Construction and Engineering

BPE Construction & Engineering Newsletter – May 2015

May has arrived bringing us not one, but two bank holidays to enjoy! As the country celebrated the birth of the royal baby at BPE we have had our own reasons for celebrating. On 30 April 2015 BPE celebrated its 10th anniversary- let this be the first decade of many! In the Construction & Engineering team our clients have been keeping us very busy! Since we last wrote:

- We held our lunchtime seminar where we discussed public procurement and tenders-thanks to all of you that attended
- We have been meeting with clients and discussing the types of legal training required for their individual business needs. Clients have been showing a keen interest in equipping their workforces with a bit of legal training on their contracts and disputes - we have been receiving lots of enquiries in relation to our external training modules along with one or two instructions to provide bespoke training. We offer 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 and a brochure, please email: constructionseminars@bpe.co.uk.

Back in the office we've been dealing with:

- New instructions to draft some standard terms for a client
- New instructions to draft a framework agreement for highway excavation works
- Agreed a drop-hands settlement for a client over some unpaid fees being claimed by the other side
- Providing advice on a high risk tender contract

- Providing advice on Pay Less Notices and withholding payments.
- Providing pre-adjudication guidance
- instructions to advise on appointment and warranty documents being entered into after the design work which they relate to has been done
- advised on a dispute relating to rotting timbers in a structure built several years ago
- New instruction concerning the supply of slates which were the wrong size and/or defective, resulting in our client sustaining a liability for delay and own costs of prolongation

- Advising on the consequences of termination of contracts, one involving a repudiatory breach resulting in recoverable losses, the other arising on insolvency which meant the client needed advice on the terms of transfer of the work to a new contractor

- Advising a Project Manager following termination of his appointment without notice.

Is your adjudicator's decision permanently binding?

By Emilie Sclater

Normally, the answer would be no. Adjudication has become a common-place part of the construction industry allowing parties to quickly obtain "interim-binding" decisions over any disputes which they may become involved in. As most parties to construction contracts are aware, the Construction Act and the Scheme for Construction Contracts provides for these decisions to be binding pending any final determination by legal proceedings, arbitration (where provided for by the contract or by agreement) or by agreement between the parties. This provision is rarely amended in construction contracts.

A recent case has however highlighted the possibility of making adjudication decisions permanently binding. This case concerns a residential occupier and therefore the contract was not a construction contract for the purposes of the Construction Act, however the principles are equally applicable to construction contracts.

In *Khurana and another v Weber Construction Ltd* [2015] EWHC 758 (TCC), the parties had not included any adjudication provisions in their contract (and these were of course not implied given that it was not a construction contract). However, when a dispute arose, they agreed to refer the dispute to adjudication adopting the provisions of the Scheme, save that the decision was to be "binding on the parties". Following the adjudicator's decision, the Khuranas (the residential occupiers) sought to litigate, however the TCC judge decided that the parties had legitimately agreed that the adjudicator's decision should be binding and therefore the Khuranas could not litigate.

It is worth being aware of any bespoke dispute resolution provisions in your contracts which might alter the standard position under the Scheme. It may also be worth (for some, particularly lower value, projects) amending the Scheme provisions in your own contracts if you consider that it would be advantageous to limit dispute resolution to adjudication. This could produce a significant saving in costs if litigation would otherwise have been pursued, although it goes without saying that adjudications can sometimes produce bizarre results and you would be stuck with these. Of course, that may not matter where the value of a dispute is too low to ever justify litigating. *For further details email: constructionseminars@bpe.co.uk*.

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Pay Less Notices & Withholding Payments

By Neil Mason

It is worth remembering that when the Housing Grants Construction and Regeneration Act 1996 was amended, there was more than just a change in terminology from Withholding Notices to Pay Less Notices.

Section 111 (as amended) provides:

'(3) The payer or a specified person may in accordance with this section give to the payee a notice of the payer's intention to pay less than the notified sum.

.

(4) A notice under subsection (3) must specify—

.

(a) the sum that the payer considers to be due on the date the notice is served, and

(b) the basis on which that sum is calculated.

It is immaterial for the purposes of this subsection that the sum referred to in paragraph (a) or (b) may be zero.'

Prior to the 2009 Act amendments, the forerunner was more complex:

'(1) A party to a construction contract may not withhold payment…unless he has given effective notice of intention to withhold payment…

(2) To be effective such a notice must specify—

(a) the amount proposed to be withheld and the ground for withholding payment, or

(b) If there is more than one ground, each ground and the amount attributable to it, and must be given not later than the prescribed period before the final date for payment.'

The requirements for Withholding notices led to much angst over what 'effective' meant, and the requirements for Pay Less notices are arguably simpler. Now, the payer needs to set out '*the basis on which that sum is calculated',* rather than containing every ground and making attribution of figures to them. There is no case law on the content of Pay Less notices yet, and not that much on the detail of Withholding notices either. However, what case law that does exist concerning Withholding notices suggests that judges were not keen to construe section 111(2) as rigorously as they might.

In *Thomas Vale Construction Plc v Brookside Syston Ltd* [2006] EWHC 3637 (TCC), in which Thomas Vale sought to challenge an adjudicator's decision and with it the content of withholding notices served by Brookside to resist payment of £57,425, HHJ Kirkham's judgment set out the content of the notice:

"The Employer is entitled to withhold a sum for the cost of making good the outstanding defects and completing incomplete work (pursuant to the contract or its common law rights). The Employer relies on the independent report of Jonathan White, a quantity surveyor, which demonstrates that the cost of making good/remedying outstanding defects and completing incomplete work will exceed the amount of the Interim Certificate."

However, Brookside's quantity surveyor had identified £168,144 as the cost of remedying defects and completing work, and his report had been disclosed, so the work and its cost were clear. Helpfully, HHJ Kirkham said:

"It does not seem to me to be appropriate to construe the withholding notice as nicely as TVC seek to do. In my judgment it would be inappropriate to apply fine textual analysis to a notice which is intended to communicate to the other party why a payment is not to be made. It is clear that BSL withhold payment because (as TVC do not challenge) TVC have not completed work or remedied defects."

In *Aedas Architects Ltd v Skanska Construction UK Ltd* [2008] CSOH 64 the Court of Session Outer House in Scotland held that Withholding notices would be 'effective' even where they attributed the whole figure to be withheld to all of the grounds relied on, i.e. the deduction of a global figure against all of the grounds complied with the requirement for attribution.

In *Letchworth Roofing Company v Sterling Building Company* [2009] EWHC 1119 (TCC), Sterling resisted enforcement on natural justice grounds, because the adjudicator displayed scant regard to Sterling's defence. He did so because he decided Sterling's withholding notice was invalid. Coulson J summarised the adjudicator's findings on the withholding notice thus: *"… it did not state the amount to be withheld; it did not give grounds for the withholding; and it was outside the prescribed timeframe."* Coulson J agreed with the adjudicator's assessment of the withholding notice and upheld his decision.

In *Leander Construction Limited v Mulalley and Company Limited* [2011] EWHC 3449, '*fine textual analysis'* was also resisted and Coulson J (again) said *"….the court will take a practical view of the contents of a withholding notice and will not allow complaints as to form which might be described as artificial or contrived."*

There is a beauty in the simplicity of the three criteria in *Letchworth* and, given the TCC judges' statements on what constituted a sufficient Withholding notice, it is logical to suggest these inspired the simpler formula for Pay Less notices provided for in the amendments. The simplicity of the Pay Less notice means it is easier to raise defences and exercise rights of set-off in such a way that they can be deployed in adjudication.

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Variations to Public Contracts

By Kerrie Jones

In my last article I touched on variations to public procurement contracts, this month I have looked at this area in more detail.

Public Contracts Regulations ('PCR') 2015.72 provides guidance with regard to when a contract can be varied without having to go back out to tender. A contract can be varied 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.

If a contract fails to sufficiently provide for change there is a risk that any changes could result in a new contract being formed and should therefore be retendered. Failure of a Public Authority to retender could put the Public Authority at risk of being accused of breaching European procurement law resulting in the contract being ineffective.

The contract can be varied if the variation is not 'material' or 'substantial'. The *Pressetext*[1] judgment, a well-known ruling, offers guidelines on 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 reached their conclusions based on whether or not the test for materiality had been satisfied. An amendment can be considered as material when it:

- Introduces conditions that had they been included in the initial award procedure would have allowed for the:

a) Admission of tenders other than those initially admitted; or
b) Acceptance of a tender other than the one initially accepted

- Extends the scope of the contract, changing the specification to include new addition to the scope on the initial contract.

[1] *Pressetext* v Repulik Osterreich (Bund) and others [2008] EUECJ C-454/06

- Changes the economic balance in favour of a service provider that was not included in the initial contract.

A development agreement was considered to be materially different as it had been altered in such a way that it became a sufficiently more attractive opportunity to a bidder. In this case the Public Authority were found to be in breach of the public procurement rule as the contract had not gone back out to tender[2]. *In Indigo Services (UK) Ltd*[3] it was held that an extension to the contract period could constitute a 'considerable' extension by applying the *Pressetext* test. A change of subcontractor constituted a material change in the case of *Wall*[4] when the court applied a 'realistic hypothetical bidder' test when considering whether a bidder that intended to bid would have been able to had the opportunity been available.

The recent judgement in *Edenred*[5] demonstrates the importance of including provisions for vary the scope of the contract within the tender documents. This case involved the Government's new tax free childcare for working parents. HMRC and NSI[6] varied the contract to include extra services that were required. Edenred claimed that this variation was unlawful as this constituted a direct award on the following bases:

a) the conclusion of the public contract under the Regulations without a proper tendering process; and
b) a material variation without tender procedure.

It was held by the court that in this case a memorandum of understanding had been agreed between the parties for an internal working relationship and therefore this did not constitute a contract. There was no contract to be tendered, and as the additional services were the same as the services advertised in the tender, this was not a material change. The Judge in this case also applied the 'realistic hypothetical' bidder test and it was concluded that it was unlikely that other bidders who could have bid but did not, would now be interested. Finally it was concluded that no other party suffered any detriment.

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[2] *Gottlieb, R (On the Application Of)* v *Winchester City Council* [2015] EWHC 231
[3] *Indigo Services (UK) Ltd* v *Colchester Institute Corporation* [2010] EWHC 3237
[4] *Wall AG* v *Stadt Frankfurt am Main* [2010] EUECJ C91/98.
[5] *Edenred (UK Group) Ltd* v *Her Majesty's Treasury*, HMRC & NSI [2014] EWHC3555
[6] National Savings and Investments

Cutting through the legalise: Top 10 things you should know about the new CDM Regulations 2015

By Katie Pickering

CDM 2015 Regulations are live, they have been passed through Parliament and came into force on 06 April 2015 with a six month transition prior for projects started before then

1. **Where can I find the regulations:**

   See the regulations here:
   http://www.legislation.gov.uk/uksi/2015/51/made/data.pdf

   The JCT have also issued updates and are working on 2015 contracts, these can be found here: http://www.jctltd.co.uk/cdm-amendment-sheets.aspx.

2. **Has the role of CDM co-ordinator changed?**

   This role disappears. The Health and Safety Executive introduced a new role of the Principal Designer. The Principal Designer will have responsibility for the health and safety aspects of the pre-construction phase of the project, passing it on to the Principal Contractor during the construction phrase.

3. **Who can be Principal Designer?**

   "designer" means "...any person (including a client, contractor or other person referred to in these Regulations) who in the course or furtherance of a business...prepares or modifies a design; or...arranges for, or instructs, any person under their control to do so, relating to a structure, or to a product or mechanical or electrical system intended for a particular structure, and a person is deemed to prepare a design where a design is prepared by a person under their control;" and

   "design" includes "...drawings, design details, specifications and bills of quantities (including specification of articles or substances) relating to a structure, and calculations prepared for the purpose of a design.

4. **Does the test of competence stay the same?**

   No, the designer or contractor must have the "skills, knowledge and experience" and if an organisation, the "organisational capability", necessary to fulfil their appointed role.

5. **How has notification changed?**

   Under the proposed changes a project will be notifiable if construction work lasts longer than 30 working days AND has more than 20 workers working simultaneously at any point in the project or exceeds 500 person days.

6. **Is a construction phase plan still required?**

   Yes, but only on those that are notifiable.

7. **What is the transitional period?**

   This is 6 months and can be found in schedule 4 of the Regulations.

8. **What are the changes to the client duties?**

   The clients responsibilities have increased, they must:

   - *make, maintain and review "suitable arrangements" for managing the project;*
   - *provide pre-construction information to designers and contractors;*
   - *ensure that a construction phase plan is drawn up by the contractor or principal contractor, as appropriate, before the construction phase begins;*
   - *ensure that the principal designer prepares, updates and keeps available for inspection, a compliant project health and safety file;*
   - *take reasonable steps to ensure that the principal designer and principal contractor comply with their other duties;*
   - *give written notice of the project, where appropriate.*

9. **What has happened to the ACOP?**

   The Approved Code of Practice (ACOP) has been removed and new guidance has been issued and can be found here - http: // www.hse.gov.uk /pubns /priced/ l153 .pdf.

10. **What are the industry guides?**

    The CITB has issued 6 documents (one for each duty holder plus one for additional workers) setting out actions required to prevent injury and ill health, these can be found here - https://www.citb.co.uk/health-safety-and-other-topics/health-safety/construction-design-and-management-regulations/cdm-guidance-documents/

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My Perfect Sunday:

This month we spoke to Dave Brennan, Chartered Construction Manager at Building Solutions Ltd

I've been involved with the construction/engineering sector since: Well – all my life really. My Dad was a brickie and he had a company called Brennan Brothers which built several churches, factories, shops etc locally. I spent my school holidays and weekends on site driving machines and generally having a great time. I could never imagine doing anything else. I left school at sixteen and started working for Preece Payne Partnership as a trainee Surveyor for the princely sum of £3.50 per week. I then worked as a Building Surveyor for Gloucestershire County Council before I started working for myself at the age of 23. Building Solutions Ltd has been trading for over 40 years now. My son is a Chartered Surveyor so it must be in the blood.

The best thing about my job: The construction industry is a great industry to be in – it's full of interesting people, every job is a different challenge and if you're good at what you do, you can do well. Personally, I've had great satisfaction in nurturing talent in members of my team and seeing them progress through the ranks. My current MD started with us as a surveyor, as did the MD before him. I'm non-exec now – that's one of the best things too!

The worst thing about my job: I could have a whinge about the industry under-selling itself and undertaking huge risks for ridiculously tight margins but nobody would listen.

The first album I ever bought: Otis Blue by Otis Redding in 1966. Still good.

My favourite holiday: South America - Argentina, Uruguay, Chile, Peru, Ecuador – really interesting cultures, people, flora and fauna. Fabulous landscapes. Every conceivable climate. Great wine.

My favourite bar/restaurant in Gloucestershire: My local, the Glass House, May Hill.

Make mine a (e.g., pint of real ale/G&T): A well-kept pint of Doom Bar.

My perfect Sunday would be: My normal Sundays are perfect enough for me. I fetch the papers for some neighbours so an early(ish) start, followed by an hour or so reading about what's going on in the outside world, coffee in hand and with my Sunday playlist in the background. A walk on May Hill followed by a leisurely lunch (Carole cooks the best roast in the world) with a couple of bottles of good wine and the family around the table. I suppose it would make it perfect if I could watch Gloucester beat Bath!