

PAYMENT FOR OFF-SITE MATERIALS IN SCOTLAND – CARE REQUIRED!

- ▶ If your business operates on both sides of the border, it's important to be aware of some of the differences between Scots and English law, which could cause problems for the unsuspecting.
- ▶ One difference, which is sometimes overlooked, arises in context of the passing of title to off-site materials
- ▶ Given the increasing trend towards off-site manufacturing and modular construction this difference is well worth a reminder

Scots common law

Under the common law in Scotland, ownership of goods and materials for use in a construction project can pass only where there is **both** an intention to pass ownership **and** delivery. This can be achieved when the relevant materials are incorporated into the works or where the materials are delivered to site and paid for by the Employer by inclusion in an interim certificate.

In other words it is not possible to enforce a provision in a construction contract subject to Scots law, which says that property will pass on payment for the materials in question, absent delivery.

Although care is always required, there can be circumstances where a compelling project need arises for payment to be made for off-site goods and materials prior to delivery to site, which presents an obvious risk to the paying party in Scotland. Indeed the risk associated with such a scenario has been underlined by the number of contractor insolvencies in recent months – if a paying party does not have good title to the materials in question, they become an ordinary creditor only in any post insolvency claim and have no right to the materials themselves.

So, how does a paying party seek to protect itself in Scotland when paying for off-site materials? A distinction can be drawn where the contract can properly be characterised, not as a construction contract, but as a contract of sale. In those circumstances, it will be subject to the Sale of Goods legislation and ownership of the property may pass by agreement, on payment rather than on delivery.

A construction contract in Scots law is not capable of characterisation as a contract of sale and so the way this is usually dealt with is for the client to enter into a separate contract for the purchase of the materials from the contractor (or sub-contractor where appropriate) so that the materials will no longer form part of their contract. Note this goes further than a simple vesting certificate which is not enough in Scotland to pass title.

This underlying difference in the law and practice is reflected in the different ways that the JCT and Scottish Building Contracts Committee (SBCC) tackle the issue.

Compare and contrast...

Clause 2.22 of JCT 2016 (DB) which provides that where a payment is made under the contract of the value of the off-site materials, the materials will become the property of the client notwithstanding that delivery has not been made. This clause is "not used" in the SBCC version of the contract.

Clause 4.15 of SBCC 2016 (DB) by contrast is in quite different terms from the equivalent JCT clause and provides that "*where the Employer considers it expedient to do so,*" the Employer may enter into a separate contract for the purchase of materials or goods prior to their delivery to site. If such a contract is entered into, the purchase of the materials or goods is excluded altogether from the building contract and title will pass in accordance with the intention of the parties as expressed in the sale contract.

The 2016 edition of the SBCC contracts for the first time helpfully include the template forms for use when contracting bilaterally (Employer/Contractor) for purchase of materials and there is also a tripartite option (Employer/Contractor/Subcontractor) where appropriate.

Care should be exercised (and specific advice taken) when contracting on other standard forms or indeed on a bespoke basis as few address this issue expressly.

Of course ensuring passing of title is only one of a number of steps which any client should take to protect itself when considering payment for off-site materials - but it is an important one.

Who to contact

ALISON HORNER

Partner

+44(0) 141 574 2325

+44(0) 7789 925123



10-31248591-1

addleshawgoddard.com

Aberdeen, Doha, Dubai, Edinburgh, Glasgow, Hamburg, Hong Kong, Leeds, London, Manchester, Muscat, Singapore and Tokyo*

*a formal alliance with Hashidate Law Office

2019 Addleshaw Goddard LLP. All rights reserved. Extracts may be copied with prior permission and provided their source is acknowledged. This document is for general information only. It is not legal advice and should not be acted or relied on as being so, accordingly Addleshaw Goddard disclaims any responsibility. It does not create a solicitor-client relationship between Addleshaw Goddard and any other person. Legal advice should be taken before applying any information in this document to any facts and circumstances. Addleshaw Goddard is an international legal practice carried on by Addleshaw Goddard LLP (a limited liability partnership registered in England & Wales and authorised and regulated by the Solicitors Regulation Authority and the Law Society of Scotland) and its affiliated undertakings. Addleshaw Goddard operates in the Dubai International Financial Centre through Addleshaw Goddard (Middle East) LLP (registered with and regulated by the DFSA), in the Qatar Financial Centre through Addleshaw Goddard (GCC) LLP (licensed by the QFCA), in Oman through Addleshaw Goddard (Middle East) LLP in association with Nasser Al Habsi & Saif Al Mamari Law Firm (licensed by the Oman Ministry of Justice), in Hamburg through Addleshaw Goddard (Germany) LLP (a limited liability partnership registered in England & Wales) and in Hong Kong through Addleshaw Goddard (Hong Kong) LLP, a Hong Kong limited liability partnership pursuant to the Legal Practitioners Ordinance and regulated by the Law Society of Hong Kong. In Tokyo, legal services are offered through Addleshaw Goddard's formal alliance with Hashidate Law Office. A list of members/principals for each firm will be provided upon request. The term partner refers to any individual who is a member of any Addleshaw Goddard entity or association or an employee or consultant with equivalent standing and qualifications. If you prefer not to receive promotional material from us, please email us at unsubscribe@addleshawgoddard.com. For further information, including about how we process your personal data, please consult our website www.addleshawgoddard.com or www.aglaw.com.