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Construction Focus

A new beginning

Construction was undoubtedly one of the hardest hit industries during the recession. The Government attempted to mitigate the effects of the recession by focussing primarily on the planning system which has often been considered a major hurdle for development. The Government introduced measures intended to reduce "red tape" and dramatically changed planning policy with the introduction of the National Planning Policy Framework, which provided a presumption in favour of sustainable development.

In addition to changes to planning policy new schemes, such as the Help to Buy initiative and European, national and regional grants have been made available, which have generally been considered quite successful in stimulating new development.

Throughout this period, Contractors and Consultants alike have worked hard to progress their businesses in very difficult circumstances and we are particularly pleased to see a significant number of local businesses go from strength to strength.

As the economy continues to improve it is possible to see this same improvement in the construction industry as more and more residential and commercial development takes place. You only need to see the number of cranes across the Leeds landscape or drive along the A63 into Hull to spot increased construction activity (which will only increase as the City of Culture works progress). A number of developments have progressed in York although perhaps not to the same degree as one sees in other areas in the Yorkshire region, which may be due to the uncertainty surrounding local planning policy in York (again showing the significant link between the construction and planning industries).

The drafting and completion of Construction documentation, such as Building Contracts and Professional Team Appointments, can at times be seen as an obstacle or a delaying factor in any project. There can often be the sense that the documentation is a necessary evil that needs to be completed as soon as possible and then the real work can take place (if such construction work indeed hasn't already started or completed in some cases).

We want to try and challenge this notion, and through a number of publications that will be sent to you over the coming months hopefully give you an insight into some of the ways that Construction documentation, if appropriately drafted, can be used to provide protection against unforeseen events. We will also discuss some of the more common areas where disputes can arise and how the effects of these can be mitigated.

David Myers

The support we can provide to existing and new clients is not restricted to regular newsletters and we certainly would be more than happy to visit your offices to provide workshops and seminars on various construction issues relevant to your business should you need it.

David Myers

Also in this issue

Introduction to the Construction Team

Left to right: Rebecca Latus, Jennifer Sewell, David Myers, Caroline Hardcastle and David Hextall

Jennifer Sewell
Jennifer is an Associate with over 8 years experience in our Dispute Resolution Department. She has particular experience in regulatory matters including issues relevant to the construction sector.

Rebecca Latus
Rebecca is an Associate within our Dispute Resolution Department and has extensive experience in dealing with building disputes and issues relating to defective works in both domestic and commercial properties.

David Myers
David is an Associate with over 7 years experience and is able to bring his knowledge of each phase of any new building project from planning to land acquisition to construction into any new matter.

David deals extensively with the preparation of all forms of construction documentation including detailed Building Contracts, Professional Team Appointments (using bespoke and industry standard forms), sub-contractor appointments, warranties, bonds and parent company guarantees.

Caroline Hardcastle
Caroline acts on behalf of clients in relation to a variety of commercial disputes, including breach of contract, negligence and warranty claims. Her work includes providing advice to clients in order to stave off proceedings, attending mediations and where required taking cases through to final hearing in the High Court and Court of Appeal.

Caroline has over 10 year's experience in the construction sector acting on behalf of employers, developers and contractors in adjudications and claims in the Technology and Construction Courts.

Beware: Is your decision final or not?

The decision earlier this year of *Aspect Contracts (Asbestos) Limited v. Higgins Construction Plc* acts as a reminder to all parties involved in adjudication that any decision is only binding until finally determined. As a result, successful parties may need to consider whether or not to have that decision finally determined by way of legal proceedings, arbitration or agreement.

In the case of Aspect, Higgins appointed Aspect to carry out an asbestos survey and report on blocks of maisonettes in Hounslow which Higgins was considering redeveloping. The survey was conducted in March 2004 and the report dated 27 April 2004. It turned out that during the development works in early 2005, Higgins allegedly found and had to remove asbestos containing materials which had not been identified by Aspect in the report.

As a result, Higgins referred the matter to adjudication claiming £822,482.00 plus interest on the basis that Aspect was in breach of contract and/or negligent in failing to exercise reasonable skill and care. The Adjudicator's decision dated 28 July 2009 found that Aspect had been in breach of such duties which had caused Higgins a loss but only to the sum of £490,627 plus interest and not the full £822,482.00 as claimed. Higgins did not commence proceedings to recover the balance of its claim or otherwise and the limitation period for Higgins to bring a claim expired.

In February 2012, Aspect commenced proceedings to recover the sum which it had paid pursuant to the adjudication decision. As part of the proceedings, Higgins sought to counterclaim for the sum of £331,855 being the balance of the claim which it had referred to adjudication together with interest.

The Supreme Court found that it was a necessary legal consequence of the Scheme for Construction Contracts which was implied into the parties contractual relationship that Aspect must have a directly and enforceable right to recover any overpayment to which the Adjudicators decision can be shown

David Hextall
David is a Partner specialising in all aspects of commercial property work, including leasehold and freehold, landlord and tenant, sales, purchases, secured lending, corporate support and development work.

His work includes acting for both private and corporate clients in the acquisition of sites, their construction and development and their subsequent disposal, whether by way of leasehold or freehold sales. David also has considerable experience in acting for lenders when they take security over properties and acts for numerous clients in the retail, office and building sectors on a day-to-day basis.

to of lead, once there has been a final determination of the dispute. As Aspect's cause of action arose from the payment, the cause of action could be brought anytime within 6 years from the date after the payment had been made.

Arguments put forward by Higgins that such a decision "gave Aspect a one way throw and undermined finality" were not accepted. Higgins had taken a decision not to commence legal proceedings within 6 years from the original cause of action and therefore itself took the risk of not confirming the adjudication award which it had received.

The decision of the Supreme Court answers an issue which has been debated for some time. It also makes clear that successful parties to adjudication cannot rest on their laurels. If they want to ensure finality, they should be prepared to have a decision finally determined by Court proceedings or Adjudication or seek the agreement of the other side that the decision of any Adjudicator is to be treated as final. Unless a party takes these steps, there will always be a risk of a claim being made against them without having an opportunity to bring their own counterclaim.

Caroline Hardcastle

Liquidated damages
the benefit of a missed penalty

Liquidated damages apply where the project or a section of the same has not yet completed by the specified completion date in the Building Contract (subject to agreed extensions). If this is the case then the liquidated damages will be payable as a debt or deducted from sums due.

Liquidated damages are provided for in most forms of Contract however a significant amount of thought needs to go into how they are calculated.

The risk is that the sum entered as being liquidated damages is in fact so excessive to be a penalty and cannot therefore be enforced. Case law has suggested the following test:

a. Is the sum entered into the Building Contract a genuine pre-estimate of the loss that will be incurred for late completion? It is not un-common for parties to state that this is the case in the Building Contract, although this will not necessarily be appropriate evidence of the same.

b. If it is not a genuine pre-estimate of loss, is the rate extravagant and unreasonable? For example, is the clause's primary function to act as a deterrent?

c. Even if the clause's purpose is to act as a deterrent, it may be enforceable if it is "commercially justified" (for example if it is part of a commercially negotiated agreement where the context justifies going beyond a genuine pre-estimate).

The key is to attempt to agree a genuine pre-estimate of loss as opposed to attempting to rely on the other aspects of the test. It would make sense to document how this sum has been calculated and allow reasonable comments from all parties to the Contract to be taken into account should the figures be challenged.

The calculation of liquidated damages is not necessarily only an issue for Employers under a Building Contract. It is not uncommon for Contractors to impose liquidated damages on sub-contractors and there can often be the temptation to simply impose the same level of liquidated damages on the sub-contractor as what has been imposed in the main contract. This in itself could fall foul of being considered a penalty dependent on the level of involvement in the project of the sub-contractor and the reasonable implications of a delay event caused by the Sub-Contractor. The Contractor must therefore be satisfied that he has complied with the test as noted above.

David Myers

End of the CDM transitional arrangements

On 6 April 2015 the Construction (Design and Management) Regulations 2015 came into force. The Regulations passed with relatively little fanfare, despite the legislation having significant implications for health and safety processes within the construction industry.

The new Regulations introduced a number of changes including:

1. the replacement of the role of CDM Co-ordinator with that of the Principal Designer;

2. further enhancing the role and responsibilities of the client; and

3. simplifying how parties assess competence, including organisational competence.

The new Regulations apply to all projects no matter when they commenced. However, perhaps recognising the impact these Regulations could have on on-going construction projects, transitional arrangements were put in place to allow existing projects to change to the new regulations over a period of time. These transitional arrangements dealt with projects that commenced prior to 6 April 2015. Importantly, these arrangements generally expired on 6 October 2015.

One of the main implications of the expiry of these transitional arrangements is the need to appoint the Principal Designer by 6 October. A failure to appoint a Principal Designer by this date can lead to those duties falling on the shoulders of the client (i.e. the employer), which one suspects is a role most clients would not want to take on.

It is equally important that the client and the Principal Designer is fully aware of their responsibilities under the new Regulations, especially in understanding what steps are necessary to ascertain whether the Principal Designer has the skills, knowledge and experience to carry out their role.

What has become apparent since the Regulations came into force in April is that those individuals and organisations who acted as the "CDM Co-ordinator" continue to play an important role. They may not have design capabilities in order to allow them to be designated as a Principal Designer, but equally, those consultants who do carry out design work may not have the health and safety experience to carry out the new role. We have therefore come across the new unofficial role of "CDM Adviser" where a designer brings in the specialist services offered by former CDM Co-ordinators in order to fulfil the requirements of a Principal Designer.

The same applies for clients who wish to ensure that they are complying with their duties under the new Regulations and accordingly appoint specialist advisers (e.g. former CDM Co-ordinators) to fulfil these requirements.

Ultimately, the new Regulations are intended to improve standards of health and safety especially in smaller sites which previously may not have been caught by the Regulations. Certainly for those projects that are on-going and commenced before 6 October, we would suggest some form of review of the CDM position to establish whether all aspects of the new Regulations are being complied with, particularly the appointment of the Principal Designer with existing Appointment documentation formerly updated where necessary.

David Myers

Information

If you have any queries on any issues raised in this newsletter, or any construction matters in general please contact David Myers on (01482) 337257 or email david.myers@rollits.com

This newsletter 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 newsletter useful.

If, however, you do not wish to receive further mailings from us, please write to Pat Coyle, Rollits, Wilberforce Court, High Street, Hull, HU1 1YJ.

The law is stated as at 26 October 2015.

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