Scottish Construction Law -
What you need to know

A talk given by Alistair Dean to the guests of Muckle LLP
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I am aware that some of you in the room will be involved in carrying out construction work in Scotland or possibly, from time to time, received tenders for Scottish work, especially if you are based in the North of England so Rob thought it might be helpful for me to come down and give a Scottish perspective on construction contracts and Construction Law generally.

What I would like to do is highlight some of the differences between Scottish Law and English Law although, as you will discover, these differences are not as great as you might think; and to say a bit about the dispute resolution landscape in Scotland. You might want to consider whether the Scottish system has any advantages over the English system if you have a choice of jurisdiction.

The fundamental point to note is that Scotland is a different jurisdiction from England and Wales. The independence of the Scottish legal system is enshrined by the Act of Union of 1707 and of course, its independence may well be further enhanced depending on the outcome of a certain referendum next year.

The fact that the two legal systems are distinct is however, I would suggest, illusory to a degree. It would be incorrect to compare Scotland and England in terms of its legal systems to Scotland and France, for example. There is, in fact, a very substantial amount of common ground between the two jurisdictions and in a Scottish court room, English case law is cited just as much as Scottish case law. Those areas of common ground are not germane to this talk.

The Scottish legal system is different in four respects:

1. It has a completely different court structure and set of court rules.
3. Some of the common law concepts are distinct.
4. Some cases in Scotland are decided differently to the way they would be decided in England, even though the underlying law is exactly the same.

1. The Scottish Court System

My own observation is that the English court system is more advanced, more modernised, than its Scottish counterpart, especially when dealing with large commercial cases. There is no equivalent in Scotland, for example, of the Technology & Construction Court which seems to me to have served England so well.

In Scotland, whilst a practitioner has a choice of raising a construction dispute in either the Sheriff Court or the Court of Session, the majority of construction disputes of any value are raised in the Court of Session. This is a court which sits exclusively in Edinburgh. The Court of Session does have a commercial division within it and most practitioners choose to raise construction disputes within this division. Adjudication enforcement actions are almost always raised as commercial proceedings.

Whilst I have suggested that the English Technology & Construction Court is a (from an outsider looking in) a very impressive court with a very enviable set of court rules, I would say that the commercial division of the Court of Session is as close as Scottish litigation gets to this level. If you are involved in putting together construction contracts where the governing law is going to be Scotland, I would suggest that you would want to ensure that it is said that the exclusive court for dealing with disputes is the commercial division of the Court of Session.

Inhibition and arrestment

One of the peculiarities of the Scottish system is that the Pursuer (the claimant) can seek the remedy of inhibition and arrestment on the raising of the action. Arrestment stops the Defender receiving monies due to it by third parties – most commonly sums in bank accounts. Inhibition stops the Defenders from transferring (or further borrowing money against) heritable property. They are very powerful remedies, which I do not think have an English equivalent.
2. Scottish only legislation

- **Time bar**
  Scotland has its own piece of legislation dealing with the prescription and limitation of claims, being the Prescription and Limitation (Scotland) Act 1973. As far as construction contracts are concerned, the important time period is the 5 year period – that is to say, one has 5 years from the date on which a breach of contract or negligent act occurred, to raise an action in order to ensure that the claim is not time-barred. There are some nuances to this general rule, however. Let’s talk about the example of a latent defect, be it workmanship or design. The 5 year period does not commence until the physical defect manifests itself - for example, a crack in a wall, unless the building owner ought to have discovered the underlying problem at an earlier stage. These two provisos (namely the physical manifestation of a breach of contract/act of negligence together with the date on which somebody ought to have known about a defect) is problematic. It gives rise to a number of arguments about whether or not an action is time-barred. There is need to go into the details here but, suffice to say, it is a completely different statutory regime from the one which applies in England.

In Scotland, there is in all cases a longstop date of 20 years from the date of the breach/act of negligence, regardless of when it manifested itself and when the building owner ought to have found out about it.

- **Formalities**
  There is also Scottish legislation regarding the signing of formal documents (Requirements of Writing (Scotland) Act 1995) with greater formality than in England, and there is a Scottish Scheme for Construction Contracts – more of which below.

3. Common Law of Scotland

- **Transfer of Title and Goods**
  In England and Scotland, when materials become fixed to the land or a building (e.g. the installation of a window, door or brick), the ownership of these goods passes to the building or land owner irrespective of any contractual terms which express something different. So, even if the building owner had not paid the main contractor for the materials, once incorporated, the ownership passes to the building owner. The practical consequence of this is to preclude the disgruntled main contractor from removing fixed goods or materials, leaving him with the remedy of an action for payment. Where this can become inequitable is where the building owner becomes insolvent, and the claim vests in the receiver or liquidator. In England the builder could only have sued his employer.

- **Third Party Rights and Ius Quaesitum Tertio**
  Although seldom seen in practice, Scotland does have a common law provision which allows for third parties to benefit from contracts in which they are not named, but where there is an intention for them to benefit from the contract. This is the common law equivalent of the Contracts (Rights of Third Parties) Act 1999. Even so, I suspect that the use of collateral warranties is every bit as common in Scotland as it is in England.

- **Insolvency**
  Scotland has different insolvency rules and indeed the definition of insolvency is different between Scotland and England. I would suggest that if you are undertaking work in Scotland, you should be careful to take advice on how insolvency works in Scotland. The SBCC (discussed below) has produced a helpful note on insolvency and how it interacts with SBCC forms. It can be accessed on-line by using the following link:

4. Different decisions in Scottish and English Courts

Scotland has a tradition of producing some influential decisions in the field of construction law, some of which is met with by approval from English courts, but not always. Some of the more historic examples are, SL Timber Systems –v- Carillion, John Doyle –v- Laing Management, and Gillies Ramsay Diamond –v- PJW Enterprises.

There are two more recent cases I’d like to comment on specifically today.

**City Inn –v-Shepherd**

This was an Inner House decision; i.e. an appeal decision of 3 judges.

The key features of that decision are as follows:
- a common sense approach is preferred to “philosophical principles of causation”;
- critical path analysis is not essential to demonstrate entitlement;
- dominant cause of delay may be given effect to where concurrency can be shown; and
- apportionment of delay is a valid approach where there are competing causes of delay, none of which are dominant.

Whilst it is now quite clear that the English courts regard City Inn/Shepherd as being wrong in certain fundamental respects, the problem is that it was decided by three Judges sitting at an appeal tribunal in the Court of Session and therefore is binding on all Judges in the Court of Session. So, if you litigated in Scotland with an extension of time claim, the outcome may be very different to the outcome in England, even where the underlying legal principles in the two jurisdictions are exactly the same. The only way that the Scottish courts will be brought in line with the English courts is if there is a Court of Session appeal on the same points of law involving a bench of 5 Judges, or if there is a Supreme Court decision which makes it clear that the decision is incorrect.

**Whyte & Mackay Limited –v- Blyth & Blyth Consulting Engineers Limited**

This was a case in which an adjudicator awarded a substantial sum against an engineering firm representing damages arising from a defectively designed floor slab. It was quite an unusual case in that the actual loss was not going to be incurred by Whyte and MacKay for many years to come.

Lord Malcolm decided that in the particular circumstances of this case, an adjudicator’s decision amounted to a breach of Article 1 of the first protocol of the Human Rights Act 1998. Lord Malcolm said this: “To proceed to Adjudication in this case was unnecessary and inappropriate. To enforce the award would result in an unfair and excessive burden being placed upon the Defendants. The interference would not be justified by any process which could, or even purported to identify the parties’ true legal rights and obligations.”

I think this is the first time that an adjudicator’s decision has not been enforced on the basis of a human rights challenge.

This may adversely affect enforcement of Scottish adjudications. In England, however, the Courts have three times refused to apply the Human Rights legislation to adjudication (Elaney –v- Vestry; Austin Hall –v- Buckley; and RG Carter –v- Edmund Nutall).
Other differences between the jurisdictions

Scottish Standard Form Construction Contracts

- Some of you may be familiar with the Scottish Building Contracts Committee (SBCC). The SBCC is responsible for producing a very wide range of Scottish Standard Form Building Contracts. The SBCC comprise 10 separate member organisations, including the RICS, the Scottish Committee of the National Specialist Contractors Council, and the Law Society of Scotland. Up until 2005, the SBCC produced documents which sought to amend the JCT standard form. This was always an unwieldy exercise because it involved having to look at two separate documents to understand the contract. Thankfully, as from 2005, the contracts stand alone without any reference to any underlying JCT form. As with JCT contracts, the SBCC suite is regularly updated, and they comprise the following headings:
  - a full suite of Standard Building Contracts (eg with/without quantities) Minor Works Contracts;
  - Design & Build Contracts;
  - Measured Term Contracts; and
  - Homeowner Contracts.

Despite the emergence of the NEC suite in Scotland, one still sees a considerable number of SBCC contracts being used variably amended for the larger contracts.

Scotland and Arbitration

Whilst Scotland prided itself on having an admirable arbitral tradition, in fact adjudication more or less sounded the death bell for arbitration in Scotland. For lawyers of my generation, arbitration became synonymous with inordinate delay and expense to the point where it almost died out completely.

However, we now have the Arbitration (Scotland) Act 2010 which came into force on 7th June 2010. This is generally regarded as an enlightened piece of legislation which arguably Scotland should have had many years before it did, and the hope is that this will kick start arbitration in Scotland, which was the traditional way of resolving disputes before 1996. The Act contains a Schedule which contains a set of rules governing the conduct and procedure of the Arbitration (including the appointment and powers of the Arbitrator) for every Arbitration seated in Scotland. These are known as the Arbitration Rules. These rules can be categorised as mandatory rules which cannot be modified or disapplied by the parties, and default rules which apply unless the parties agree to modify or disapply those rules.

The Act also makes provision for legal challenges to be dealt with swiftly through the Court of Session where there is a challenge as to jurisdiction, a breach of natural justice on the part of the tribunal, or appeals on errors of law. We are starting to see some of these cases now coming through the Courts and there is no doubt that this is a significant improvement over the pre-existing regime of "stated cases" which took years to go through the Court of Session and only started once the arbitration was over. The new regime is designed to deal with legal challenges as and when they arise rather than storing them up until the end of the process.

So what we now have in Scotland is a set of arbitration rules which are fit for purpose. Unfortunately, the SBCC suite of documents (which I have already referred to) do not make arbitration an automatic default process. It only applies if the parties state that it applies, and this is a change for the pre-existing position which did make it a default process.

Scotland and Adjudication

Adjudications under Scots law are more or less identical to adjudications in England, in terms of process and procedure (although, as we have seen, not always in terms of the substantive law and enforcement), albeit Scotland does have its own Scheme for Construction Contracts (as amended). The Scheme is virtually identical to the English Scheme – with one notable exception. The Scottish Scheme provides for decisions to be “Registered in the Books of Council and Session”; the effect of this is to give the decision the same status as a court order. Sheriff Officers would accordingly have the authority to treat this registered document as such, and could formally serve it on a payee. Non payment could result in insolvency. It therefore avoids the need to raise enforcement proceedings; any disgruntled party would have to raise an action to have the award reduced and in the interim to suspend the right of sheriff officers to treat the decision as a court order.

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