

WEBINAR:

International Fraud – Beware!!

with Keith E Oliver of Peters & Peters Solicitors LLP (UK)

Subcontracting under JCT and NEC

with Sinéad Clarkson MRICS of PH Plasterers Limited (UK)

16 November 2023 | 11:00am UK (GMT)



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Keith E Oliver
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PETERS & PETERS



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International Fraud – Beware!!



Keith E Oliver

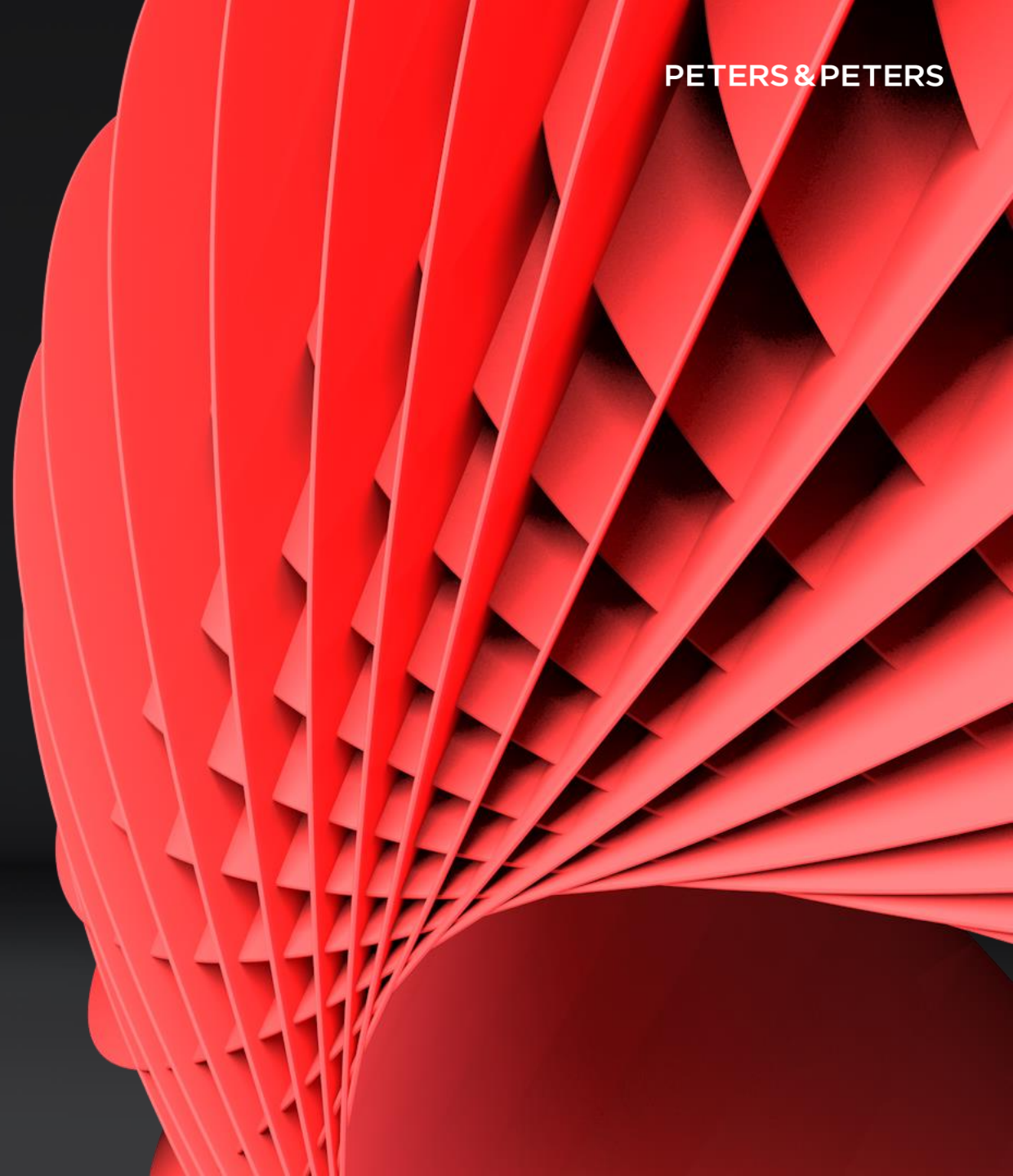
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International Fraud – Beware!

Keith Oliver

Peters & Peters



What do you need to look out for?

- 26% of UK construction companies have experienced fraudulent activity over the last year
- Larger companies are nearly twice as likely to fall victim to fraud
- Two in five construction companies didn't report fraudulent activity to the police, meaning it's more prevalent in the industry than authorities think
- The most common type of fraud is changing the quality of materials — three in five companies were affected by this in the last year

“Within construction, the most common types of fraud include bid rigging, falsifying expenses, invoice fraud, bribery and stealing tools for other projects.”

Consequences of fraud

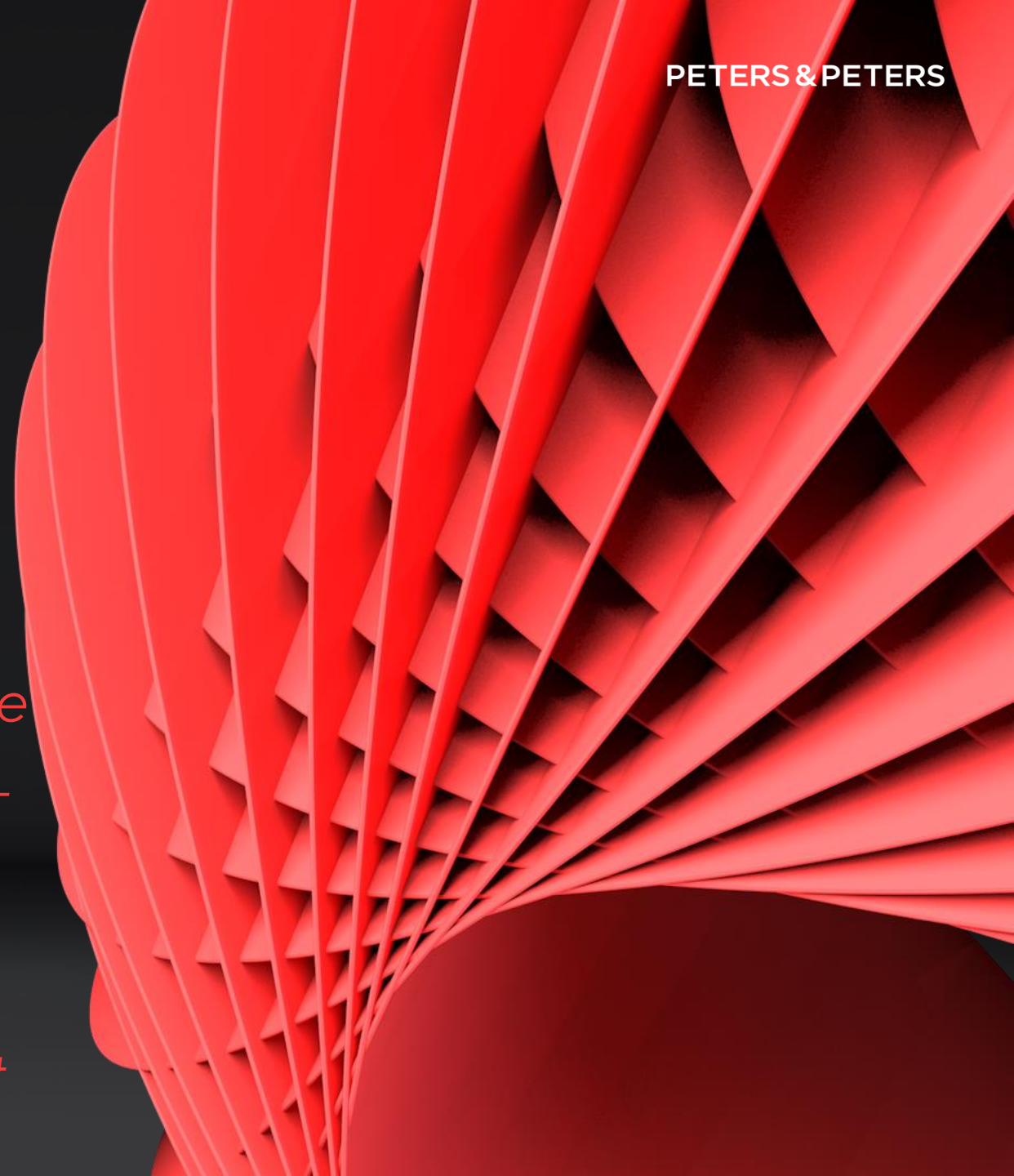
- Three in five small companies were close to bankruptcy due to fraud.
- A quarter of medium-to-large companies said their industry reputation was tarnished by illegal activity. This rose to 40% for small companies.
- Employees also suffer: half of construction companies with more than 100 people lost employees as a result of fraud.

Construction fraud rises during economic uncertainty

- Financial fraud affecting project owners
 - Procurement fraud
 - Change orders
- Financial fraud impacting contractors
 - Asset misappropriation
 - Labour and wage compliance violations

Solutions to protect your business

- 1. Incorporate detailed cost estimates throughout the construction lifecycle*
- 2. Perform risk-based vendor due diligence*
- 3. Implement enhanced oversight of high-value assets*
- 4. Incorporate centralized oversight for labour compliance*
- 5. Set expectations of a project cost audit*



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Subcontracting under JCT and NEC



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Chartered Quantity Surveyor



Subcontracting under JCT and NEC

Sinéad Clarkson, MRICS

PH Plasterers Ltd



General Issues with Subcontracting

- ▶ Nature of subcontracting businesses - Lack of contractual experience/competence
- ▶ Main Contractor - Lack of competence
- ▶ Industry trends - Main Contractor's bespoke forms of contract
- ▶ Industry trends - risk exposure
- ▶ 'Stepping down' of standard form main contracts vs specific, standard form subcontractor agreements.

Five common contractual issues when subcontracting...



1. Payment Issues

Common for Main Contractors to reduce or delay payments to subcontractors, which can lead to significant cashflow issues.

Two distinct issues with different rights and actions under the contract: abatement and non-payment.



1. Payment Issues - Abatement

Abatement

- ▶ Subcontract agreements under JCT drafted with intention that the valuation/payment regime under the sub-contract is linked to the Main Contract regime
- ▶ JCT SBCSub/C 2016 cl 4.7
- ▶ JCT DBSub/C 2016 cl4.7
- ▶ NEC4 ECS 2017 cl50 & cl51 and option (Y(UK)2)
- ▶ If contract is non-compliant: HGCR 1996, s110B, s111 (UK Construction Contracts)
- ▶ [Millers Specialist Joinery Company Ltd v Nobles Construction Ltd \[2001\] TCC 64/00](#)
[SL Timber Systems Ltd v Carillion Construction Ltd \[2001\]](#)



1. Payment Issues - Non-Payment

Non-Payment

- ▶ Most standard form contracts give effect to section 112 of the Construction Act - contractual right to suspend.
- ▶ JCT SBCSub/C 2016 cl4.7.7 interest payable, and cl4.8 suspension
- ▶ JCT DBSub/C 2016 cl4.7.7 and cl4.8
- ▶ NEC4 ECS cl51.2 - interest payable (cl60 CE), Y(UK)2 - suspension, s9 - termination for breach
- ▶ If contract is non-compliant: HGCRA 1996 s112.
- ▶ [Mayhaven Healthcare Ltd v Bothma & Anor \(t/a DAB Builders\) \[2009\] EWHC 2634 \(TCC\)](#)

2. Design Responsibility & Fitness for Purpose Obligations

Design Responsibility

- ▶ Contractual provisions rendering the subcontractor responsible for the accuracy and suitability of a design produced by others.
- ▶ *Oil States Industries (UK) Ltd v Lagan Building Contractors Ltd [2018] CSOH 22*

‘Fitness for Purpose’ vs ‘Reasonable Skill and Care’

- ▶ Significantly changes subcontractor’s obligations under the contract.
- ▶ JCT Standard forms do not impose a fitness for purpose obligation (JCT SBCSub/C 2016 cl.2.22, JCT DBSub/C 2016 cl.22).
- ▶ Beware amendments or bespoke contracts!
- ▶ NEC4 ECS Cl.20.1 - subtle ‘fitness for purpose’ obligations? Option X15.
- ▶ *MT Højgaard A/S -v- E.ON Climate & Renewables UK Robin Rigg East Ltd [2017] UKSC 59 BLR 477*

3. Notice Provisions

- ▶ Notice provisions are increasingly onerous in standard forms.
- ▶ Clauses commonly feature a condition precedent which must be satisfied before an entitlement arises.
- ▶ JCT SBCSub/C 2016 cl4.15
- ▶ JCT DBSub/C2016 cl4.15
 - ▶ *'Shall notify'*
- ▶ NEC4 ECS cl15.1 - Early Warning Notices, s6 - Compensation Events, particularly cl61.3 and cl63.7
- ▶ Again - beware amendments to notification requirements and bespoke contracts!

Notifying compensation events	
61.3	In the second paragraph delete "eight weeks" and insert "seven days" and insert after "has happened" "or is likely to happen".

4. Liquidated/Delay Damages

- ▶ Extensive potential liability for subcontractors.
- ▶ JCT SBCSub/C 2016 cl2.21, cl2.51, cl2.52 and cl4.17.
- ▶ JCT DBSub/C 2016 cl2.21, cl2.51,cl2.52 and cl4.17.
- ▶ NEC4 ECS option X7 (rate in Contract Data)
- ▶ Key considerations for subcontractors when issued with a Pay Less Notice asserting liability for liquidated (JCT) or delay (NEC) damages.
- ▶ If contractor can substantiate, only defence is to claim damages are a penalty:
- ▶ *Cavendish Square Holding BV v Talal El Makdessi (Rev 3) [2015] UKSC 67*

5. Final Accounts

- ▶ Issues can arise concerning timescales when settling final accounts. Beware amended timescales!
- ▶ JCT SBCSub/C 2016 cl4.21, cl1.8.3
- ▶ JCT DBSub/C 2016 cl4.21, cl1.8.3
- ▶ *Marc Gilbard 2009 Settlement Trust v OD Development and Projects Ltd [2015] EWHC 70 (TCC)*
- ▶ NEC4 ECS cl53 (updated from NEC3 approach of no ‘final account sweep’).
 - ▶ Emphasis on resolving issues and agreeing costs as they arise, in theory should be very little to dispute!
- ▶ *Northern Ireland v Healthy Buildings (Ireland) Ltd [2017] NIQB 43*

To Conclude...

- ▶ Subcontracting can be high risk, especially concerning potential liability relative to organisation size.
- ▶ Detailed review of contracts and amendments before signing allows for negotiation of better terms, e.g. improved notice provision.
- ▶ Early engagement with construction solicitors is key when in dispute.
- ▶ If in doubt - seek legal advice!



QUESTIONS



NEXT WEBINAR

18 January 2024 | 11:00 AM UK (GMT)

Title to be revealed in due course

BOOK LAUNCH OF FIDIC Contracts in the Americas and FIDIC Contracts in Africa and the Middle East

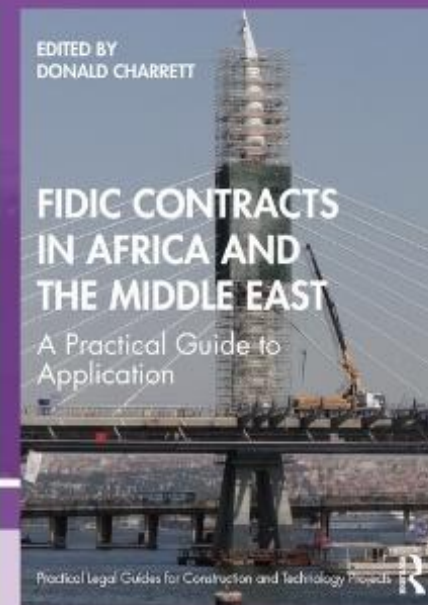
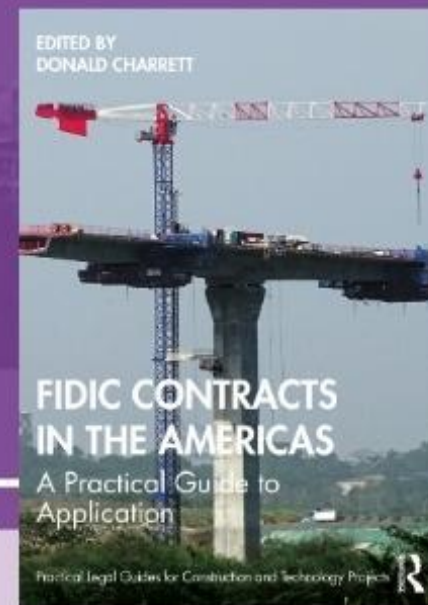
Edited by Dr Donald Charrett
With guest speaker Sir Rupert Jackson



Hybrid event – join in-person or online

27 November 2023 | 16:30 UK (GMT)
At the IDRC, 1 Paternoster Lane, London EC4M 7BQ

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