Construction and Engineering

BPE Construction & Engineering Newsletter – April 2015

April is here and we all enjoyed a lovely sunny bank holiday (long may the warm weather continue!). In the Construction & Engineering team our clients have been keeping us very busy! Since we last wrote:

- We have been out and about meeting clients and hearing about exciting new opportunities.
- We are looking forward to seeing all of you that are attending our lunchtime seminar next week (17 April). Neil Mason and Kerrie Jones will be discussing public procurement and tenders. To find out more visit:
- Anna Wood from the team had a baby boy at the end of March - mother and baby are doing well.

Back in the office we've been dealing with:

- Investigating an allegation of diminution in value raised by a developer as justification for exercising set – off against sums due to a contractor
- Insolvency advice in the wake of GB Building Solutions Limited, and its parent company GB Group Holdings Limited, going into administration
- Dealing with a claim concerning breaches of the Party Wall Act etc. 1996, trespass and nuisance
- Reviewing a JCT Intermediate with Contractor's Design contract relating to fit out works in London office premises
- Continuing progress on contracts for three GP surgeries
- Success in having a judgment set aside when obtained against the wrong address EPC and renewable energy projects
- Public Procurement and tender advice

Legal training for non-lawyers

By Emilie Sclater

As lawyers working in the construction industry, my colleagues and I often advise on situations where the parties have become embroiled in expensive and time-consuming disputes, and have to fight over positions weakened or sometimes caused by avoidable errors. These errors come in many forms including non-compliance with condition precedents, failure to serve notices on time (or even serve them at all), failure to provide contractually required information (in notices or otherwise), missing or incomplete records to evidence causes of delay, etc.

Not only can such errors result in direct financial losses to your business, they can also result in damage to reputation, extensive management time being diverted from running the business, loss of opportunities for new work and large legal bills.

Why are simple mistakes made?

All too frequently these costly errors are the result of a lack of understanding of the contracts the parties have entered into or erroneous assumptions that all contracts are more or less the same and can be operated in the same way.

Staff working on projects have often had little or no training in relation to the commercial and contractual implications of their actions (or omissions) on the job. There is also a misguided view held by some in the construction industry that some parties are "too contractual" and that this is a 'bad thing'. However, as well as providing protection for the parties, the contractual mechanisms, when operated properly, can serve as an early warning of problems and result in early correction of those problems. This can be of benefit to all of the parties on the project and being "contractual" need not be antagonistic or result in tensions between the various parties to a project.

The question is, how does your business avoid costly mistakes and place itself in the best position possible? The answer is simple: targeted training for your staff. Some organisations will have the capability to carry out such training in-house, for example those with an in-house legal team. However, for those that do not, there are numerous organisations offering training on specific matters affecting the construction industry, including contract-specific sessions*. These can often be tailored to suit your business' needs and budget.

What benefits can training bring to your organisation?

Ensuring that your staff are trained to understand the contracts they are working under can bring a range of benefits:

- Staff can avoid inadvertently leaving your business open to obvious claims, for example in relation to non-compliance with contractual notice provisions;
- Increase productivity and reduce defects;
- Ensure compliance with statutory regulations (such as the CDM Regulations) and avoid costly fines or investigations (not to mention accidents);
- Develop good habits in your staff which will become second nature to them, particularly in relation to good record-keeping;

- Improve staff morale and motivation and reduce staff turnover;
- Find ways to improve the day-to-day running and operation of your business' contracts;
- Reduce management time spent supervising and dealing with problems and disputes;
- Win new business.

Ultimately, effective training could save your business money, increase profitability on projects and avoid the disruption and associated damage to reputation caused by disputes.

For businesses where continuing professional development (CPD) is a requirement, training courses can also fulfil those CPD needs.

Demonstrating to your customers that you can effectively and efficiently operate your contracts and that your staff are well-trained is likely to result in your business winning more work. Some customers demand evidence of staff training and increasingly, this extends beyond the remit of health and safety training.

Which staff should be trained?
This is a difficult question to answer. There is no easy formula which you can apply across the board.

For example, you might consider training to be appropriate only for relatively new or junior members of staff. However, such staff may have recently undergone significant training in obtaining qualifications. They are more likely to be lacking in areas which tend to be developed through practical experience. That does not necessarily mean that training cannot help them; practical experience of problems which tend to be encountered in real life and training specific to the needs of your business can still be of great benefit.

Experience is sometimes valued above all else in the construction industry – however, even experienced members of staff may be rusty in some areas. They may have missed developments and changes in the industry's contracts, mechanisms and relevant statutory regulations. More experienced staff also often have very ingrained habits – some of which will be bad ones. A training session could encourage such staff to "turn over a new leaf" and improve some of their day-to-day practices (particularly where record-keeping is concerned).

In light of the above, it is important to keep an open mind when considering which staff might benefit from some training and what form that training might take. A one-size-fits-all approach to all of your staff might be the most cost-effective solution in the short-term but may not be the most beneficial in the long-term.

What training would be beneficial to your staff and your organisation?
The key to implementing successful training is planning. Decisions on how to spend your training budget should not be treated like a "box-ticking" exercise. If your business is prepared to invest some time and money in training staff, it is important to ensure that that training is appropriate and likely to benefit the business. Some points to consider when creating a training programme (whether in-house or external) are:

- Budgetary constraints:

- Length of training (as this will result in staff time spent away from carrying out their normal roles)
- Location of training – can it be carried out at your offices or at a venue nearby?
- Cost of training, travel expenses, venue hire if necessary, etc.
- Which staff and how many staff need to be trained? Can they be trained together or would their needs differ and require separate sessions?

- Choosing appropriate topics:

- What types of contracts does your business tend to use? Are they bespoke or based upon a standard form?
- How large is your business and what is the typical value of your contracts?
- Does your business tend to work in specific sectors or is it involved in a wide variety of projects?
- What disputes has your business been involved in over the last three years?
- Have certain issues cropped up on multiple occasions?

- Does the training provide any sort of certification, CPD points, etc.?
- Flexibility:

- Could "off-the-peg" training cover your needs?
- Would it be beneficial to create a bespoke training programme?

- Format:

- Would webinars be suitable or would your staff benefit from face-to-face sessions?
- Do you require your staff to be assessed at the end of the training?
- What materials would you like provided as part of the training (e.g. pre-reading, notes of the session, handouts, etc.)?

Taking into consideration the above points should help you to decide exactly what kind of training would be most suitable for your staff and plan how, when and where that training should take place. Developing and implementing training is not a quick process and may even take several months However, done properly, it should prove to be a worthwhile investment for your business.

Armed with a well-informed work force, you should see real and measureable improvements in the outcomes of your projects and ultimately in your profit margins.

**BPE offers a broad range of standard and bespoke training modules which are available to book as individual modules, half-day or full-day sessions or bespoke programmes to suit your business. For further details email:constructionseminars@bpe.co.uk.*

You can contact Emilie Sclater on emilie.sclater@bpe.co.uk or 01242 248296.

Falling at the first hurdle when the going is otherwise good: Eurocom Ltd V Siemens plc [2014] EWHC 3710 (TCC)

By Jon Close

Having just weathered Cheltenham Race week (okay for some, I know, but you didn't see how much I lost…)I am reminded that you can get to the final hurdle in adjudication enforcement and then fall on the final approach to the finishing line. Sometimes, it's not your fault. Sometimes, it is – plain and simple. This is one of those occasions. The jockey messed up the approach – not just at the final fence but out of the starting gate.

If you're going to enforce an adjudicator's decision, you want to be pretty certain that the 'going is good' but also that you are as clean as a whistle procedurally. If you don't, then don't cry foul play if this trips you up and your otherwise enforceable decision is later called into question. *Eurocom v Siemens* is a salutary tale of woe where the party enforcing ended up footing the bill due to the conduct of its legal representative during the adjudicator appointment process.

You know the case; it's the one involving subcontracted communication installations at both Charing Cross and Embankment underground stations, resulting in delay and all other kinds of other nasties. The representative for Eurocom sought to restrict the list of possible adjudicators who could hear a second adjudication, making certain assertions as to various conflicts of interest along the way. For instance, anyone connected with Fenwick Elliott Solicitors had a raw deal but that's nothing compared to the ones who were named in person. It was off to the Knacker's Yard for them without reprieve.

According to the representative, these individuals suffered from 'apparent bias'. The problem was that he couldn't really substantiate his assertions as to the reasons why, despite providing two witness statements.

Now, we have all been in situations whereby we don't particularly like the style of certain adjudicators. They are, after all, human (well, the vast majority are) and some are more broad-brush than others in their approach. Decisions can be sometimes bizarre as a result. If you don't like the process, litigate instead.

The judge, Ramsey J, stayed enforcement of Eurocom's application for summary judgment of the adjudicators award partially on the basis that the representative's answers to whether certain adjudicators had a conflict of interest amounted to fraudulent misrepresentation. There was an implied duty for that representative to act honestly when filling out the RICS nomination form. The fact that the representative did not act honestly meant that the nomination, based upon such a misrepresentation, was invalid and a nullity.

What's to be made of all of this? Expect, as a matter of good practice, a discussion with your representative/lawyer as to why s/he declares that potential adjudicators have a conflict of interest. If you can't get a straight answer then re-consider. It's in your ultimate interests to be involved from the off – now is not the time to place an each way bet.

It's tempting, of course, to regard this decision as a natural check to the practice of adjudicator shopping. We may see more dates for serving the referral notice lapse as a result where a party is not happy with a choice of adjudicator.

The simplest way to avoid all of this, of course, is to agree the identity of the adjudicator when drafting the contract (form an orderly queue please…). Now, that would be a race worth seeing!

You can contact Jon on jon.close@bpe.co.uk or 01242 248278.

Don't waive your rights goodbye

By Neil Mason

Following on from my previous article on the importance of keeping records of pre-contractual negotiations, it is right to consider the legal doctrines which might allow you to rely on them, namely Waiver, Estoppel and their close ally, Acquiescence.

This month, waiver. This occurs when one party unequivocally grants a concession or forbearance to the other party by not insisting upon the precise mode of performance provided for in the contract. Waiver can occur before or after any breach of the term waived.

The essential requirements of waiver are: -

1. a clear unequivocal promise or representation which indicates that its maker will not insist on their strict legal rights. The waiver may be express or implied from conduct, although inactivity or silence will not normally suffice since the circumstances where that is likely to be judged to be unequivocal will be rare. So the grant of an indulgence in not enforcing contractual rights, or conducting negotiations about those rights, will not be enough;

2. reliance on the promise or representation, so that they influence the conduct of the party to whom it was made - an inducement is the key;

3. there would be an inequitable result if the maker were permitted to go back on the promise or representation, because the other party has acted in reliance on the promise or representation, and can no longer be restored to the position in which he was before he took such action. The reliance need not (as some have suggested) be detrimental – a change of position will be sufficient – but the consequences of the promisor's reversion to the strict contractual position must be detrimental.

Waiver only has a suspensory effect. This is because the parties have not agreed to vary their contract or backed that up with consideration (i.e. money, or money's worth), and a temporary waiver may be terminated by reasonable notice. However, in some circumstances, events may mean that the doctrine will extinguish contractual rights permanently because the original performance becomes impossible or inequitable.

Examples where a party has successfully contended that waiver applies include:

• A landlord gave notice to a tenant requiring him to carry out repairs pursuant to certain covenants, but the parties then began negotiating for the surrender of the lease. Those negotiations broke down, and the landlord immediately sought to forfeit the lease on the ground that the repairs had not been done. The landlord was prevented from exercising forfeiture on the grounds that he had led the tenant to believe that he would not insist on

the repairs being carried out during the negotiations, and the right to exercise forfeiture must be postponed for a reasonable time in order to allow the tenant to carry out the repairs (see *Hughes v Metropolitan Railway* (1877) 2 App Cas 439).

• A tenant under a building lease was obliged to build a property before the end of 1885, but the landlord agreed to suspend this requirement. During the period of the suspension, the land was compulsorily acquired by the London and North Western Railway (LNWR), and although the lease was still contractually binding it became impossible to perform the obligation to build and so the waiver became permanent (see *Birmingham & District Land Co v LNWR* (1888) 40 Ch D 268).

• *City Inn v Shepherd Construction Limited* may be a Scottish case but it concerned the construction of a hotel in Temple Way, Bristol, and the operation of provisions in . JCT Standard Form of Building Contract (Private Edition with Quantities) (1980 edition) concerning variations and extensions of time. City Inn had withheld £150,000 in liquidated and ascertained damages in respect of a five-week period on the basis of clause 13.8, a bespoke amendment which sought to ensure that, if an instruction or variation were issued, the question of delay and any financial consequences would be dealt with immediately, and operated as a condition precedent to obtaining an extension of time. Shepherd obtained part of the extension of time sought by its contention that City Inn had, by its conduct in considering Shepherd's application, waived the requirement of strict compliance with its own clause 13.8, and also successfully defended City Inn's appeal on that issue. *City Inn Ltd v Shepherd Construction Ltd* [2007] CSOH 190; [2008] B.L.R. 269; (2008) 24 Const. L.J. 590.

There are lessons here for everyone; in your dealings with those down the chain of operations (employers, main contractors), seek to protect your contractual position with 'non-waiver' clauses, which say that forbearance on your part will not amount to waiver of your legal rights, and keep any concessions made under review. For those looking up the chain of operations (main contractors, subcontractors) in difficult situations, resist such clauses where possible, and consider whether there has been a promise made or conduct which, coupled with a change of circumstance, means it may be unfair for your immediate employer to insist on strict compliance with your contractual obligations.

You can contact Neil on neil.mason@bpe.co.uk or 01242 248432.

The Public Contract Regulations 2015

By Kerrie Jones

Further to my previous article last month, I have provided you a further snapshot of some of further changes to the new Public Contracts Regulations 2015 that were not discussed last month, namely "MEAT" & Amendments to Contracts.
Regulation 67 states that at tender stage all documents must refer to contracts being awarded on the basis of "most economically advantageous tender"- this is commonly referred to as "MEAT". Pubic Authorities should no longer advertise that a bidder's success will be dependent on the lowest price, with no regard being paid to the quality of the tender submission. In reality, that is not to say that the lowest priced tender submission will not win, but the Public Authority will have to show some consideration with regard to the submissions overall merit. Overall Merit could include (but is not limited to):

- quality
- delivery (program, commencement date, completion date)
- pricing model
- technical ability of the bidder
- social or welfare considerations
- environmental impact
- innovative
- sustainability

The Regulations state that award criteria should reflect the subject matter of the contract inclusive of life-cycle costs. Life-cycle costs could take account service and maintenance costs as well as additional factors. There remains flexibility of how tenders can be priced depending of the type of contract and the requirements of the parties. Cost/payments models may take the form of fixed price/lump sum or an alternative model which may be subject to targets or a service level agreement. The cost/pricing requirements should be set out in the tender documents.
Regulation 72 provides guidance with regard to when a contract can be amended without having to go back out to tender. A contract can be amended without retender if it falls below the value threshold and/or the changes were previously 'clearly' disclosed in the tender documents, under the proviso that the changes do not alter the overall nature of the contract.

The contract can be amended if the amendment is not 'material' or 'substantial'. A very basic explanation of this could be:

a) A Contractor wins a tender to develop 5 residential flats
b) After contract award stage (or during the construction phase) the Employer/tendering party decided to amend the contract to also build another block of flats at the site in

addition to the original proposal
c) This will be considered a 'material' change and would be required to go back out to tender
The Pressetext judgment is a well-known ruling offering guidelines of interpretation with respect to contract amendments. In this case, the ECJ established circumstances in which an amendment to a contract may be regarded as the award of a new contract. The ECJ steered their conclusions based on whether or not the test for 'materiality' had been satisfied.

I hope that you found the above of interest, this is only intended to provide an introductory overview of the topics and I would be happy to discuss the above or any of your public procurement or tendering queries with you in more detail. Contact me atkerrie.jones@bpe.co.uk

You can contact Kerrie kerrie.jones@bpe.co.uk or 01242 248297.

Cutting through the legalise: Changes to the Construction Industry Scheme

By Katie Pickering

Under the Construction Industry Scheme (CIS), contractors deduct money from a subcontractor's payments and pass it to HM Revenue and Customs (HMRC).

The deductions count as advance payments towards the subcontractor's tax and National Insurance.
Contractors must register for the scheme.

Subcontractors don't have to register, but deductions are taken from their payments at a higher rate if they're not registered.

The government has made changes to the Construction Industry Scheme ("CIS") which came into force on 6 April 2015. The purpose of the changes is to reduce the administrative and related cost burden on construction businesses.

The changes should result in improving cash flow for subcontracting businesses because they will be able to maintain gross payment statuses.

From the 6th April, the following amendments will be made to the system:

- The contractor will not be obligated to make a payment to HMRC if they have not made any payments to sub-contractors in a tax month.
- Earlier repayments can be made to liquidators in insolvency proceedings.
- The requirements for joint ventures to gain gross payment status will be relaxed where one member already has this status and that firm or company has a right to at least 50% of the assets or the income or holds at least 50% of the shares or the voting power in the joint venture.
- Proposed changes as of 6 April 2016:
- The turnover threshold test will be reduced to £100,000 in multiple directorship situations.
- The directors' self-assessment filing requirements will be removed from the initial and annual compliance tests.
- A mandatory online filing of CIS returns will be introduced with the offer of alternative filing arrangements for those unable to access an online channel by reason of age, disability, remote location or religious objection.

These notes have been prepared for the purpose of an article only. They should not be regarded as a substitute for taking legal advice. "Cutting through the legalese" in particular is intended to be a short and introductory feature which does not provide comprehensive guidance on the topic in question. Legal advice should always be sought.

You can contact Katie on katie.pickering@bpe.co.uk or 01242 248271.

Guest Article: Split Solar PV Schemes where there's a community interest

By Dale Williams, Partner, BPE

Alongside the changes to the FiT Order that came into force on 1 April 2015 Ofgem and DECC have released updated guidance enabling schemes to be split into two FiT projects with one grid connection where a community ownership scheme is involved.

Ofgem has issued Feed-in Tariff (FIT): Guidance for Renewable Installations (Version 8) which repeats the four criteria for defining a 'site' for the purposes of gaining FiT accreditation. This new Version 8 makes a significant change in relation to the MPAN rule, which means two installations can share a grid connection when at least one of them is owned, or is to be owned, by a "community organisation".

DECC has released guidance on '"community ownership models" under the FiT which sets out under which community ownership model projects will be able to access the community FiT provisions.
(see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/417731/Guidance_on_community_ownership_models_under_the_FITs_scheme.pdf for full guidance).

There is now potential for schemes for over 5MW which did not succeed in the CfD auction to split and utilise the remaining capacity over 5MW in conjunction with a community ownership scheme. However, the approach of the DNO at present remains unclear. Will they be willing to deal with two entities or prefer one entity up to the MPAN meter (any split connection past this point being a private arrangement)?

These notes have been prepared for the purpose of an article only. They should not be regarded as a substitute for taking legal advice.

You can contact Dale on dale.williams@bpe.co.uk or 01242 248234

My Perfect Sunday: Phil Cavanagh from HMG

I've been involved with the engineering sector since:
In truth since around 1982 when the ZX Specturm was launched (and I was 13), professionally it's been my living since I graduated back in 1991.

The best thing about my job:
An even split between the amazing people I get to work with and exposure to the latest technologies from around the world.

The worst thing about my job:
Paperwork :-)

The first album I ever bought:
Iron Maiden (Iron Maiden) 1980

My favourite holiday:
Always the next one I'm about to go on, currently looking forward to cycling around Iceland this summer (then diving in the Canaries)

My favourite bar/restaurant in Gloucestershire:
The Clothiers Arms in Stroud, one of the first pubs I went into around Gloucestershire over 20 years ago. Great beer, food and people.

Make mine a (e.g., pint of real ale/G&T):
When in Rome, so it would be a pint of Organic from Stroud Brewery first off (I'm also into my American IPA's at the moment), after that a good single malt from the western isles.

My perfect Sunday would be:
Up early for an Old Spot sausage sandwich then onto the Stroud and District Clay Club for a 100 bird straight. Pick up the family on the way to the pub for lunch and a couple of pints. Gym in the afternoon, nothing too strenuous for a Sunday: light cardio then yoga followed by a long steam and soak in the spa. Home again for tea with family and friends, late evening outside, whiskey, cigar.... bed.