

LEGAL ALERT

CONSTRUCTION BULLETIN

Rollits
SOLICITORS

MANAGING BUILDING CONTRACTS - SOME "BACK TO BASICS" TIPS

Good management of building contracts is second nature to many construction firms, but we find that timely reminders of some basic techniques and practices can help Clients to prevent disputes and litigation from arising.

Even in the event of a claim being made against a Contractor, well-managed documentation and legal agreements can prove to be invaluable in defending actions, and minimising the expense in researching the merits of claims and negotiating settlements. The following are some points to watch out for:

1. Contracts to be in writing - Oral contracts are valid at law. However we would always advise that building contracts are made in writing, utilising a standard form text with such amendments as may be appropriate to the circumstances. Anything that is agreed in a face to face conversation, or over the telephone during the course of a contract, must be recorded in writing to provide for certainty if a claim arises.

2. No gaps - When putting together contract documentation it is essential to ensure that there are no gaps or ambiguities. Each part of the paperwork forms a vital link in the chain. For example, in commercial developments there are often several interconnected parties (employer/funder/tenant/contractor/sub-contractors/consultants/sub-consultants etc.). Where any one party has specific requirements, for example a funder's request for a specific form of warranty, or a pre-contracted tenant's need for certain critical dimensions to be met, then these requirements will almost certainly have to be inserted into all the contracts and appointments. Certainly, careful thought needs to be given at the outset as to the implications of not having a totally cohesive suite of legal documentation.

3. Letters of intent - Letters of intent should be avoided unless strictly necessary to bridge a very short term gap before contract. They invariably lack clarity and the level of detail necessary to document the parties' intentions, and time is often at large. Case law indicates that they are often unenforceable. One solution can be to produce a short form bespoke contract if a contractor/consultant is pressing for a letter of intent to enable it to commence work at short notice. Such a contract can be in the form of a letter, but in fact contain all the core provisions of a longer form contract, and be executed as a contract by both parties, and thus enforced if that proves to be necessary.

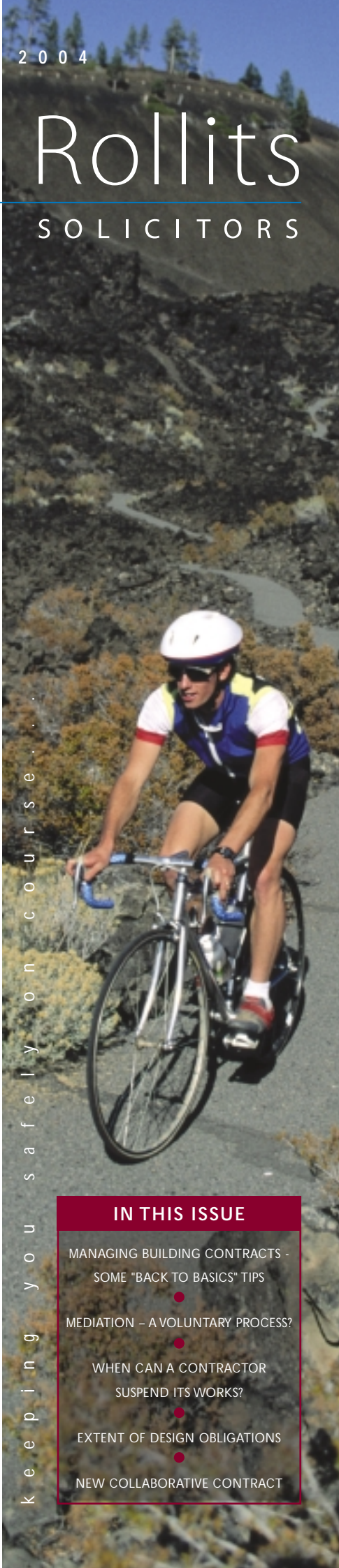
4. The law of contract - Basic contract law principles need to be borne in mind at all stages of the procurement process. These are some of the common traps that may catch out the unwary or uninformed:

- Late incorporation of written terms - Written conditions cannot be unilaterally inserted into a contract after it has been formed. For example, in a case where the scope and conditions of sub-contract works are detailed in a tender letter which is then accepted, it will be too late post-contract for the Contractor to insist upon a warranty being given in more specific and perhaps more onerous terms to a funder. This requirement should have been made clear at the outset.
- Incorporation by reference - Many sub-contracts or sub-consultants' appointments are often drafted to incorporate the terms of the main contract or "upper" contracts or appointments. Care must be taken, as such incorporation provisions are generally perfectly valid at law, and may put an unnecessary and possibly undeliverable burden on the sub-contractor, for example a fitness for purpose obligation.
- Under seal or under hand - The most important legal consequence of entering into a contract as a deed is that the parties are then bound by their obligations for twelve years rather than six.
- Plans/Specifications etc. - The issue numbers of the plans and specifications that are appended to the contract form a part of that contract. Any subsequent amendments will be variations. Therefore great care must be taken to check plans and documents immediately prior to entering into the contract.

These are just a few matters that must be borne in mind when entering into and managing building contract documentation. It is essential for all members of your team to have a good understanding of the overall development, who is involved, and their specific requirements. A clear, documented audit trail should be established at the outset to avoid, or at least to clarify, any disputes that arise at a later date.

keeping you safely on course

IN THIS ISSUE	
MANAGING BUILDING CONTRACTS - SOME "BACK TO BASICS" TIPS	●
MEDIATION - A VOLUNTARY PROCESS?	●
WHEN CAN A CONTRACTOR SUSPEND ITS WORKS?	●
EXTENT OF DESIGN OBLIGATIONS	●
NEW COLLABORATIVE CONTRACT	●



MEDIATION – A VOLUNTARY PROCESS?

Those involved in construction disputes are well used to using methods alternative to litigation to resolve such disputes. Arbitration and more recently adjudication are both well tried and tested methods of resolving disputes outside the courtroom. Another method of resolving disputes that has become increasingly important in recent years is mediation. Mediation is a voluntary and non-binding process whereby the parties seek, on a without prejudice basis, to resolve their dispute using the services of a Mediator. The Mediator facilitates discussion between the parties, assisting them to reach their own conclusion. The Mediator does not impose his decision on the parties. Once the parties have reached an agreement it will be recorded in a binding document.

Although mediation is a voluntary process several recent decisions from the Court indicate that a party who refuses to mediate might be penalised for such refusal.

In the recent case of **Royal Bank of Canada v Secretary of State for Defence** the Royal Bank offered at an early stage to settle their dispute by mediation but the Secretary of State for Defence refused. The case went to a final hearing and the Secretary of State won. However, when the Judge decided

whether costs should be awarded he held that he had to take into account the conduct of the parties both before as well as during the proceedings. The Judge decided that this was a case that had been suitable for mediation and a refusal by the Secretary of State to mediate was a factor that he had to take into account in deciding whether the Secretary of State should recover his costs. Although the Judge was not in a position to form any real view on whether mediation would or would not have succeeded he concluded that it might have done and in the circumstances the Secretary of State did not recover his costs from the Royal Bank of Canada from the time that the Secretary of State refused to submit to mediation.

Mediation is a process that any party to a building dispute should consider at an early stage as an alternative to arbitration or adjudication. Whilst it may not be suitable in all cases refusal to mediate where it was reasonable to do so could result in a successful party not recovering legal costs where otherwise it might have done so. The moral of the story is that parties should wherever possible attempt to resolve their dispute before litigating. A refusal to do so might be costly.

WHEN CAN A CONTRACTOR SUSPEND ITS WORKS?

In the recent Technology and Construction court case of **C J Elvin Building Services Limited v Noble and Noble (2003)** involving residential occupiers it was decided that the builder was entitled to suspend its works in the face of the clients' failure to pay it a reasonable sum within a reasonable time.

The court held that there were implied terms in the contract that entitled the builder to be paid a reasonable sum within a reasonable time and the clients had committed a serious breach of contract by failing to do this. The effect of the breach was to discharge the builder from its legal obligations to continue to carry out the works.

Non-payment does not, however, automatically entitle a builder to suspend its works and advice should therefore be sought in each case before suspending works due to non-payment. If a builder suspends works when it is not entitled to, it may itself commit a serious breach of contract and be liable to the client in damages. Contractors should also consider the wording of their contract and in particular whether the contract should make express provision as to the consequences of non-payment.

EXTENT OF DESIGN OBLIGATIONS

Before agreeing to or embarking upon the completion of a design partially prepared by another firm, contractors should be aware that they could be taking on overall responsibility for that design.

In the Court of Appeal case of **Motherwell Bridge Construction Limited v Micafil Vakuumtechnik** the court held that where a contractor agrees to complete a design partially prepared by another, it owes a duty to use reasonable care and skill in that work. This includes a duty to check that any partially prepared design that the contractor agrees to complete is satisfactory, irrespective of whether it is to complete all or part only of the design.

If a problem later occurs that is directly due to defects in the design, the contractor may find itself liable to the employer in damages for any loss caused by defects in that design.

Contractors must therefore review any design that they have agreed to take over and understand the principles and assumptions upon which it is based. Contractors must then assess those principles and assumptions and take a view as to whether or not the design is satisfactory. Failure to do so may result in contractors being held liable for loss caused by defects in the design.

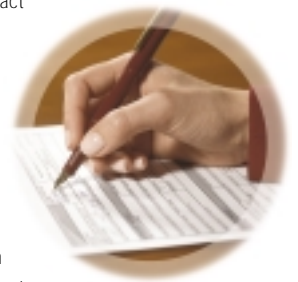
By seeking advice, contractors may limit the extent to which they assume responsibility for a design and if necessary, warranties may be obtained from the firm that provided the initial design.

NEW COLLABORATIVE CONTRACT

A new contract (in preparation for three years) has been launched by Be, the group formed by the merger of the Reading Construction Forum and the Design & Build Foundation.

A criticism of the traditional two-party contract is that it works against an inclusive and integrated approach. The Be contract has been developed to encourage and support collaborative ways of working so that contractors, sub-contractors and designers can all be engaged under the same terms. Under a traditional two-party contract the engagement of the main contractor and its key subcontractors is postponed until the construction phase, which excludes them from the processes of design development and risk management.

At the centre of the Be contract is risk management and the 'sharing out of risk'. The contract allocates the risks to the parties able to bear them and allows risk to be identified early and managed efficiently. It remains to be seen whether the contract will find favour. Depending on which side of the fence you sit you may be happy to share risk or may prefer to pass the risk to someone else.



INFORMATION

If you have any queries on any construction law matters or disputes please contact:
Non-contentious matters - Steve Hawkins on (01482) 323239
Contentious matters - David Watson on (01904) 625790

This bulletin is for the use of clients and will be supplied to others on request. It is for general guidance only. It provides useful information in a concise form. Action should not be taken without obtaining specific advice. We hope you have found this bulletin useful. If, however, you do not wish to receive further mailings from us, please write to Mrs. Pat Coyle, Rollits, Wilberforce Court, High Street, Hull, HU1 1YJ.

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