Construction and Engineering

Newsletter – April 2014

March was another busy month for the team and in between dealing with plenty of projects and disputes, we enjoyed getting out and about to:

- See Fiddler on the Roof at the Everyman (sponsored by BPE)
- Catch up with Nick Bevan and the new additions to his team
- Enjoy a few days up at the racecourse (no big winners!)
- (Jon) start training for a 900 mile charity cycle ride across Europe in aid of The Footprints Foundation. For more information, visit the team's JustGiving Page

Back in the office we've been kept on our toes considering issues such as:

- Is my client really obliged to claim under insurance before pursuing a negligent contractor?
- What, if any, amendments are necessary to make the JCT Repair & Maintenance Contract 2011 work well for our employer client?
- Is "drop hands" the best outcome for our client's dispute?
- Exactly how many times do you have to write to the Court before they will issue papers you have sent to them?
- How can we re-organise/re-draft a client's business-to-consumer Terms & Conditions so that they protect our client well, without falling foul of UCTA?
- Is now the right time for our client to terminate their contract?
- How do you deal with litigation when the two co-defendants simply blame each other?

Finally, the highlight of March for us, was the launch of BPE's new website. The address is the same, but the contents, look and feel are very different. Please have a look at www.bpe.co.uk and let us know your thoughts. We are really interested in your feedback.

So… onto business...

Amending a standard form contract beyond all recognition: a cautionary tale.

By Jon Close

There's nothing like a standard form contract to give people a false sense of security. Give it to certain lawyers and they'll fight their way out of a paper bag negotiating amendments about a “reasonable” here or a “condition precedent” there. Next thing you know, you'll be wishing you'd started with some heads of terms, a blanket canvass and an ink pot (or a blank iPad screen).

What is it about a standard form that sends everyone into a gnashing frenzy to change it beyond all recognition? Invariably, it comes down to habit, ignorance, laziness, amnesia or all four – like PTSD, the recession has had undesired consequences on the nervous system of some.
He or she who holds the purse-strings gets their way (well, almost). Don’t I make my money from encouraging this sort of behaviour though, I hear you cry? Well, not really, no. I’d much rather get the deal across the line with sensible behaviour and move on to the next project.

Amendments should be well thought out and strictly necessary to reflect the deal that the parties intended in absolute clarity. Then put your red pen (or quill and inkpot) or iPad away and leave the bloody contract alone (apart from operating the mechanisms within it to ensure a smooth project). Otherwise, you may end up with 40 pages of expensive amendments, which do nothing to assist either party or anyone really understands once the dust has settled on negotiations.

The key thing to remember is that there is a reason that our industry has come up with a range of “standard” contracts. It’s not *just* to make a lot of money in publishing fees. Actually, the variety exists to reflect the variety of project types on the ground, and the variety of appropriate risk profiles, as matched to those project types. Trying to amend one standard contract to the point that it looks more like another is not just inefficient, it is dangerous. There is a place for drawing *some* concepts from one suite to another, but only with intelligent consideration of all the consequences.

No wonder many parties simply ignore contracts - badly drafted ones aren't worth the paper they are written on. Great ones however empower the parties in equal measure (yes, subject to a bit of give and take) and give them comfort. That folks is what we are supposed to be doing. Some people seem to have forgotten that purpose; clients, funders and lawyers alike.

Casting your net (contribution clause) wide

By Anna Wood

The Wests engaged Mr Finlay to provide architect services in relation to the refurbishment of their home, working alongside a main contractor and a specialist contractor. Following the works, the main contractor went bust and then defects arose in the works so the Wests sued Mr Finlay ("IFA"). IFA argued that the main contractor was also to blame and relied on a net contribution clause (NCC) in his own appointment, which said:

"Our liability for loss or damage will be limited to the amount that is reasonable for us to pay in relation to the contractual responsibilities of other consultants, contractors and specialists appointed by you."

In April 2013, the TCC found that the reference to "other… contractors" was to the specialist contractor and not to the main contract, since the architect had known that there was going to be a specialist contractor. The Wests were awarded £649,251.06 plus interest totalling £243,688.89. This was, therefore, a dark day for architects (and other professionals). Articles written following the TCC's decision therefore advised professionals to widen the drafting of their NCCs and make sure that all relevant parties are listed.

The Court of Appeal ("CA") on 27 March 2014 reversed this decision. They said that the TCC had considered the interpretation of the NCC when such exercise was unnecessary since "*the normal meaning of the words is crystal clear…. And they must be taken to mean any such persons, including any main contractor ultimately appointed, but of course excepting IFA itself (because of the use of the word "other")*". The CA dismissed any suggestion that the parties had accidentally used the wrong language to express their agreement and also ruled that the NCC was not in breach of the Unfair Contract Terms Act (1977) or the related UTCC Regulations. The main reasons for the CA's decision were that:

1. *"The Wests' appointment of others and the fact of those others' insolvency caused the detriment, and both were outside IFA's control;*
2. *It is fair and reasonable that the Wests should assume that risk of a third party insolvency….;*
3. *The Wests were sophisticated and intelligent, whilst IFA was a one man band of modest means….; and*
4. *NCCs are common in both commercial and consumer contracts… and are not so onerous or unusual as to need to be brought specifically to the Wests' attention"*

The CA emphasised the point further saying:

"A provision rendering IFA liable (as between itself and the Wests' own chosen contractors) only for losses which it can reasonably be held responsible, and which

requires the Wests to take the insolvency risk of those chosen contractors would seem to be reasonable, and indeed to be expected."

It is therefore fairly safe to assume (pending any appeal to the Supreme Court), that if your professional appointment includes a NCC with wording similar to that in IFA's appointment, you will be able to rely on it. However, we would recommend a "belt and braces" approach of ensuring that any list is sufficiently complete and also that you (as the professional) draw this clause to the attention of your consumer clients in the covering letter sending your appointment to them for signature.

Post script

We do not yet know how this Judgement will affect the level of damages awarded to the Wests as that has been referred back to the TCC for the trial judge to reconsider.

Post Post script

It is also worth mentioning two other points which arose in West: interest and damages for distress and inconvenience:

1. Interest: the Wests were originally awarded 7% p.a. above base on their actual expenditure in remedying the defects. The CA decided that the TCC had erred in considering the Wests' actual method of financing the remedial works and should have considered "an appropriate borrowing rate for persons in the Wests' position". The CA concluded that this was 4.5%p.a. above base.
2. Distress and inconvenience: the Wests (and their infant son) were awarded £14,000 for distress and inconvenience. The CA found that the Judge had erred in awarded damaged "above the well-accepted maximum mentioned in the AXA Insurance case." The CA reduced the damages to £6,000.

Adjudication update: jurisdiction

By Steven Oakes

Adjudication is available as a dispute resolution process for any dispute 'arising under' a construction contract. As some of you will be aware, whether a dispute arises 'under' or 'in connection with' a contract is a matter which was put to rest way back in 2007 in "The Fiona". The case decided by the House of Lords (now the Supreme Court) meant that an arbitration clause would mean that a dispute could be referred to arbitration regardless of whether the dispute arose pursuant to the contract or in connection with the contract. Given this decision, the matter is therefore closed and this article is now finished.

However earlier this year a matter fell to be decided by the Technology and Construction court in the case of Hillcrest Homes Ltd v Beresford and Curbishley Ltd [2014] EWHC 280 (TCC) – an adjudication enforcement case. The Claimant asked the court to decide that the decision of an adjudicator was unenforceable for want of jurisdiction. The dispute arose from alleged misrepresentation during negotiating the contract. This of course means that the dispute was 'in connection with' rather than 'arising under' the contract (as the misrepresentation had arisen prior to the contract being signed). However, rather than following 'The Fiona' the court held that the adjudication provisions contained within the JCT contract were not wide enough to include for the referral of disputes arising 'in connection' with the contract. This decision was reached based upon the wording of the JCT adjudication provisions when compared to the arbitration provisions.

In relation to adjudication, the JCT provides that disputes 'arising under the contract' may be referred to adjudication whereas in relation to arbitration the clause provides 'any dispute or difference.. of any kind whatsoever' may be referred to Arbitration. The court felt that the difference in wording was intentional and as such a claim for misrepresentation could not be referred to adjudication.

There are a number of disputes which may arise in connection with any contract, not least those which concern the formation of the contract itself. However, what is of most interest is that this wording in the JCT is verbatim to that set out at s108 of the Housing Grants, Construction and Regeneration Act 1996 (as amended) ("HGCRA"). The importance is that the Local Democracy, Economic Development and Construction Act 2009 repealed s107 HGCRA which means that now construction contracts do not need to be evidenced in writing. Contracts may now be oral, fully expressed in writing or a combination of both. This means that there are likely to be more disputes over what the terms of the contract actually are, but if you cannot refer a dispute to adjudication which arises 'in connection with' the contract, how can the adjudicator have jurisdiction when it's the actual agreed terms which are disputed?

I think we might have just opened the door to another jurisdictional challenge. Only time will tell.

Early Disclosure

By Katie Pickering

"Disclosure" refers to a stage in litigation when each party is required to disclose the documents that are relevant to the issues in dispute. Each party is required to disclose any document they have in their possession, even if it has an adverse effect on their case. Disclosure is normally ordered at the first Case Management Conference ("CMC").

The parties may exchange documents at an early stage, whether informally, under the pre-action protocol or under the Practice Direction – Pre-Action Conduct. This gives the benefit of each party to put their cards on the table at an early stage.

Pre-action protocols are intended to encourage the exchange of early information. Also, Civil Procedure Rule 31.16 enables an applicant to apply for forced disclosure even before a claim has been issued.

There are many benefits to both parties for early disclosure, this includes allowing both sides to see the strengths and weaknesses of the other side's claim and this will encourage offers of settlement rather than a lengthy and costly court case.

The overriding objective of the Civil Procedure Rules is to enable the court to deal with cases justly and at proportionate cost. Early disclosure can help with this because it will help the parties see the merits of the claim and in some cases looking at the other side's case, they may decide it will be too costly and disproportionate to take this matter all the way through the court proceedings and so try a form of Alternative Dispute Resolution.

Many potential clients do not like to disclose all of their documents to their solicitor in the first instance in fear it may rack up costs before the claim has even started. However, doing so is greatly advised as it will help your solicitor understand all of the facts of the claim and enable them to give you clear and concise advice which in the long run will save both time and money.

Cutting through the legalese: "time at large"

By Anna Wood

I took the opportunity to ask our Twitter followers to put in requests for any "legalese" that they would like me to translate for them. The first suggestion was "time at large". I was challenged to explain it in one Tweet (140 characters). I have, instead, managed to explain it clearly (I hope) in 210 words as follows:

"Time at large" is only relevant if a delay event occurs which isn't specifically covered in your construction contract. This happens more often than you might think as many contractors' standard T&Cs either fail to deal with delay at all, or deal with very specific causes of delay but fail to include a "catch all provision".

Under a contract defective in that way, if a delay event occurs for which the contractor isn't liable, the completion date in the contract falls away. If the contractor isn't liable for the delay, the employer cannot require him to complete the works by the contractual completion date, and so time is "at large."

From this point, the contactor does not have "as long as they want" to complete the works; they must complete them within a reasonable time, which will be decided on a case by case basis taking into account all the relevant circumstances.

It is therefore important to remember that, in the event of a delay event not covered by your contract, the contractor's obligation is only to complete within a "reasonable" time. The ideal approach would be for the parties to agree a revised completion date as soon as possible and treat this as an amendment to the original contract.

Anna Wood assisted by Ben Blackman

My Perfect Sunday: Jeremy Uzzell, Cass Stephens Insurance Brokers

By Anna Wood

Jeremy Uzzell joined Cass-Stephens in July 2012 after 18 years working in the insurance industry having worked for several regional brokers specialising in a range of Construction, Manufacturing and Transportation Insurance clients. Jeremy values the local professional community and the networking opportunities that go with this.

I've worked in/with the construction sector since: 2005 – a progression from my original specialism in Transport & Logistics Insurance

The best thing about my job is: The people. A bit of a cliché but it's true! The people are fantastic (most of the time) and making sure they are protected, as well as their businesses, is my main motivating factor.

The worst thing about my job is: Some of the politics & procedures within certain insurance companies are, frankly, ridiculous and that can really cause issues for both me as a broker and my clients.

The first album I ever bought was: I think it was Bad by Michael Jackson. I have moved on since then!

My favourite holiday was to: I loved my time in New Zealand, but for fear of offending my wife I'd have to say our honeymoon in Bali. There's something pretty special about the place and the people.

My favourite bar/restaurant in Gloucestershire is: For a great meal and good fun I'd have to say the Daffodil. For a couple of pints it's got to be the Jolly Brewmaster – a proper pub!

Make mine a: Pint of Peroni please!

In 2014....the last year has been great in both work and family life……so more of the same would be gratefully received!

My perfect Sunday would be: Being awoken a little later than usual by the kids, followed by circuit training, then a decent lunch with friends and family and some good wine. Oh and if Gloucester or Newcastle United are playing a win would be nice!

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

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