treatment of a proposed contract as a works contract, supply contract or a services contract	37
2.7 What are the relevant financial thresholds?	40
2.8 Is there an applicable exclusion?	41
2.9 Types of procurement procedure	42
2.10 The open procedure	42
2.11 The restricted procedure	43
2.12 The negotiated procedure with advertisement	46
2.13 The competitive dialogue procedure	49
2.14 Awarding the contract	53
2.15 The <i>Alcatel</i> mandatory standstill period	54
2.16 The use of framework agreements in public procurement	56
2.17 Remedies against contracting authorities (bidder grievances and complaints)	57

2.18	Awarding low-value contracts fairly	61
2.19	Forthcoming changes in the Procurement law landscape	62
3	Entering into a Construction Contract	64
3.1	Introduction	64
3.2	Essentials of written and oral contracts	64
3.3	Capacity to contract	71
3.4	Implied terms	73
3.5	Letters of intent	78
3.6	Incorporation of terms by reference to another document	80
3.7	Contract interpretation	83
3.8	Signing a building contract	84
4	Employers' Obligations	87
4.1	Introduction	87
4.2	Possession of the site	88
4.3	Administration	92
4.4	Information and instructions	95
4.5	Variations	97
4.6	Other obligations	102
5	Contractors' Obligations	103
5.1	Introduction	103
5.2	Completing the works	103
5.3	The quality of the work	118
5.4	Defective work	128
5.5	Progress of the works	131
5.6	Insurance and indemnity	138
5.7	The Joint Fire Code	139
5.8	Health and safety	140
6	Time	141
6.1	Introduction	141
6.2	Commencement of the works	141
6.3	Time of the essence	142
6.4	Progress of the works	142
6.5	Adjustment of the Completion Date and extension of time for completion	143
6.6	Partial possession, sectional completion and acceleration	152
6.7	Completion of the works	153
6.8	Damages for late completion	154
6.9	Liquidated damages	155
6.10	The SBC/DB	158
6.11	The NEC3	159

7	Certification	168
7.1	Introduction	168
7.2	Formal requirements of certificates	168
7.3	Interim certificates	171
7.4	Final certificates	176
7.5	Other certificates	180
7.6	Roles and duties of certifiers	183
8	Payment	188
8.1	Contractual payment	188
8.2	Adjustment of the contract price	206
8.3	Loss and expense	215
8.4	<i>Quantum meruit</i>	220
8.5	<i>Quantum lucratus</i>	222
8.6	Contractual retention	224
8.7	Project bank accounts (PBA)	227
9	Ending a Construction Contract	229
9.1	Introduction	229
9.2	Frustration and impossibility	229
9.3	<i>Force majeure</i>	232
9.4	Termination	233
9.5	Repudiation and rescission	242
9.6	Death and illness	243
9.7	Illegality	244
9.8	Insolvency	245
9.9	Prescription	248
10	Remedies	254
10.1	Introduction	254
10.2	Rescission	255
10.3	Specific implement	256
10.4	Damages for breach of contract	257
10.5	Finance charges	261
10.6	Interest	263
10.7	Interdict	267
10.8	Withholding payment	267
10.9	Suspending performance	269
10.10	Delictual claims	271
11	Sub-contractors and Suppliers	275
11.1	Introduction	275
11.2	SBCC Standard Sub-Contracts	275
11.3	NEC3 Standard Sub-Contracts	276
11.4	Nominated and domestic sub-contractors	276

11.5	Named and specialist Sub-Contractors	277
11.6	Direct payments to sub-contractors	279
11.7	Privity of contract	280
11.8	Relationship between main and sub-contracts	282
11.9	Restrictions on sub-contracting	283
11.10	Main contractor's discount	284
11.11	Suppliers	285
11.12	Retention of title clauses	285
11.13	Supply of goods by sub-contractors	287
11.14	Adequate mechanism for payment	288
12	Assignment, Delegation and Novation	290
12.1	Introduction	290
12.2	Common law	291
12.3	Effect of assignment upon claims	292
12.4	<i>Delectus personae</i>	294
12.5	Assignment under the SBC and the SBC/DB	294
12.6	Assignment under the NEC3	295
12.7	Delegation	295
12.8	Novation	296
13	Rights for Third Parties	300
13.1	General	300
13.2	Collateral warranties	300
13.3	Typical clauses	303
13.4	Effects of the 1996 Act on collateral warranties	310
13.5	Third party rights schedule	311
13.6	Assignment	313
14	Insurance	314
14.1	Insurance: General principles	314
14.2	Insurance under the SBC and the SBC/DB	318
14.3	Insurance under the NEC3	323
14.4	Professional indemnity insurance	325
14.5	Latent defects insurance	327
14.6	Project insurance	327
15	Litigation	329
15.1	Introduction	329
15.2	The litigation process	329
16	Adjudication	338
16.1	Introduction	338
16.2	The scope of Part II of the 1996 Act, as amended by the 2009 Act	338
16.3	The notice of adjudication	340

16.4	Appointment of the adjudicator	341
16.5	The referral notice	342
16.6	Conduct of the adjudication	342
16.7	The decision	347
16.8	Adjudicator's fees and costs/expenses of the parties	348
16.9	Liability of the adjudicator	351
16.10	Enforcement proceedings	351
16.11	Proceedings following adjudication	373
16.12	Human rights	373
16.13	Adjudication in PPP contracts	375
17	Arbitration	377
17.1	Introduction	377
17.2	The Arbitration (Scotland) Act 2010	380
18	Other Forms of Dispute Resolution	396
18.1	Mediation	396
18.2	Settlement agreements	408
18.3	Expert determination	414
18.4	Early neutral evaluation	418
18.5	Senior management review	419
18.6	Dispute boards	422
19	Tax	426
19.1	Value Added Tax (VAT)	426
19.2	The Construction Industry Scheme	433
20	Health and Safety	437
20.1	Introduction	437
20.2	Common law	437
20.3	Health and Safety at Work etc. Act 1974	438
20.4	The Construction (Design and Management) Regulations 2007	444
20.5	The SBC and the SBC/DB provisions	455
20.6	The NEC3 provisions	456
21	Regulatory Matters: Competition in Construction	457
21.1	Competition law in the UK: Introduction	457
21.2	Competition law: Overview	457
21.3	Penalties	458
21.4	The Chapter I prohibition	459
21.5	The Roofing and English Construction cases	462
21.6	The cartel offence	464
21.7	Leniency	465
21.8	The Chapter II prohibition	466
21.9	Summary	467

22	Regulatory Matters: The Bribery Act 2010	468
22.1	Compliance: The Bribery Act 2010	468
22.2	The Bribery Act 2010: The offences	469
22.3	The Bribery Act 2010: The defence	474
22.4	Facilitation payments	477
22.5	Consequences of offences under the Bribery Act	478
22.6	Prosecution under the Bribery Act	482
22.7	Construction industry risk profile	482
22.8	The SBC, the SBC/DB, the NEC3 and the Bribery Act	484
23	Guarantees and Bonds	486
23.1	Guarantees	486
23.2	Bonds	491
	<i>Tables of Cases</i>	497
	<i>Table of Statutes</i>	522
	<i>Table of Statutory Instruments</i>	529
	<i>Table of References</i>	538
	<i>Index</i>	547

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

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

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.

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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.*

Section 105(2) details a number of operations that are not construction operations for the purposes of Part II. The exceptions relate to oil and gas and mining, both underground and opencast; certain specified operations on a site where the primary purpose is nuclear processing, power generation, water or effluent treatment or the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink; the manufacture or delivery to site of components or equipment where the contract does not also provide for their installation; and the making, installation and repair of wholly artistic works. The scope of excluded operations insofar as applicable to works at power stations was considered in the case of *North Midland Construction plc v. AE & E Lentjes UK Ltd* (2009).

1.2.3 Excluded contracts

Section 106 provides that contracts with residential occupiers are excluded from the operation of Part II of the 1996 Act, as is any other description of construction contract excluded by order of the Secretary of State (or in Scotland, the Scottish Ministers).

A construction contract with a residential occupier is one which principally relates to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence.

The term 'dwelling' means a dwelling-house or a flat; and for s.106(2) 'dwelling-house' does not include a building containing a flat and 'flat' means separate and self-contained premises constructed or adapted for use for residential purposes and forming part of a building from some other part of which the premises are divided horizontally. In itself, section 106 is self-explanatory. However, it should be noted that a residential occupier cannot be a limited company for the purposes of this section, see *Absolute Rentals Ltd v. Gencor Enterprises Ltd* (2001).

The Construction Contracts (Scotland) Exclusion Order 1998 ('the 1998 Order') came into force with Part II of the 1996 Act on 1 May 1998. This excluded from the scope of Part II of the 1996 Act project agreements under the Private Finance Initiative (PFI) (provided certain criteria were met) but not sub-contracts such as the construction contract and facilities management or operation and maintenance contract. One of the amendments to the 1996 Act referred to in section 1.2.1 above was the introduction of section 110(1A) which prohibits payment provisions in construction contracts which are conditional on the performance of obligations under another contract or a decision by any person as to whether obligations under another contract have been performed. To avoid this prohibition applying to first-tier sub-contracts under PFI projects and thus prohibiting what are commonly known as 'equivalent project relief' clauses in such sub-contracts, the Construction Contracts (Scotland) Exclusion Order 2011 excludes from the operation of section 110(1A) a construction contract if it is a contract pursuant to which a party to a relevant contract (i.e. excluded by the 1998 Order) has subcontracted obligations under that contract to carry out construction operations.

Certain development agreements are also excluded from the operation of Part II under article 6 of the 1998 Order. A contract is a development agreement if it includes

provision for the grant or disposal of a relevant interest in the land on which take place the principal construction operations to which the contract relates.

A relevant interest in land means either ownership or a tenant's interest under a lease for a period which is to expire not earlier than 12 months after the completion of the construction operations under the contract.

In *Captiva Estates Ltd v. Rybarn Ltd (In Administration)* (2006), Captiva entered into a contract with Rybarn to construct 28 flats. Captiva owned the land on which the development was to take place. The contract provided that, as consideration for the works, Captiva would pay Rybarn and would also grant to Rybarn an option to purchase leases in respect of 7 of the 28 flats. The question arose as to whether the contract was a development agreement within the meaning of the English equivalent to the 1998 Order. The court held that the definition of a 'development agreement' in the 1998 Order is wide and the contract was caught by it.

1.2.4 Agreements in writing

Section 107 of the 1996 Act as originally enacted provided that Part II only applied to agreements in writing or evidenced in writing or recorded by one of the parties or a third party who has been duly authorized to do so. However, this was repealed with effect from 1 October 2011 in England and 1 November 2011 in Scotland, which means that oral contracts may now be subject to Part II of the 1996 Act. This does not, however, avoid the practical difficulty of proving the terms, or even the existence, of an oral contract in the first place.

1.3 Parties involved in a construction project

The parties involved in a building project can vary considerably depending on the nature and complexity of the project. At one end of the scale, a private individual may engage a joiner, electrician or builder to carry out work to his home. In such an instance, the employment of anyone other than the tradesman or builder may not be necessary. At the other end of the scale, major projects, such as the construction of public buildings, motorways, hotels or power stations, can involve a considerable number of parties from different professional and non-professional disciplines. It is therefore crucial to identify, particularly in a large project, the parties involved in that project, the terms of their respective appointments, the scope of each individual's involvement, and their roles within the project. The following parties are commonly involved in building projects:

1.3.1 Employer and consultants

The term 'employer' is used throughout this book as meaning the party for whose benefit the building works are being carried out. This is the term generally used in the standard form building contracts and associated documentation. Other terms such

as ‘the owner’, ‘the client’ or ‘the authority’ are also sometimes used. The employer usually assembles the advisory team, though there is no obligation to do so (see obligations of employers in Chapter 4) and smaller projects often do not require the involvement of anyone other than the employer and the contractor. The nature of the team varies depending upon the nature of the project and the choice of procurement method. In the case of a large project, the team may consist of an architect, civil and structural engineer, mechanical and electrical engineer, quantity surveyor, construction design and management (CDM) co-ordinator, one or more specialist consultants depending on the nature of the project, such as environmental consultant, acoustic consultant, etc., and possibly a project manager, a clerk of works and a BIM information manager (see Section 1.7). The team will also vary depending on the procurement method chosen, e.g. design and build, and may also be transferred at a later stage, at least in part, to the contractor in the case of novation (see Section 12.7). The terms of appointment of each member of the team are very important and must ensure that each member’s obligations are clearly defined. Where this is not done, difficulties can arise with unnecessary overlap of work or, more importantly, in crucial issues failing to be addressed by any of the members of the team due to lack of clarity as to allocation of responsibility. An example of the type of problem that can arise is to be found in the case of *Chesham Properties Ltd v. Bucknall Austin Project Management Services Ltd and Others* (1997).

To avoid this kind of situation arising, an employer may appoint a single entity as an integrated multi-discipline professional team. This can take the form of a single multi-discipline consultancy practice taking overall responsibility for a number of consultancy services and carrying these out in-house, or a single discipline practice, normally the architect, engaging directly with the employer for a range of services and then sub-contracting these to other firms, such as civil and structural engineers and mechanical and electrical engineers. This provides the employer with ‘one-stop’ responsibility on the part of the architect, since in such circumstances (unless the appointment expressly states otherwise), the architect will be responsible for the performance of the services, including any design, by those to whom he has delegated such performance under a sub-contract. In contrast, the architect will have no responsibility (subject again to the terms of the appointment) for the work of other consultants whom the employer has appointed directly.

It may not always be the architect who assumes this single point of responsibility, as it is not uncommon for a project manager to enter into an appointment with the employer, which includes not only project management and CDM co-ordinator services, but also the full range of design services and, in turn, to sub-contract the design services to others. This is indeed the model used for the project manager-led integrated design team services which may be procured under the Government Procurement Services ‘Buying Solutions’ framework (see Section 1.4.9). In a design and build scenario, the design sub-consultants’ appointments may in due course be novated to a contractor, with the project manager’s appointment remaining with the employer.

In relation to novation of design appointments, see Section 12.7. It should also be borne in mind that though the most common practice in design and build contracts is for the employer’s design team to be novated to the contractor, it is not unusual

for the contractor to form its own design team by engaging sub-consultants directly. In practice, the more advanced the design at the time the contractor is appointed, the greater the likelihood of novation being appropriate.

The roles of the most commonly used consultants in construction projects are briefly described below, including the forms of consultant appointment produced by the relevant professional body. However, in many cases (and in almost all cases where the appointment is subject to the public procurement regime), the form of appointment will be selected by the employer. That is often a bespoke form of appointment rather than the professional body's standard form, though the use of the NEC3 Professional Services Contract has gained considerable popularity.

1.3.2 Architect

In a traditional building contract, it is the architect who usually has overall responsibility for the project from its conception to its conclusion. An architect is the agent of their client (in most cases, the employer, but under a design and build contract following novation, the contractor) and the general law of Scotland in relation to agency applies to their actions. The scope of their actual authority depends upon the terms of the agreement, comprising the appointment by their client.

Chartered architects in Scotland may be members of the Royal Incorporation of Architects in Scotland (RIAS) and/or the Royal Institute of British Architects (RIBA). The RIAS is a charitable organization founded in 1916 as the professional body for all chartered architects in Scotland. It is independent of the RIBA though it consults with the RIBA on UK-wide professional issues. The RIAS produces a suite of five Appointment documents, most recently revised in November 2011: SCA 2000; Sub Consultant Form of Appointment; ASP 2005 (Small Projects); Design and Build Appointment DBE/2000 (where the client is the employer); and Design and Build Appointment DBC/2000 (where the client is the contractor). The RIBA also publishes its own suite of contract documents for the appointment of architects, consultants and sub-consultants, the most recent edition of which is known as the RIBA Agreement 2010 (2012 Revision).

In a conventional building project, the architect will normally work in conjunction with the structural engineer, the former being engaged to produce at the initial stages the plans and elevations and an outline design, whereas the latter will be responsible for the design of the sub-structure and load-bearing elements of the building and for producing structural calculations and drawings. In May 2013, the RIBA launched a fairly radical change to its 'Plan of Work' which set out a recognized model for the building design and construction process, split into a number of stages, identified as A–L. The RIBA Plan of Work 2013 (endorsed by the RIAS) replaces these stages A–L with a new list of eight stages (along with eight 'task bars'). The stated intention is to align these stages with the unified industry stages agreed with the Construction Industry Council (CIC). The wider aim of the new Plan of Work is to cover the various procurement routes, to emphasize the project team as a whole, including client, contractors and designers, and to integrate building information modelling (BIM) into the work process.

The eight stages contained in the RIBA Plan of Work 2013 are:

- Stage 0 – Strategic Definition
- Stage 1 – Preparation and Brief
- Stage 2 – Concept Design
- Stage 3 – Developed Design
- Stage 4 – Technical Design
- Stage 5 – Construction
- Stage 6 – Handover and Close Out
- Stage 7 – In Use.

The architect may also, if so appointed by the employer, act as certifier under the building contract and will normally fulfil that role as contractor administrator under the SBC (but not the SBC/DB). In exercising the role of certifier, the architect will have a duty of care to the employer (see below) but will not normally owe any duty of care to the contractor (*Pacific Associates v. Baxter* (1980)). For a full description of the role and responsibilities of the certifier, see Section 7.6.

The architect's duty to the employer in the performance of his obligations in relation to both design activities and other services under the appointment, as with any other professional consultant or adviser, is to use reasonable skill and care. Where the professional holds himself out as having a special skill, such as in the case of an architect, the standard of care is that of the ordinary skilled man exercising and professing to have such a skill (*Bolam v. Friern Hospital Management Committee* (1957)). In many cases this duty of care will be expressly set out in the appointment, but in the absence of such an express term, it will nonetheless be implied. That same standard will apply to the architect's duty of care to the employer where he is carrying out the function of certifier under the building contract on behalf of the employer. On the other hand, a stricter duty than that of exercising reasonable skill and care may, by agreement, be imposed on the architect by an express term to that effect. This will generally be resisted by the architect as his professional indemnity insurance will normally cover only acts of 'negligence', i.e. breaches of the common law duty of reasonable skill and care and not a breach of a higher contractual duty. It is also possible that a stricter 'fitness for purpose' duty may be implied as matter of fact on the appointment by the particular circumstances and what is demonstrated to be the common intention of the parties (*Greaves & Co (Contractors) Ltd v. Baynham Meikle & Partners* (1975)).

1.3.3 Quantity surveyor

A quantity surveyor may be engaged by the employer to discharge specific functions. These tend to be of a financial nature and can include, for example, acting as cost consultant in preparing cost estimates, preparing bills of quantities, valuing work done for the purposes of both interim and final certificates, ascertaining direct loss and expense under the provisions of the building contract, and preparing the final account. Like architects, chartered surveyors are members of a professional organization, in this case the Royal Institution of Chartered Surveyors (RICS), which was founded in 1861.

It is now a world-wide organization, with RICS Scotland being one of the four UK regional divisions. The RICS produces a suite of documents for consultancy appointments. This consists of the core appointment (either the standard form of consultant's appointment or the short form of consultant's appointment, in each case with a separate version for use in Scotland) along with a standard schedule of services relevant to the appropriate discipline, i.e. building surveyor services, CDM co-ordinator services, employer's agent services, project manager services, project monitor services, and quantity surveyor services.

The various schedules of service mentioned above illustrate that the role of the chartered surveyor in a project may not be limited to the traditional, albeit still essential, role of quantity surveyor, but has expanded into other areas such as project management.

The traditional principal role of the quantity surveyor is to value the work carried out by the contractor, and not to inspect that work for quality (*Sutcliffe v. Chippendale & Edmondson* (1982)). This was clarified in the case of *Dhamija v. Sunningdale Joineries and Others* (2010) in which Coulson J held that a quantity surveyor is concerned with quantities, not the quality of the work, and that it was for the architect to advise the quantity surveyor, and not for the quantity surveyor to see for himself, any defective work which should be excluded from the valuation.

1.3.4 Engineer

Historically, contracts for the construction of infrastructure such as roads, tunnels, railways or bridges, where the design process is led by the civil engineer rather than the architect, have generally been known as engineering contracts (as opposed to contracts for 'buildings'). In a traditional engineering contract, the engineer normally undertakes design responsibility and carries out a similar administrative role to that of the architect under a building contract, such as the certification of payments and of completion. The relevant UK professional organization for civil engineers is the Institution of Civil Engineers (ICE). There are also business associations for the consultancy and engineering industry such as the Association for Consultancy and Engineering (ACE), which in turn is represented on the European Federation of Engineering Consultancy Associations (EFCA) and the International Federation of Consulting Engineers, or *Fédération Internationale des Ingénieurs-Conseils* (FIDIC).

The Civil Engineering Contractors Association (CECA) is a representative association for the UK civil engineering contractors. The CECA in Scotland represents over 100 civil engineering contractors, ranging in size from small rural contractors to multinationals.

While civil engineers are concerned primarily with structures and the physical environment, mechanical engineers (almost invariably conjoined with electrical engineers and often referred to in that combined role as building services consultants) are responsible for the mechanical and electrical systems in a building. The professional institution in the UK for mechanical engineers is the Institution of Mechanical Engineers (IMechE), while the equivalent body for electrical engineers is the Institution of Engineering and Technology (IET) which was formed in 2006 by the merger of the

Institution of Electrical Engineers (IEE) and Institution of Incorporated Engineers (IIE). The Chartered Association of Building Services Engineers (CIBSE) is the business organization that promotes building services engineers. This was formerly the Institution of Heating and Ventilating Engineers and was granted its Royal Charter in 1976.

In a typical building contract (as opposed to an engineering contract), the specialist consultant engineering input will be provided to the employer by the structural engineer and the mechanical and electrical (M&E) (or building services) engineer. As mentioned in Section 1.3.2, the structural engineer's role is normally the design of the sub-structure and load-bearing elements. The M&E consultant will be responsible for specifying the required mechanical and electrical installations and the outputs and performance standards, while in more complex projects the detailed M&E design will be the responsibility of specialist M&E sub-contractors engaged directly by the main contractor.

A recent case has considered the extent to which a structural engineer was entitled to rely on advice obtained from a specialist subcontractor in producing a soil stabilization performance specification for the purposes of construction of a new supermarket. In the event, the floor slab suffered differential settlement as a consequence of the ground under the floor slab not being improved enough. The employer, the supermarket owner, contended that the engineers could not avoid liability by arguing that they were entitled to rely on the advice of the specialist subcontractors. However, the court held that it was not a question of whether the engineers had delegated their duty to the subcontractors but whether they had acted with reasonable skill and care in relying on advice from a specialist subcontractor instead of carrying out their own assessment. The court held that a construction professional could discharge its duty to take reasonable care by relying on the advice or design of a specialist provided that it acts reasonably in doing so. In the circumstances of the case the engineers had acted reasonably in doing so, and would not have been in breach of their duty of care even if even the advice of the specialist had been negligent (*Cooperative Group Ltd v. John Allen Associates Ltd* (2010)).

1.3.5 Specialist consultants

In large building projects, employers often employ specialist consultants to advise on specific areas, for example, planning consultant, environment and sustainability consultant, fire consultant, landscape architect, heating and ventilation consultant, lift consultant, interior and space consultants, transport consultant. In most cases a CDM co-ordinator will require to be appointed. See Section 1.7 in relation to a BIM Information Manager and Section 1.8 on GSL Lead or Champion in respect of 'Soft Landings'. The CIOB Complex Projects Contract 2013 referred to in Section 1.4.8 introduces a new role of 'Project Time Manager' to review progress, advise the employer's team on programming and work with the contractor to identify measures to recover delay. Additionally, the trend in recent years for building owners to demand that completed projects achieve a specified BREEAM rating has resulted in the emergence of the BREEAM consultant as a specialist. BREEAM (i.e.

the BRE Environmental Assessment Method) is a means of assessing the overall environmental performance of new and existing buildings. In order to achieve one of the ratings of Pass, Good, Very Good, and Excellent, a minimum number of points must be achieved.

1.3.6 Project manager

Depending upon the size of the building contract and the method of procurement, the employer may decide to engage a project manager. Although in the past a project manager in the construction context tended to be found only in a construction management contract (see Section 1.4.1), the role is nowadays found in all types of construction procurement and normally covers the management and coordination of the tender process and the works, including advising on procurement strategy and risks, coordinating the preparation of tender documents and assessment of tenders, producing contract documents, programming and monitoring of progress. Ultimately, however, the exact scope and extent of the duties will be determined by the terms of the appointment. The role of the Project Manager acting as contract administrator is recognized in NEC 3 and a project manager is often appointed by the employer to undertake the role of employer's agent in SBC/DB. The extent of the project manager's responsibilities to their client has been considered in a number of recent cases. In *Sweett (UK) Limited v. Michael Wight Homes Limited* (2012), the employer's agent's appointment imposed an express duty on it to 'prepare contract documentation and arrange for such documents to be executed'. The contractor was contractually obliged to provide a performance bond but went into liquidation after commencing work without having done so. The court rejected the employer's contention that the consultant was under an absolute obligation to arrange execution of the performance bond by the contractor and held that their duty was limited to using reasonable care to ensure it was provided. In the circumstances the consultant had fulfilled that duty. In contrast, in *The Trustees of Ampleforth Abbey Trust v. Turner & Townsend Project Management Limited* (2012), the project manager was held to have breached their duty to use reasonable care to ensure execution of the building contract by the contractor. The project manager had instead issued a series of letters of intent and had failed to warn the employer of the limited protection afforded by such letters as compared to a formal contract. As a consequence of the absence of a formal contract, the employer was unable to apply liquidated damages for delay against the contractor, and the court held the project manager liable to the employer for that loss.

1.3.7 Clerk of works

A clerk of works is generally employed on site by either the employer or the architect to act as construction inspector, oversee the execution of the works, and monitor compliance with the required contract standards. There is a professional body for clerks of works known as the Institute of Clerk of Works and Construction Inspectorate of Great Britain Inc (ICWCI). Clause 3.4 of SBC expressly permits the Employer

to appoint a clerk of works whose duty is to act solely as inspector on behalf of the Employer under the directions of the Architect/Contract Administrator. The clerk of works cannot give any direction to the Contractor unless it is in regard to a matter in respect of which the Architect/Contract Administrator is expressly empowered by the Contract to issue instructions and the direction must be confirmed in writing by the Architect/Contract Administrator within two working days of being given. The corresponding role is carried out under NEC3 by the 'Supervisor' whose duties include the carrying out of tests and inspections, instructing the Contractor to search for defects, notifying the Contractor of defects, and issuing the defects certificate.

1.3.8 Contractor

Once an employer has decided upon the nature and extent of the work which they wish carried out (possibly with the assistance of the architect, quantity surveyor and/or project manager), they will usually invite one or more contractors to tender for the work. Where the employer is a contracting authority or a utility for the purposes of public procurement law (see Chapter 2), the mandatory rules in respect of competitive tendering will of course apply. The obligations of contractors under a building contract are considered in Chapter 5.

1.3.9 Sub-contractors

Often, and almost invariably in major projects, elements of the work are executed not by the main contractor itself but by sub-contractors or even sub-sub-contractors. These may include 'domestic sub-contractors' (chosen by the main contractor normally with the employer's consent); specialist contractors pre-named by the employer (which is not the same as nominated) or 'works contractors' (under a management contract). In the past these could also have included nominated sub-contractors.

The position of sub-contractors under a building contract is considered in Chapter 11.

In addition to the principal parties referred to above, other parties may have a role in a building project such as suppliers, insurers, funders, prospective tenants and purchasers of the building.

1.3.10 Experts

Some specialist consultants may be considered experts in their field. The use of expert witnesses in complex construction disputes is commonplace. An expert should act objectively and independently to avoid being viewed as no more than a hired gun. The expert witness or, to give him his proper title under Scots law, the 'skilled witness', is through practice or study, or both, specially qualified in a recognized branch of knowledge. A number of professional consultancy bodies, e.g. RIAS maintain a list of accredited expert witnesses.