Legal Aspects of Building Services

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Speaker Profile

Jon Miller originally left school at 16 and became an apprentice with Matthew Hall Mechanical and Electrical Engineers Limited. In 1981 he left Matthew Hall to re-enter full time education qualifying as a solicitor in 1989. Since then, Jon has been exclusively involved in the law relating to construction and engineering matters.

Jon is a Fellow of the Chartered Institute of Arbitrators, an Associate of the Chartered Management Institute, and Academy of Experts accredited mediator, holds an Msc (Construction Law and Arbitration), is an RIBA, TeCSA, AICA and CIC Adjudicator having been appointed an Adjudicator on over 80 occasions. Jon lobbied the House of Lords on behalf of the construction industry during the passing of the Housing Grants etc Bill and prepared the first draft of adjudication rules for two adjudicator nominating bodies.

As well as resolving disputes via adjudication, mediation, litigation and arbitration, Jon has also vetted tenders, drafted construction contracts, bonds, warranties and guarantees. He was responsible for drafting agreements relating to CTRL and West Coast Mainline and recently drafted the contracts for the largest leisure centre in the UK.

Jon sits on the Board of Construction Excellence in Essex and the Chartered Institute of Building Services Engineer North East Home Counties Board.

Jon is a solicitor and partner with Prettys.
INTRODUCTION

1. The aims of this seminar are to:

1.1. explain some of the basic legal concepts that govern building services (i.e., what does "reasonable skill and care" actually mean?);

1.2. deal with some recent changes in the law affecting building services;

1.3. highlight recent Court cases when engineers have got into trouble?

Design Responsibility

Reasonable Skill and Care

2. "The law required of a professional man that he live up in practice to the standard of the ordinary skilled man exercising and professing to have his special professional skills. He need not possess the highest expert skills; it is enough if he exercises the ordinary skill of an ordinary competent man exercising his particular art."¹

3. "...a professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession... he must bring to any professional task he undertakes no less expertise, skill and care than any other ordinarily competent members of his profession would bring, but need bring no more. The standard is that of the reasonable average."²

4. As a designer, you are obliged to use reasonable skill and care. The standard required is the ordinary member of the engineering profession carrying out design. What this means in practice is that, if there is a claim for professional negligence against an engineer, engineering experts are called on both sides to decide if competent engineer would have acted in the same manner. Reference is made to the relevant British Standards Codes of Practice, BRE Standard etc to establish what can be expected of an Engineer.

5. Standard Form Appointments confirm reasonable skill and care is required:

5.1. ACE Conditions:

"...reasonable skill, care and diligence"

5.2. ICE Design and Build form:

"... the skill and care normally used by professionals providing services similar to the Services..."

5.3. RIBA Standard Appointment Form for an Architect:

¹ Bowlam v Friern Hospital Management Committee 1957 1WLR 582
² Eckersey v Binni 1988 1B Con LR1. The case related to consequence of the Abbestead Disaster
"... reasonable skill and care in conformity with the normal standards of the Architect’s profession...”

5.4. In Costain Ltd v Charles Haswell & Partners Ltd\(^3\), a construction and civil engineering contractor pursued a claim against its civil engineering consultant, Haswell, regarding a new water treatment works. The contractor alleged negligence in the design of ground works to pre-treat the site to minimise differential settlement of the foundations. The contractor had paid its subcontractor, to compensate it for delay caused to its works, largely (it was alleged) as a result of the consultant's negligence which delayed completion of the foundations.

The contractor succeeded in establishing that the consultant was negligent, but failed to recover anything towards the amount paid to the sub-contractor. The judge held that there was no evidence before him to establish a causal link between the consultant's negligence and the sum paid to the sub-contractor. There was no reference in the documents that the sub-contractor was being delayed by the late completion of the foundations and the contractor was unable to produce any evidence to explain how the delay period was calculated.

The judge acknowledged that courts need to be careful not to dissuade parties from reaching commercial settlements by making it difficult to recover amounts paid out from the culpable third party. Judges will require some evidence beyond mere assertion that the defendant's breach created the need for the settlement payment and, if only part of the payment is to be claimed, there must be some evidence to support an assertion that a particular sum was attributable to the issue in question and that it was reasonable.

5.5. Galliford Try Infrastructure Ltd & Anor v Mott MacDonald Ltd\(^4\) involved the redevelopment of a hospital into mixed use residential, retail and leisure complex. Morrison Property Solutions Ltd (M), the developer, entered into a design and build contract with Galliford Try Infrastructure Ltd (GT). Morrison One Ltd (M1), a subsidiary of MPS, subsequently engaged Mott MacDonald Ltd (MML) to provide engineering advice on the project.

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\(^3\) Costain Ltd v Charles Haswell & Partners Ltd [2009] All ER (D) 139 (Oct)

\(^4\) Galliford Try Infrastructure Ltd & Anor v Mott MacDonald Ltd, Court of Appeal - Technology and Construction Court, July 17, 2008, [2008] EWHC 1570 (TCC)
During construction, it came to light that additional costs and delays would be caused due to the necessity of temporary support to a retained wall, to be put in place during the demolition and construction phases, and also significant alteration to the structural steel design prepared by the steelwork subcontractor to take "prop forces" at ground level from piled walls that was required. These were not accounted for in the cost plan or design. As a result the project encountered delays, and the contractor incurred additional costs.

The contractor had no contract with the engineer and therefore brought a negligence case on the basis that the engineer had assumed responsibility towards the contractor for ensuring that the design was correct. The contractor alleged that the engineer's advice (or lack of it) to this effect was negligent and that it had relied on the engineer's negligent misstatements in preparing its cost plan for the project (which was subsequently found to be inadequate) and suffered economic loss as a result of having to expend additional sums.

The judge found that the engineer had not assumed responsibility towards the contractor and in fact at all times had remained under the control of the developer, The engineer had not acted negligently, and there was no evidence on the balance of probabilities that the contractor had in fact relied on the engineer's advice when pricing the contract. There was no evidence that the contractor had ever provided the engineer with details of its contract pricing or discussed the pricing with the engineer. The claim was therefore dismissed.

5.6. *Cooperative Group Limited v John Allen Associates Limited*5 concerned the construction of a supermarket in Kent. The site was overlain by a layer of soft clay which was treated by vibro replacement stone columns to stabilise or improve the ground. The concrete floor slab was then cast on the improved ground. The main building structure and outside walls were supported by piles with pile caps and ground beams. However, the ground floor slab settled by as much as 110mm and because it was supported in places by pile caps that did not settle there was significant differential settlement, resulting in sloping floors.

The developer brought a claim against the consulting engineers. During the proceedings the engineer brought in the main contractor who in turn joined the specialist ground improvement works subcontractor who carried out the vibro replacement works into the action. Following settlements between the other parties, the developer's claim against the engineer proceeded.

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The main allegation concerned the reasonableness of the vibro replacement ground improvement scheme. The engineer argued that it had relied on the advice of the specialist ground improvements works sub-contractor, that it was reasonable to do so and accordingly that it was therefore discharged of its obligations.

The court agreed and stated that whilst construction professionals do not by the mere act of obtaining advice or a design from another party divest themselves of their duties in respect of that advice or design, that duty can be discharged by relying on the advice or design of a specialist provided that it is reasonable to do so.

The judge found, on the facts, that vibro replacement was not bound to fail so the developer’s claim failed. Further, even if he was wrong in that conclusion, the developer’s claim failed because the engineer had acted in accordance with its duty of care of reasonable skill and care.

*Fitness for purpose*

6. This is a more onerous obligation. A designer subject to a fitness for purpose obligation must ensure that the design conform where the purposes that have been made known to him, no matter how unusual they are. You should not the Engineer may have:

6.1. Fitness for purpose is an absolute requirement;

6.2. professional indemnity insurance will only cover a reasonable skill and care type obligation. In theory insurers can refuse to cover fitness for purpose type obligations.
Design and Build

7. In the leading case of IBA v EMI\(^6\) the House of Lords was concerned with a typical design and build type of arrangement i.e.: -

IBA (Employer)

\[\text{Design & Build Contract}\]

EMI (Contractor)

\[\text{Consultants Appointment}\]

Engineer

8. The case concerned the construction of a tall television mast. The Contractor claimed he had used reasonable skill and care in the design of the mast and no one could have foreseen the sheer stresses that caused the mast to fail.

Joint and Several Liability

9. In England according to the Civil Liability (Contribution) Act 1978, where two or more parties cause the same damage, they are both responsible for all of the damage so caused. In other words, it is not sufficient for the Engineer who has carried out the design in conjunction with the Contractor to say that he did not design all of that particular element of the work. Frequently it is impossible to work out who designed what, and if both elements of design were defective, then the Engineer will be responsible for all the damage suffered.

Recent Case Law

10. The case of Carillion JM Ltd v Phi Group Ltd [2011] EWHC 1379 (TCC)\(^7\) concerned the design and construction of a train servicing depot near Wembley Football Stadium (the “Works”).

Carillion engaged RWC as Consulting Engineer and Lead Consultant in respect of the Works. The engineer’s scope of work involved developing outline proposals into a fully detailed scheme for the depot, advising on further site investigations, providing working drawings and specifications and once construction commenced, site visits and attendance at site meetings.

Carillion engaged Phi as a specialist design and build contractor for the soil nailing works. This was work to restrain and stabilise the slopes around the excavation for the depot.

\(^6\) 1980 14 BLR 1
\(^7\) Carillion JM Ltd v Phi Group Ltd [2011] EWHC 1379 (TCC)
Whilst the construction works were progressing, slips occurred in the upper levels of clay. Phi addressed the slips by undertaking remedial works. RWC was not involved in correspondence regarding these slips, although it was aware of them. When more slips occurred, Phi prepared a report and remedial design, which was commented on by RWC.

Further to more slips, an expert’s report concluded that there was deep seated instability which had not been adequately accounted for in the design calculations. It was the deep seated instability that formed the subject matter of the proceedings.

Carillion subsequently gave RWC and Phi notice of the potential claims against them. Carillion issued proceedings against Phi on the basis that Phi had been negligent at various stages in its design assumptions. Phi issued contribution proceedings against RWC on the basis that if it was liable for various losses, so was RWC and Carillion issued direct proceedings against RWC alleging negligence.

Carillion and Phi settled the dispute but Carillion’s claim against RWC continued.

Judgment was given against RWC, finding that the deep seated instability and the need for remedial works were caused by RWC’s negligence. The judge found that both RWC and Phi were liable to Carillion for 100% of its loss and damage.

The judge concluded that at all stages pre-construction and after the slips both RWC and Phi failed to pick up on the potential for instability. He stated that whilst one could argue that the negligence was in the detail of the design produced by Phi, the deficiencies in the design were in essence fundamental misconceptions in the design approach.

The judge stated that both Phi and RWC had a responsibility to pick up the instability and guard against them in design and installation. Taking into account RWC’s position as lead consultant, and that it had a specific responsibility to advise on the need for further site investigations, which Phi did not, the judge found Phi and RWC equally responsible at the design stage, stating that there was less ‘causative potency’ and ‘blameworthiness’ at the later stages on the part of RWC as Phi had a greater involvement. The judge therefore considered a 60:40 apportionment between Phi and RWC respectively as being “just and equitable”.

11. In *Burford NW3 Ltd v Brian Warwicker Partnership plc*\(^8\), the claimant developer acquired a site where it planned to make a major development. The developer engaged BWP as a mechanical and electrical engineering consultant and HOK as the architect.

Soon after opening there were complaints about cold draughts from tenants of restaurant units. Remedial measures suggested by the engineering consultant did not remove the problem and the developer therefore engaged new engineering consultants and architects to complete the remedial works.

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\(^8\) *Burford NW3 Ltd v Brian Warwicker Partnership plc (HOK International Ltd, Part 20 defendant) [2004] EWHC 2642 (TCC), [2005] EWCA Civ 962*
The developer commenced an action against the engineer, who in turn joined the architect to proceedings. The developer and the engineer agreed an all claims settlement on the basis of the payment by the engineer of a specified sum, representing damages, interest and costs. The engineer sought to recover a contribution from the architect under the provisions of the Contribution Act 1978.

The judge decided that a reasonably competent architect in the architect’s position would have recognised that the building might be subject to draughts and would have been aware of the design options which might play a part in overcoming or alleviating this risk. The architect failed to exercise reasonable care and skill in failing to recognise that, with the Centre located and oriented where and as it was, it might be subject to draughts. The engineer was also found to be guilty of breaches of its obligations. However, the judge decided that it was ‘just and equitable’ in all the circumstances for the architect to be required to contribute 40% of the settlement sum.

**Net contribution clauses**

12. Engineers make easy targets as they are insured. This is why many professional appointments, include net contribution clauses. Essentially they try to make sure the Engineer only pays damages to the extent he is at fault and the Engineer receives credit for the damages which other parties are liable to pay, whether or not they actually do.

13. Clause 8.2 of the ACE Conditions contains the following:

"...notwithstanding otherwise anything to the contrary contained in this Agreement, such liability of the Consulting Engineer for any claim for claims shall be further limited to such sum as the Consulting Engineer ought reasonably to pay having regard to his responsibility for the loss or damage suffered.....on the basis that all Other Consultants and all Contractors and Sub-Contractors shall be deemed to have provided contractual undertakings.....and shall be deemed to have paid to the Client such proportion which it would be just an equitable for them to pay having regard to the extent of their responsibility”.

14. Bear in mind:

14.1. employers frequently try to strike out net contribution clauses from standards terms of appointment;

14.2. insurers often insist they are in!

14.3. when drafting your own terms of appointment, net contribution clauses are often overlooked.

**INSURANCE**

15. All of you will have professional indemnity insurance which will cover you insofar as you use reasonable skill and care. One of the key points about all insurances is that an insurer must be notified as soon as there is any possibility of a claim. An insurer will want to take over the claim and ensure no admissions are made which could increase
the damages payable. The insurer is only prepared to do this if they are notified of claims as soon as they arise.
THE NEW CONSTRUCTION ACT

16. The New Construction Act came into force in England and Wales on 1 October 2011. The JCT have released new versions of the JCT standard forms of contract to reflect the New Construction Act.\(^9\)

WHEN WILL THE HOUSING GRANTS ACT AND THE NEW CONSTRUCTION ACT APPLY?

17. To recap:

17.1. Both Acts apply to contracts for the carrying out, or arranging for the carrying out, of "construction operations"\(^10\). Accordingly:

17.2. almost all professional appointments;

17.3. works of construction, alteration, repair, maintenance, demolition and extension\(^11\);

17.4. labour only sub-contractors\(^12\); and

17.5. installation of heating, lighting, air-conditioning, power supply, drainage, water supply, security or communication systems\(^13\)

17.6. are governed by the Act.

18. Some contracts are excluded. For example:

18.1. supply only contracts;

18.2. contracts of employment (i.e. unfortunately your employees will not be able to adjudicate their pay rises); and

18.3. contracts with a residential occupier (i.e. where the Employer will live in either in the dwelling or a flat where the works are being carried out).

EXCEPTIONS - RESIDENTIAL OCCUPIER

19. Under the Housing Grants Act\(^14\), construction contracts with residential occupiers were excluded, which included an exclusion from provisions relating to referral to adjudication in the event of a dispute. This remains the case with the new Construction Act.

\(^9\) The NEC has been amended and the ICE 7th is no more but replaced by the Infrastructure Conditions of Contract
\(^10\) Section 104(1) of the Act
\(^11\) Section 105(1)(a) of the Act
\(^12\) Section 104(1)(c) of the Act
\(^13\) Section 105(e) of the Act
\(^14\) Section 106(1) Housing Grants Act
20. However, all standard form construction contracts (in this case usually the JCT Minor Building Works contract and JCT Homeowners contract commonly used for domestic projects) contain adjudication provisions. As a result, homeowners have sought to exclude the operation of any incorporated adjudication clauses under the Unfair Terms in Consumer Contracts Regulations 1999 ("the Regulations"). A finding that the adjudication provisions were unfair under the Regulations would effectively render those provisions ineffective.¹⁵

21. The Regulations aimed to provide protection to consumers who entered into consumer contracts by stating that "a contractual term that is not individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."

22. The ensuing case law has helped clarify the position:

23. In Picardi (t/a Picardi Architects) v Cuniberti and another,¹⁶ the employer engaged the services of the contractor in relation to refurbishments to their house.

24. A dispute subsequently arose and the matter was referred for adjudication, in accordance with the terms of a draft contract which was provided by the contractor but not signed by the employer. The employer argued that no contract existed between the parties and that, if there was a contract, the provisions as to adjudication should be declared unfair under the Regulations and therefore ineffective.

25. The court held that no contract existed, but, if there had been a contract, it would have been incumbent on the contractor specifically to draw the employer's attention to the adjudication provisions, which he had failed to do. In these circumstances the adjudication provisions did not bind the homeowner.

26. However, in Lovell Projects Limited v Legg and Carver¹⁷ the employer engaged the contractor to conduct works to their house. It was not disputed that the employer was a residential occupier and the contract was based on the JCT Minor Building Works contract, incorporating adjudication provisions.

27. Following a dispute, the matter was put before an adjudicator, who found for the contractor.

28. In later proceedings, however, the employer raised a defence under the Regulations relying upon Picardi. However, the case was differentiated from Picardi in that the employer in this case had proposed the form of contract, receiving advice from both their solicitors and the nominated contract administrator.

29. In Bryen and Langley Limited v Boston (Martin),¹⁸ the Court of Appeal highlighted the fact that the employer, through his agent, had imposed the relevant provisions on the contractor in a contract incorporating the JCT Standard Form with adjudication

¹⁵ Homeowners have also used the Human Rights Act to try to get round the Housing Grants Act
¹⁶ [2002] EWHC 2923 (QB)
¹⁷ [2003] BLR 452
¹⁸ [2005] EWCA Civ 973
provisions. The judge stated that it was not for the contractor to take the matter up with the employer to ensure he knew what he was doing. The judge also highlighted that the employer had had the benefit of a professional to advise him on the effect of the terms and for these reasons concluded that there was no lack of good faith or fair dealing by the contractor and that the adjudication provisions were therefore not excluded by the Regulations.

30. In *Edenbooth Ltd v Cre8 Developments Ltd*\(^9\), the court considered whether a company could constitute a residential occupier. In this case, the employer was a development company which engaged the contractor to carry out works to two properties. Payment disputes arose and adjudication proceedings subsequently commenced.

31. The development company submitted that the adjudicator did not have jurisdiction to determine the dispute because it was a residential occupier and thus its contract with the contractor was exempt from the statutory adjudication provisions.

32. However, the High Court judge ruled that it was “difficult to imagine how a company could ever be a residential occupier”. Further, the court stated that a company might occupy premises for commercial purposes, but the use of the word ‘residential’ conveyed a requirement that a real person had to be living in the house or flat.

33. In summary, with residential occupiers, the courts have demonstrated a clear reluctance to exclude the operation of adjudication provisions from construction contracts where the employer has had the benefit of advice from a professional adviser.

**EXCEPTIONS – POWER GENERATION AND OTHERS**

34. Contracts for the “assembly, installation and demolition of plant or machinery .... on a site where the primary activity is ...nuclear processing [or] power generation”\(^20\) or “production ... processing or bulk storage ... of chemicals ... oil, gas, steel, food or drink”\(^21\) are excluded. There is already significant body of case law on the point.

35. In *ABB Power Construction v Norwest Holst Engineering Limited*\(^22\) the extension of an existing power station in Aberdeen involved the cladding of the boilers in an area fenced off from the main site. The fence was erected for operational and heath and safety reasons. It was held that the primary activity of the whole site was power generation. Disputes involving insulation to the boilers in a fenced off area could not be adjudicated on;

36. In *ABB Zantingh Ltd v Zedal Building Services Limited*\(^23\) the construction of printing works involved the erection of a separate building hosting standby generators which cut out in the event of a power failure. The dispute concerned the installation of wiring to the standby generator. Not surprisingly, the judge found that the “...primary

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\(^9\) [2008] EWHC 570 (TCC)
\(^20\) Section 105(2)(c)(i) Housing Grants Act emphasis added
\(^21\) Section 105(2)(c)(ii) Housing Grants Act
\(^22\) 77 ConLR 20
\(^23\) 77 ConLR 32
activity...” of the site was printing. Power generation was a secondary activity and accordingly the Housing Grants Act applied;

ORAL CONTRACTS

37. Previously, under the Housing Grants Act, a construction contract needed to be in writing.24

38. The New Construction Act deletes this requirement; oral agreements made on or after 1 October 2011 will be covered by the New Construction Act. For example, an agreement reached in a meeting, a phone call, an email or a letter could create a construction contract covered by the New Construction Act.

PAYMENT TERMS – THE NEW CONSTRUCTION ACT

39. The Housing Grants and Construction Act requires an ‘adequate mechanism’ in place for determining what payments are due, and when they become payable. This shall determine what payments become due under the contract and when (the due date for payment), and provide a final date for payment. The parties are free to agree the period between the dates for payment.

40. The payment mechanism incorporated by the New Construction Act is very similar to the previous payment mechanism. The new mechanism includes: an application for payment (by the contractor, sub-contractor or professional consultant); a due date for payment; a payment notice (generally from the paying party); if required a pay less notice (which used to be a withholding notice); if required a default payment notice; a final date for payment; and if required a notice of intention to suspend (from the unpaid party).

24 The notorious Section 107 Housing Grants Act
25 Section 110(1)(a) and (b) Housing Grants Act
THE NEW CONSTRUCTION ACT
PAYMENT SCHEME FOR CONSTRUCTION CONTRACTS - IF THE CONTRACT DOES NOT PROVIDE FOR APPLICATIONS OR AN APPLICATION IS NOT MADE IN ACCORDANCE WITH THE CONTRACT

28 days i.e. not every calendar month
Payment due 7 days after end of valuation period or or application, whichever is later
Payment notice stating how payment has been calculated (Must be no later than 5 days after payment due)
If the payment notice is not served the party receiving payment can send a Default Payment notice
Pay Less Notice 7 days before final day for payment
Final date for payment

Default payment notice postpones final date for payment

17 days after payment due

41. However what is causing some concern is that an Application can automatically become a Default Notice if:

41.1. the contract provides for the Receiving Party to either give a notice/application;

41.2. the Receiving Party's notice states the amount due at the payment due date analysis calculated; and

41.3. the Receiving Party's application/notice is given in accordance with the Contract.

JCT 2011 SBC - PAYMENT TERMS

42. To use the JCT 2011 Standard Building Contract with Approximate Quantities as an example
THE NEW CONSTRUCTION ACT
PAYMENT SCHEME WITH AN APPLICATION

Application 7 days before the due date (NB Application is not compulsory in a JCT Contract)
Payment due date every calendar month
Payment notice certificate stating how payment has been calculated (Must be no later than 5 days after payment due)
Pay Less Notice 5 days before final day for payment
Final date for payment 14 days from the due date

Accordingly, provided an Application is made in accordance with a JCT Contract and a Payment Notice is not given by the Employer, the Application automatically becomes the Contractor's Payment Notice.

If the Employer wish to challenge the Application, he must give a Pay Less Notice.

43. Please note:

43.1. A Payment Notice can be given by either the Paying Party or the Receiving Party or another "Specified Person" (e.g. the Architect). It will in most cases be the Paying Party or the Architect.

43.2. A Payment Notice needs to be given even if no money is due - the valuation will be "Nil".

43.3. When considering notice periods Christmas Day, Good Friday or a day which under the Banking and Financial Dealings Act 1971 is a Bank Holiday, is excluded.26

44. The important point to be kept in mind is that, save for the Payment Notice being given five days after the Application/Valuation Period (whichever is the earlier) all of the above periods can be extended.

45. For an Interim Application, Payment Notice, Default Payment Notice and a Pay Less Notice to comply with the New Construction Act it must state the sum which is due, together with a calculation showing how this figure was arrived at.

26 Section 116(3) Housing Grants Act
NOTICES - CONTENT

46. For an Interim Application, Payment Notice, Default Payment Notice and a Pay Less Notice to comply with the New Construction Act it must state the sum which is due, together with a calculation showing how this figure was arrived at.

47. It is essential when considering notice periods that when the period would include Christmas Day, Good Friday or a day which under the Banking and Financial Dealings Act 1971 is a Bank Holiday, that day shall be excluded.  

PAID WHEN PAID STILL OUTLAWED BUT ....

48. The Housing Grants Act outlawed the paid when paid clause save for one exception. If very clear words are used, if the paying party or someone further up the paying chain is insolvent this can be used as a valid reason not to pay. "Insolvency" is given a very wide meaning including administration, administrative receiver, the appointment of a liquidator etc.

49. In the current climate many contractors are relying upon this paid when paid/insolvency exception to guard against the risk of the Employer becoming insolvent.

PAID WHEN CERTIFIED NOW OUTLAWED

50. The New Construction Act has prevented payment being linked to a performance obligation in a different contract. Accordingly payment to the sub contractor cannot be dependent upon practical completion being certified under the main contract for the main contract works.

51. Where this will be particularly significant is under JCT Standard Form Sub Contracts payment of the second half of retention to a sub contractor is dependent upon a certificate of defects being issued under the Main Contract — this will now be changed.

Adjudication

52. Where a matter has been referred for adjudication, payment of the amount determined by an Adjudicator is now due within 7 days of the Adjudicator's decision or the Final Date of Payment, whichever is the later.

53. Any provision restricting the power of the Adjudicator to allocate his fees and expenses unless it is made after the giving of a notice of intention to refer is now

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27 Section 116 (3) Housing Grants Act
28 Section 110 (1A) Housing Grants Act
29 NEC3 ECC Page 46 Subclause W2.3(7); NEC3 ECS Subclause W2.3(7); NEC3 ECSC Clause 1.8, NEC3 ECSS Clause 1.8; NEC3 PSC Page 32 Subclause W2.3(7); NEC3 TSC Page 31 Subclause 2.3(7); NEC3 TSSC Clause 1.8
rendered ineffective. The NEC3 contracts have been amended to give the Adjudicator the power to allocate his fees and expenses between the parties.30

SUSPENSION

54. The Housing Grants Act allowed the party who had not been paid the sum due under the Construction Contract to suspend the Works – provided seven days notice of intention to suspend was given in writing in advance.

55. This has been enhanced in the New Construction Act. The party may still suspend when the sum due is not paid, provided seven days notice is given, but the New Construction Act allows a party to suspend only part of the Works31.

56. Further an extension of time will be allowed for the period of any valid suspension plus any period of delay suffered as a consequence32.

57. Any period of suspension and any period that is in “consequence of the exercise of the right” to suspend will be disregarded when calculating any delay to the contractual completion date33.

58. Additionally, the paying party in default will be required to pay a reasonable amount to the non-paying party for the reasonable costs and expenses suffered as a consequence of the suspension34. Before the Housing Grants Act 1996 was silent on this point.

ADJUDICATION

59. According to the Housing Grants Act/New Construction Act adjudication applies to all contracts for construction operations, subject to the limited exceptions mentioned above.

60. All construction contracts must contain the following provisions:

60.1. Notice to refer a dispute to adjudication can be issued at any time – in theory a notice could be served as soon as a contract is agreed.

60.2. The adjudicator is to be appointed within seven days of the notice being issued.

60.3. The adjudicator is to reach his decision within twenty eight days.

60.4. The referring party may extend the twenty eight day period by a further fourteen days.

60.5. The adjudicator must be impartial.

30 Section 108A Housing Grants Act; NEC3 ECC Page 46 subclause W2.3(8); NEC3 ECS Page 44 subclause W2.3(8); NEC3 ECSC Clause 1.6; NEC3 ECSC Clause 1.6; NEC3 PSC Page 32 subclause W2.3(8); NEC3 TSC Page 31 subclause W2.3(8); NEC3 TSSC Clause 1.6
31 Section 112(1) Housing Grants Act
32 Section 112(4) Housing Grants Act
33 Section 112(4) Housing Grants Act
34 Section 112(3A) Housing Grants Act
60.6. The adjudicator must have the power to take the initiative in ascertaining the facts and the law.

60.7. The adjudicator’s decision is binding until the dispute is finally determined by an arbitrator or a court of law.

60.8. The adjudicator is not liable for any act or omission on his part unless he has acted in bad faith – this normally boards on fraudulent behaviour.

WHAT HAPPENS IF THE ADJUDICATOR MAKES A MISTAKE?

61. In Bouygues UK Limited v Dhal Jensen\textsuperscript{35} the adjudicator mistakenly omitted to take into account the retention that was due to one of the parties to the adjudication. The result of this omission meant that the party who should have received damages, ended up paying a sizeable sum to the other side.

62. There was no doubt that the Adjudicator had made a mistake. The Court of Appeal refused to overturn the Adjudicator’s decision. The test as to whether the Adjudicator’s decision should be reviewed was, in the Court of Appeal’s view, a simple one. The Court asked whether the Adjudicator had asked himself the right question – here he had. If he asked himself the right question, but got the wrong answer, the decision was unimpeachable.

63. If however he answered entirely the wrong question then his decision was a nullity.

64. The English Courts have held subsequent to the above case that an Adjudicator does have the power to correct their clerical errors provided that this is done within a reasonable time\textsuperscript{36}.

65. The New Construction Act will force the parties to include within their contract a provision whereby the Adjudicator has the power to correct a clerical or typographical error. In default the Scheme provides that corrections must be made within 5 days of delivery of the decision to the parties.

THE ADJUDICATOR AND THE PARTIES’ COSTS

66. It has always been the intention of the court that each party should pay their own costs in adjudication but the Housing Grants Act was silent on this point. However, following the case of Bridgeway Construction Ltd v Tolent Construction Ltd\textsuperscript{37} ("Tolent") the courts allowed clauses which stated that one party must pay both sides’ costs and the adjudicator’s fees, even if they won the adjudication.

67. To require a party to pay his own and his opponents costs, win or lose, is seen by many as a deterrent to adjudication even when there is a genuine dispute. A trade contractor challenged this decision in the case of Yuanda (UK) Co Ltd v WW Gear

\textsuperscript{35} [1999] All ER (D) 1281
\textsuperscript{36} Blower Construction v Bowmer and Kirkland 2000 BLR 314
\textsuperscript{37} [2000] (TCC) CILL 862
Construction Ltd\textsuperscript{38} and was successful because the clause acted as a deterrent to adjudication and prevented a party from adjudicating "at any time".

68. The government intended to make clauses allocating the costs of adjudication ineffective. Many commentators and practitioners believe that the government have failed to achieve this due to the two exceptions that exist in the new legislation.

69. The New Construction Act prohibits a contract from providing that one party must pay the Adjudicator’s or the other party’s fees save for two exceptions:

70. The first exception exists where there is an agreement in writing made after the giving of notice by one party to the other of their intention to refer a dispute to adjudication\textsuperscript{39}. This is unlikely to be an issue because most parties would not enter into such an agreement following the giving of a notice of an intention to refer a dispute to adjudication.

71. The second exception severely dilutes the government’s intention. This exception applies if there is an agreement, in writing, in the construction contract which allows the adjudicator to allocate his own fees and expenses between the parties\textsuperscript{40}.

72. Section 108A of the Housing Grants Act does not address what will happen if a contract provision allocates liability for both the parties’ costs and the adjudicator’s fees and expenses. It is arguable that in such a situation, the whole clause will be "ineffective".

THE NEW SCHEME

73. Essentially the old scheme and the new scheme are the same in their operation. If the Construction Contract does not contain all of the minimum requirements for adjudication as outlined above the new scheme will apply in total whereby the new scheme contains the above requirements (and more) which will apply to any adjudication.

WHAT NEEDS TO BE DONE?

74. As the New Construction Act will apply to oral contracts, when negotiating a contract the parties need to be clear as and when a binding agreement has been entered into. It is suspected that there will be far more documents marked "subject to contract" or with other clearer expressions in writing that the contract will not be entered into until it has actually been signed etc etc.

75. With the New Construction Act covering oral contracts or partly oral/written contracts, there will be more adjudications.

76. With Adjudicators having to decide the terms of an oral contract, there will probably be more hearings with "witnesses" having to appear to explain what was agreed or not agreed as the case may be.

\textsuperscript{38} [2010] EWHC 720 (TCC)
\textsuperscript{39} Section 108A(2)(b) Housing Grants Act
\textsuperscript{40} Section 108A(2)(a) Housing Grants Act
77. The JCT and all the other institutions are changing their standard form contracts to get to grips with the new payment terms.

78. The most significant change will be if a party does not give a Payment Notice, the party receiving payment can then serve a Default Notice. If a Default Notice is not challenged with a Pay Less Notice, then the amount in the Payment Notice/Default Notice will have to be paid.

79. If a payment due has not been made then, provided seven day’s written notice is given, the party may suspend only part of the Works rather than all of the Works. Suspending all of the Works can give rise to a claim that the suspending party has breached the contract.

80. I personally doubt that the part of suspension power will be used as widespread as thought – when the paying party wishes to suspend the works it needs to have the maximum impact – part suspension does not necessarily have the same impact and if the works are continuing the party will have to continue to pay suppliers, sub contractors etc, even though they are not being paid.

81. Training will have to be given to contractors and sub contractors alike, particularly members of the Accounts Department, as to what to do if a Default Notice is received, and when to do it by (when the Housing Grants Act was introduced in 1996 there was a wide spread training programme and this has already commenced with the New Construction Act).

82. Everyone in the industry will have to look at their own standard terms of contract – it is very likely that they will contravene the New Construction Act. For example the JCT is abandoning the notion of a sub contractor’s second half of retention being paid when the Certificate of Making Good Defects is issued under the Main Contract.

83. The construction and engineering industries are faced at the moment with an interim transition period. Contracts entered into before 1 October 2011 are not bound by the Construction Act – they may contain provisions whereby retention is paid once the certificate is issued under a superior contract. However if contracts are entered into after 1 October 2011 they have to apply the New Construction Act – paid when certified will no longer be allowed.
Why do Contracts matter?

Commercial considerations

84. There are sound commercial reasons why you should ensure the Contract is agreed and signed in the early stages of a project:

84.1. without a contract in place the Contractor will be entitled to a reasonable price for the work done at the Employer’s request (aka “quantum meruit”). What is a reasonable price will depend on part on market forces but could be far higher than the rates and prices in the Contractor’s (competitive) tender;

84.2. difficult (but not impossible) to counterclaim without a binding contract. No contractual liability, no obligation to complete and probably no common law liability for defects;

84.3. no contract - no agreed completion date. The only obligation, if any is to complete in a reasonable time.

Should the contract be in writing?

85. It surprises me how often engineering and building contracts (and even some professional appointments) remain unsigned. A contract does not have to be in writing or signed to be a binding agreement. However if an agreement is set out in writing it will avoid the inevitable arguments as to what is agreed.

86. However the Housing Grants Act will only apply to contracts for construction operations “evidenced in writing”. It will not apply to situations where the contract has not been agreed, or the terms are not in writing.

Offer and Acceptance

Invitation to Tender

87. The essence of a professional appointment or building contract, like any other contract, is agreement. Courts look for an offer to do something and acceptance of the offer. The acceptance must be unconditional. An acceptance cannot change the underlying offer.

88. The Employer, normally acting through his Architect, will send out an Enquiry enclosing the proposed conditions of contract, plans, specification, etc. An enquiry is not an offer to carry out the works. It is an “invitation to treat” or “offer[s] to negotiate – offers to receive offer[s]...” Essentially, by sending out an enquiry, the Employer is saying, “Make me an offer”!

89. A Contractor’s tender is an offer to carry out the Works.

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41 See RJT Consulting v. DM Engineering 8 March 2002
42 Bowen LJ in Cartil v. Carbolic Smoke Ball Company [1893] 1QB 256 at 268
Acceptance must be unequivocal

90. Acceptance must be unequivocal – it must accept all of the offer, not parts.

Employer’s responses to tenders are rarely so simple. The Employer’s response will insist on the conditions in the Enquiry (which the Contractor has conveniently ignored). It is rare that a letter responding to a tender will amount to a contract.

Orders

91. This is particularly the case where Orders were involved. An Order will say more than "...I accept". Orders which have conditions on the back do not amount to acceptances. The Order is a counteroffer which the tender can either accept or reject.

92. The significant point to bear in mind is that a counter offer revokes all earlier offers. For example, if an Order is despatched which imposes new conditions, the original tender offer is no longer capable of acceptance.

Battle of the forms

93. As is often the case, tender, is followed by Order, which is then followed by a letter insisting on the tenderer’s conditions, followed by a letter insisting on the Order’s conditions etc, etc. These letters appear spasmodically throughout the course of a project.

94. As it is always open to argue that the last communication was accepted by conduct e.g. starting works on site, accepting a variation, etc, it is always best to have the last say.

95. "In some cases the battle is won by the man who fires the last shot"\(^43\).

96. Always make sure you have the last say.

97. In *AE Yates Trenchless Solutions v Black and Veatch* sub contractor was asked to tender on the I Chem E form of contract. They did not but instead the sub contractor produced his own form of sub contract.

The contractor and sub contractor met and the contractor again offered the I Chem E form. The sub contractor said the would check with this head office.

There never was an "acceptance” but the sub contractor proceeded with the works, accepted variations and even made a claim for loss and expense.

It was held the sub contractor had accepted the I chem. E form by conduct.

\(^43\) *Butler Machine Tool v Ex-Cell - Operations* [1979] IWR 401 at 404
THE CORPORATE MANSLAUGHTER AND HOMICIDE ACT 2007

98. Thames Trains were fined £2M in respect of the Paddington Rail Disaster. Great Western Trains were fined £1.5M in respect of the Southall Disaster. In respect of Hatfield\textsuperscript{44}. Balfour Beatty were fined £7.5M\textsuperscript{45} and all these cases were brought for breaches of the Health and Safety at Work Act 1974.

Significantly the attempt to convict Balfour Beatty’s managers for manslaughter which failed in the Hatfield disaster, resulted in defence costs of £20.9M being paid by the public purse.

99. The problems with the old law was that it required a “directing mind”. It is difficult not only to imprison a company but to find its “directing mind”. A company cannot be convicted of manslaughter on the basis of just one rogue employee.

100. The new Corporate Manslaughter Act came into effect on 6 April 2008 and organisations where gross failure has resulted in the person’s death. Instead of now looking for a single director or manager with a “controlling mind”, instead the jury will look at the combined failings of a company’s senior management.

101. Juries will be encouraged to look at the fatal activity was managed or organised throughout the organisation. What systems and processes there were for managing safety, and how these were actually operated in practice (for example, were health and safety procedures no more than procedures that were not actually operated and often ignored by senior management). At least part of the failure must be at senior level i.e. people who make significant decisions about an organisation or part of it, this does not necessarily have to be the board.

Gross Breach

102. For an organisation to be convicted its conduct must have fallen far below what would reasonably be expected. Juries will take into account how often safety breaches, how serious the danger was, the attitudes, policy etc. It is for a jury to decide what an organisation broad attitude was to safety by looking at other sites, whether a profit was made, the extent of danger and degree of risk.

Sentencing

103. Sentencing guidelines state that the starting point for any fine should be 5% of gross annual turnover for the preceding three years, going up to 10% if there are aggravating features.

104. Cotswold Geotech Limited has recently become the first company in April 2009 to be charged with the offence of corporate manslaughter. The charge relates to the death of a 27 year old employee who was killed in September 2008 when a trench he was digging some soil samples collapsed, possibly following heavy rain. The company faces a charge of corporate manslaughter whilst one of its directors personally faces

\textsuperscript{44} In Hatfield inspections were not done. Results of ultrasonic tests were ignored.

\textsuperscript{45} Reduced from £10M from the Court of Appeal
the common law offence of gross negligence manslaughter. The case has run for months because of the poor health of the Director involved and only recently resumed.
BRIBERY

Introduction

105. The Bribery Act 2010 created criminal offences for seeking to influence decision makers in business and government. It has been criticised for being open ended and many businesses are struggling to come to terms with the Act.

106. The purpose of this seminar is to explain the key points of the Act, what actions the Act does and does not permit and what actions businesses need to take to ensure they are not caught by the Act. The government has now issued guidance on the Bribery Act 2010 and this will form a key feature of the seminar.

107. Bribery is the receiving or offering of any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office and incline him to act contrary to the known rules of honesty and integrity.46

108. Bribery is a serious crime and the World Bank estimates that bribery adds up to 10% to the total cost of doing business globally.

109. The UK’s previous law on bribery was considered to be unsatisfactory because it was inconsistent with the OECD Bribery Convention, which the UK ratified in 1998.

110. The Bribery Act 2010 (“the Act”) received Royal Assent in April 2010 and came into force on 1 July 2011. The Act was due to come into force in April 2011 but this was delayed because the Ministry of Justice failed to produce the guidance on how to interpret the rules in time.

111. The Act repeals all previous statutes in relation to bribery, with the aim of modernising and simplifying the law to allow prosecutors and the courts to deal with it more effectively.

112. A Guidance Paper on the Act was published by the Ministry of Justice on 30 March 2011.

Associated Person

113. The Act defines a person who may be criminally liable as an “Associated Person”. An “Associated Person” is associated with a company, partnership etc if that person performs services for or on behalf of the company, partnership etc.

114. The capacity in which an Associated Person performs services for or on behalf of a company does not matter and the Associated Person may be (for example) a company’s employee, agent or subsidiary.

115. Whether or not an Associated Person is a person who performs services for or on behalf of a company is to be determined by reference to all the relevant circumstances

46 Russell on Crime (Stevens, 12th ed, 1964)
and not merely by reference to the nature of the relationship between an Associated Person and a company.

116. But if an Associated Person is an employee of a company, it is to be presumed unless the contrary is shown that an Associated Person is a person who performs services for or on behalf of a company.

THE OFFENCES

Introduction

117. The Act applies to the whole of the UK and repeals the existing law on bribery. A person will be guilty of an offence where they offer, promise or give financial advantage to an Associated Person where:

117.1. They bribe another person (section 1);

117.2. They receive a bribe (section 2);

117.3. They bribe a foreign official (section 6); or

117.4. A commercial organisation fails to prevent bribery (section 7).

Section 3 – Definitions

118. ‘Relevant function’ means a function that is public in nature.¹⁴⁷

119. ‘Relevant activity’ means connected with a business or performed in the course of employment or performed by or on behalf of a body of persons.¹⁴⁸

120. ‘Business’ means any trade or professions.¹⁴⁹

121. The relevant function or activity is (A) expected to be performed is good faith (B) expected to be performed impartially and (C) performed by a person in a position of trust by virtue of performing it.

122. ‘Improper performance’ means performance which amounts to a breach of a relevant function or activity, for example, a breach of a relevant expectation.¹⁵⁰

123. ‘Expectation test’ is an objective test measured by what the reasonable person in the UK would expect of a person performing the relevant function or activity. The local customs and practices are disregarded unless they are written into law.¹⁵¹

¹⁴⁷ Section 3 Bribery Act 2010
¹⁴⁸ Section 3 Bribery Act 2010
¹⁴⁹ Section 3 Bribery Act 2010
¹⁵⁰ Section 3 Bribery Act 2010
¹⁵¹ Section 3 Bribery Act 2010
Section 1 – Bribing another person

124. A person (P) is guilty of an offence where they offer, promise or give a financial advantage to another person in two cases:

124.1. Case one applies where P intends the advantage to bring about an improper performance by another person of a relevant function or activity or to reward such improper performance.\(^{52}\)

124.2. Case two applies where P knows or believes that the acceptance of the advantage offered, promised or given, in itself constitutes the improper performance of a relevant function or activity.\(^{53}\)

125. For the purposes of deciding whether a function or activity has been performed improperly the test of what is expected is a test of what a reasonable person in the UK would expect in relation to the performance of that function or activity.

126. In case one, it does not matter whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the function or activity concerned.\(^{54}\)

127. In either case, the advantage can be offered, promised or given by P himself or through someone else.\(^{55}\)

128. In order to proceed with a case under section 1 based on an allegation that hospitality was intended as a bribe, the prosecution would need to show that the hospitality was intended to induce conduct that amounts to a breach of an expectation that a person will act in good faith, impartially, or in accordance with a position of trust. This would be judged by what a reasonable person in the UK thought.

129. For example, an invitation to foreign clients to attend a Six Nations match at Twickenham as part of a public relations exercise designed to cement good relations or enhance knowledge in the organisation’s field is extremely unlikely to engage section 1 as there is unlikely to be evidence of an intention to induce improper performance of a relevant function.\(^{56}\)

Section 2 – Offences relating to being bribed

130. Section 2 provides for offences relating to being bribed. The recipient or potential recipient of the bribe (R) is guilty of an offence in the following circumstances (cases three to six).

130.1. Case three applies where R requests, agrees to receive or accepts a financial or other advantage and then intends that a relevant function or activity is performed

\(^{52}\) Section 1(2) Bribery Act 2010
\(^{53}\) Section 1(3) Bribery Act 2010
\(^{54}\) Section 1(4) Bribery Act 2010
\(^{55}\) Section 1(5) Bribery Act 2010
\(^{56}\) The Bribery Act 2010 Guidance – Page 10
improperly. It does not matter if the improper performance is by R or by another person. 57

130.2. Case four applies where R requests, agrees to receive or accepts a financial or other advantage and that request, agreement or acceptance itself is the improper performance by R of a relevant function or activity. It does not matter whether R knows or believes that the performance of the function or activity is improper. 58

130.3. Case five applies where R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance of a relevant function or activity. It does not matter if the improper performance is by R or by another person nor does it matter whether R knows or believes that the performance of the function or activity is improper. 59

130.4. Case six applies where a relevant function or activity is ‘improperly performed’ by R (or another person, where R requests, assents to or acquiesces in it) in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage. It does not matter whether R knows or believes that the performance of the function is improper. Where the function or activity is performed by another person, it is immaterial whether that person knew or believed that the performance of the function or activity is improper. 60

131. All four cases (cases 3 to 6) are subject to section 2(6) of the Act. This provides that it does not matter whether it is R or someone else through whom R acts, who requests, agrees to receive or accepts the advantage. In addition, the advantage can be for the benefit of R or another person.

Section 6 – Bribery of a foreign public official

132. This offence is committed where a person offers, promises or gives a financial or other advantage to a foreign public official in the performance of his or her official functions. The person offering, promising or giving the advantage must also intend to obtain or retain business or an advantage in the conduct of business by doing so.

133. A foreign public official is a person holding a foreign legislative, administrative or judicial position or a position in a public international organisation.

134. This offence is significantly broader than the section 1 offence. There is not requirement for proof of an intention or knowledge about the improper performance of the functions or activities of the person bribed. All that is required is an intention to influence them and to obtain some kind of business advantage.

135. This offence will be of more concern to organisations which operate in foreign jurisdictions, particularly if they have significant dealings with government officials.

57 Section 2(2) Bribery Act 2010
58 Section 2(3) Bribery Act 2010
59 Section 2(4) Bribery Act 2010
60 Section 2(5) Bribery Act 2010
Section 7 – Failure of commercial organisations to prevent bribery

136. The Act creates a new strict liability offence for companies of failing to prevent bribery occurring within the organisation.

137. An organisation is guilty of an offence if a person associated with it (such as an employee or a contractor) accepts or offers a bribe to another person. Any organisation that has a business presence in the UK can be prosecuted, even if the offence itself took place outside the UK.

138. It will be no defence for a company to say they are not aware on what their employees are doing. The only defence is if the company has in place “adequate procedures” designed to prevent employees and others from engaging in such conduct (the Adequate Procedures Defence). This defence has been included in order to encourage commercial organisations to put procedures in place to prevent bribery by persons associated with them.

139. The meaning of adequate procedures is not defined in the Act. The Secretary of State has now published guidance about procedures which commercial organisations can put in place to prevent persons associated with them from bribing. We will look at ways of avoiding bribery by following the adequate procedures shortly.

Hospitality

140. “Bona fide hospitality and promotional or other business expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations, is recognised as an important part of doing business and it is not the intention of the Act to criminalise such behaviour”\(^{61}\).

141. However, hospitality must be “reasonable and proportionate” because “hospitality and promotional or other similar business expenditure can be employed as bribes”\(^{62}\).

142. The standards or norms in particular sectors may be relevant, but less so if the norms are extravagant.

143. For example if New York is genuinely the most mutually convenient place for foreign officials to meet with the senior executives of a U.K. organisation, then paying for the cost of travel, tickets to a sporting event and some “fine dining” for the official and the official’s spouse or partner will not on their own be indications of improper conduct. Conversely, a Five-Star holiday for a foreign official that is unrelated to a specific business visit is more likely to raise an inference of possible bribery.

Facilitation payments

144. Eradication of facilitation payments is a long term objective that will require economic and social progress and sustained commitment to the rule of law in those parts of the World where the problem is most prevalent.

\(^{61}\) The Bribery Act 2010 Guidance - page 12 para 26
\(^{62}\) The Bribery Act 2010 Guidance - page 12 para 26
Section 12 – Territorial application

145. Acts that take place abroad constitute an offence if the person performing them is a British national or ordinary resident in the UK, a body incorporated in the UK or a Scottish partnership.

146. For the purposes of section 7 (corporate offence) it is immaterial where the conduct element of the offence occurs.

BRIBERY ACT GUIDANCE

Introduction

147. The guidance consists of six guiding principles which are followed by commentary and examples but this is by no means a one-size-fits-all document. The question of whether an organisation had adequate procedures in place to prevent bribery is a matter that can only be resolved by the particular facts and circumstances of the case.

148. These principles are intended to be flexible and outcome focused. Bribery prevention procedures should be proportionate to risk, for example organisations operating in entirely domestic markets will generally face lower risks of bribery than those that operate in foreign markets.

149. It suggests that commercial organisation adopt a risk-based approach to managing bribery risks. No policies or procedures are capable of detecting and preventing all bribery but a risk-based approach will serve to focus the effort where it is needed and will have most impact.

The six principles

150. The six principles are as follows:

150.1. Principle 1 – Proportionate procedures

150.2. Principle 2 – Top-level commitment

150.3. Principle 3 – Risk assessment

150.4. Principle 4 – Due diligence

150.5. Principle 5 – Communication (including training)

150.6. Principle 6 – Monitoring and review

151. It is important to ensure that organisations identify who their “associated persons” are, and are satisfied they have robust checks and balances in place prior to the Act coming into force.
Principle 1 – Proportionate procedures

152. Procedures and policies should be proportionate to the bribery risks faced and the nature, scale and complexity of activities. They should be clear, practical, accessible, effectively implemented and enforced. This should help create an anti-bribery culture.

153. The initial assessment of the level of risk at the organisation should take in to account the size, nature and complexity of the business, but small businesses should not assume they are low risk. The organisation should also consider the type and nature of persons associated with the business, for example agents.

154. Procedures can be standalone or embedded into existing policies (for example, recruitment, managing public procurement processes etc). Applying new procedures to existing associated persons will take time and a risk-based approach should be adopted.

Principle 2 – Top level commitment

155. Responsibility for preventing bribery and fostering a workplace culture that sends a clear message that bribery is not acceptable should start at board level. This is particularly important as senior officers can be personally liable under section 14 of the Act for offences committed by the organisation if they have “consented to” or “connived in” the commission of a bribery offence.

156. Top level management need to commit to the anti-bribery culture and foster the culture of non-acceptability. Clear communication is needed to the management, workforce and third parties. The board needs to take responsibility for design, implementation, operation and review of prevention procedures.

157. An anti-corruption statement from the chief executive is advised and it is likely to require senior managers to lead anti-bribery work. Responsibilities of leadership should include developing the code of conduct, endorsing bribery prevention publications and leading on dissemination of procures to employees, associated persons, etc.

158. Leadership should also have specific involvement in high profile decision making and quality assurance of risk assessments. Leadership should also oversee breaches and give feedback to the board on compliance levels.

Principle 3 – Risk assessment

159. Periodic, informed and documented assessments of the nature and extent of risks relating to bribery should be maintained. These assessments should cover the internal and external risks at a proportionate level. For many commercial organisations this principle will manifest itself as part of a more general risk assessment carried out in relation to business objectives.

160. New assessments should be completed as the business evolves (for example, new markets, sectors etc).
161. There are a number of common external risks that need to be considered:

161.1. Country

161.2. Sector

161.3. Transaction type

161.4. Business opportunity

161.5. Business partnership

161.6. Training/knowledge deficiencies in staff

161.7. Bonus culture – excessive risk taking encourages?

161.8. Lack of clarity in procedures RE: hospitality, promotional expenditure etc.

161.9. Lack of clear financial controls

161.10. No clear top-down commitment

**Principle 4 – Due diligence**

162. The purpose of this principle is to encourage commercial organisations to put in place due diligence procedures which can be used as a way of mitigating the risk.

163. Due diligence should be proportionate to the identified risk, for example, the appropriate level of due diligence required by a commercial organisation when contracting for the performance of information technology services may be low, to reflect low risks of bribery on its behalf. In contrast, an organisation that is selecting an intermediary to assist in establishing business in foreign markets will typically require a much higher level of due diligence to mitigate the risks of bribery on its behalf.

164. Due diligence may include, direct interrogative enquiries, indirect investigation, general research on proposed associated persons and ongoing appraisal of relationships.

**Principle 5 – Communication (including training)**

165. The commercial organisation should seek to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training which is proportionate to the risks it faces.

166. Internal communication includes specific policies, for example, hospitality, facilitation payments, etc., penalties for breach and whistle-blowing procedures.
167. Training should be proportionate but effective, for example, mandatory training for new recruits and associated persons, knowledge of whistle-blowing procedures. The training should be continuous, be monitored and evaluated.

168. Prudent employers should consider introducing anti-bribery and ethics policies and procedures which make clear that a breach of these policies will be a disciplinary matter, so as to deter employees and other individuals acting on the company’s behalf from committing bribery.

169. Employers should consider reviewing the adequacy of their policies and procedures to ensure they take account of the provisions of the Act. Staff training may be required to ensure policies and procedures are properly implemented. Employers may also wish to consider incorporating anti-bribery terms into their service contracts and/or contracts of employment, so that disciplinary sanctions can be imposed in the event of any breach.

170. Employers should consider implementing a separate anti-bribery or ethics policy. Any current policies such as hospitality, the giving and receiving of gifts and reimbursement of expenses should be updated. Whistle blowing policies should also be reviewed to ensure they include provisions which confirm that employees who report suspected bribery can do so without and threat to their safety or job security. Disciplinary policies may also require updating, as employees should be left in no doubt what the consequences of breaching the new regime will be.

**Principle 6 – Monitoring and review**

171. As business changes risks will change. The commercial organisation should therefore monitor and review procedures designed to prevent bribery by persons associated with it and make improvements where necessary.

172. Procedures should be in place for monitoring and review such as financial control mechanisms, staff surveys and feedback from training. It would also be prudent to have formal periodic reviews and external verification of the procedures in place.

173. Accounting systems should be reviewed to ensure that they are effective in maintaining accurate records. In addition, a register of gifts and hospitality should be kept in order to record and monitor who is receiving what and from whom.

**The adequate procedures defence**

174. The onus to prove the adequate procedures defence will remain with the organisation being prosecuted. The standard of proof which the commercial organisation would need to discharge in order to prove the defence is the balance of probabilities. A departure from the suggested procedures will not in itself give rise to a failed defence. You may have alternatives in place that are also considered adequate.

175. The government has announced that it did not expect “genuine hospitality” or similar expenditure to fall under the Act.
176. It appears that the government has listened to the concerns of business and tried to soften the more extreme ways in which the Act potentially could have been enforced.

177. Justice secretary Ken Clarke stated “I have listened carefully to business representatives to ensure the Bribery Act is implemented fully and in a workable, common sense way – this is particularly important for small firms that have limited resources. I hope this guidance shows that combating the risks of bribery is largely about common sense, not burdensome procedures”.

178. The published guidance does not come without criticism. Although many feel that the common sense approach is good news (enabling small businesses to avoid implementing unnecessary controls and incurring resultant costs if they do not foresee a risk of bribery), others such as Transparency International UK (TI UK) feel that the guidance “undermines key features of the Act”.

179. TI UK have highlighted the loophole, which exempts foreign companies listed on the London Stock Exchange from the rules, as one area of serious concern.

Senior Officers’ Liability

180. If a company commits any of the offences outlined above and if the offence is proved to have been committed with the consent or connivance of a senior officer, or a person purporting to act in such a capacity, the senior officer is guilty of the offence. “Senior officers” is defined widely and includes not only directors but also senior managers and the company secretary.

Penalties

181. An individual who is guilty of an offence is liable to imprisonment up to a maximum term of 10 years.

182. A company guilty of an offence is liable to an unlimited fine.

183. Penalties for the corporate offence include unlimited fines, confiscation of any benefit accruing from the bribe\(^63\) and a ban on the organisation engaging in public sector contracts for up to 5 years\(^64\).

First case prosecuted under the Act

184. The first conviction under the Act came in November 2011. A former magistrates’ court clerk was sentenced to six years’ imprisonment after pleading guilty to bribery and misconduct in public office.

185. Mr Patel was convicted of an offence under section 2 of the Act for attempting to bribe with the intention of improperly performing his functions. He had accepted £500 in exchange for omitting to record a traffic offence.

\(^63\) Proceeds of Crime Act 2002
\(^64\) Public Contracts Regulations 2006
186. Mr Patel was given a three-year sentence under the Act and a six-year sentence for misconduct in public office, to run concurrently.

Conclusion

187. Corporate organisations should be aware of the potential damage to reputation if a firm is found guilty or suspected of bribery.

188. The Corporate organisation is likely to suffer from negative press coverage, a demotivated workforce, loss of customers, clients and contracts and a consequent fall in market capitalism.

189. Organisations should consider in advance how they would respond to such allegations.

190. As unlimited fines can be imposed on companies and their directors under the Act, many employers will want to ensure they are doing all they can to give themselves the best chance of availing themselves of the Adequate Procedures Defence.