Construction and Engineering

CONSTRUCTION AND ENGINEERING NEWSLETTER – MAY 2014

BPE Construction & Engineering Team's News – May 2014

April was a funny old month with a welcome break in the middle for Easter. Inbetween mouthfuls of chocolate eggs (maybe that was just Anna who always loves chocolate and Katie who had given it up for Lent!) we were out and about as usual:

- Katie and Anna had some excellent technical training on engineering issues from Capita
- Jon and Anna met with Debra Drew of Fabric Architecture to film a case study video for our website (keep checking back to see when it's uploaded)
- Jon attended the Gloucestershire Energy Event at Gloucestershire College
- Anna went to the Cotswold Life spring drinks at Crazy Eights and had a good catch up with Phil "twinkle toes" McCabe from Britannia Construction
- Jon was continuing his training for the 900 charity cycle ride across Europe

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

- Preparing a Repair & Maintenance Contract based on the JCT format
- Ensuring that contracts are executed properly (to avoid clients having wasted their money in paying us to prepare and negotiate them!)
- Dealing with litigation where the defendant admits liability but refuses to pay interest or costs
- Structuring the construction aspects of various renewables projects
- Taking new instructions on an exciting project for a college

So…. onto business….

Multiple bites at the procedural cherry – tales of woe when dealing with "LIPs".

By Jon Close

We have recently seen a worrying trend in the courts when dealing with litigants-in-person ("LIPs") on the other side. Judges are more lenient when it comes to breaches of the Civil Procedural Rules, no doubt about it. They've been doing it for years in the name of balance but is has the once exception now become the rule? Does it really provide both parties with access to justice if a wronged party chooses to get legal representation and then is effectively ignored or applications for interim relief not granted?

Unfortunately, it is not just when dealing with unrepresented individuals when this can happen, as can be seen by the TCC case of *Whessoe Oil & Gas Ltd v Dale [2012]*. In that case, HHJ Akenhead refused to strike out a claim on the basis that the information in expert reports was insufficient to support a claim of negligence or breach of duty against the defendant.

The reasoning was largely based on the fact that the case did not turn on expert evidence although a Master had ordered the claimant to procure such evidence. Given that the Master had not explained why this was the case, HHJ Akenhead believed it would be 'unfair' to strike out the claimant's 'major claim' without giving it a final chance to particularise its claim properly.

Whilst the sentiment of the judiciary may be just, this may be now sending out the wrong message to claimants, who may feel that they will be afforded a second (or third or even fourth as we have seen in one current matter) bite at the cherry if they do not instruct representation and get procedure (and the law?) wrong. All this serves to do is clog up the judicial system even more – what ever happened to the Overriding Objective or has that now been overridden?

Pay now: argue later

By Anna Wood

The concept of "withholding notices" is not new to the world of construction. In fact, even the re-branded "pay less notice" is not new: it has applied to all commercial construction contracts since 1 October 2011. Most industry standard construction contracts even have a contractual mechanism for pay less/withholding notices.

Why (oh why) then, do so many employers/contractors fail to serve such notices and then fail to pay on time? More to the point, when the payee is not paid, and there has been no such notice, why (oh why) do they fail to act?

I currently have no less than three active files where the nub of the problem is a failure to pay: and in all three cases, there have been no pay less notices served. In all three cases the HGCRA applies and in all three cases there was a clear contractual mechanism, patently breached by the employer/contractor. Furthermore, in all three cases, there was a contractual right to interest (and given that all three cases involve decent six-figure sums, the daily rate of interest was akin to a construction labourer's daily wage).

Far be it from me to encourage an unnecessary fight (any lawyer worth their road grit will encourage their client always to bear in mind the long term commercial picture) but when the Act is clear and the contract is clear, there can be no defence.

Those who have not been paid are perfectly entitled to serve a Statutory Demand on their employer and demand payment within 21 days. Continuing failure to pay entitles them to commence Winding Up proceedings. Moreover, unpaid (sub)contractors are entitled to suspend their works upon 7 days' notice and should give such notice straight away, before the debt gets worse.

The unpaid party may suspect that their employer will dispute the sums owed. That may be true. However, in the absence of a pay less notice (and in the absence of a contractual right of abatement – let's leave that for another day) the employer MUST "pay now, argue later".

The UK construction industry lobbied the government for a stronger construction Act and got one: the armoury is better stocked than ever before. If payment remains a problem, payees need to use the ammunition they have and do something about it. Speak now or it's your own cashflow that suffers.

Guest article: Contractors' Renewable Energy Insurance

By Carl Gurney

Starting up a renewable energy installation company is a great idea, but as with all businesses it doesn't come without risk. Therefore making sure you have the right insurance in place is paramount to protect you and your customers.

Many insurance quotations will assume you're a generic contractor without a specific business description. If you don't accurately explain what your business does, where you work and the specific technologies you install, a claim could be repudiated.

Covers to be considered are:

- **Public and Products Liability** – covers third party property damage and bodily injury. This should include Indemnity to Principal and contingency cover for bona fide sub-contractors if their insurance fails.
- **Employer's Liability** – compulsory cover for your employees & labour only sub-contractors.
- **Professional Indemnity** – covers professional errors and omissions. Ensure this extends to include feasibility studies and calculations.
- **Contract Works** - covers materials on site, in transit and in temporary storage. This should include testing and commissioning. Also, be wary of higher excesses.
- **Business Premises** – covers your contents, stock and computers
- **Management Liability Portfolio** - wider cover than standard Directors' and Officers' policy including employment practices liability and corporate legal liability.
- **Environmental Liability** - covers your own, third party and Environmental Agency clean-up costs, loss mitigation and legal costs.
- **Cyber Liability** - protection against loss of sensitive data, regulatory defence, business interruption costs, hacking, cyber extortion, dishonesty of employees etc.
- **Tools, Equipment and Own Plant** – Ensure sums insured are accurate, limits adequate and check overnight security conditions.
- **Hired In-Plant** – if you take the hire company's own insurance, check they cover loss of future hire charges
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You must comply with any warranties, endorsements and exclusions for your policy to provide indemnity. For example, height and depth limits or use of heat conditions. It is important to be aware of these before your cover starts.

As always, it is advisable to seek advice from an independent, qualified insurance broker who understands this niche sector before finalising any agreements.

For more information please contact Carl Gurney at Jelf Insurance Brokers on 01905 892156

If you would like to write a guest article for a future edition of our newsletter, please contact Anna Wood on 01242 248215.

Guest article: Do you include your postal address on ALL emails?

By Iain Garfield

There is some discussion over whether emails were invented in the 1960s or the 1970s but, either way, they pre-date the internet by some margin and have been around for longer than a fair number of us. And whilst businesses are well-versed in the formalities of including their corporate details on company letterheads, the need to do so in email footers is rather less widely known.

However, since 2007, all company emails (including replies, forwards and emails sent from smartphones) are required to display the company's full name, its registered office address, its registered number and its place of registration (being England and Wales, more often than not). Alas, the regulations do not extend so far as requiring telephone numbers.

A rather random and entirely unscientific survey of the last 20 emails received from clients immediately prior to writing this note showed that 65% of those emails failed to comply with this requirement.

Failure to do so not only renders the company liable for a £1,000 fine (and a further fine of £100 per day), but also any director who sends a non-compliant email is personally liable to the same extent.

And how many prosecutions have there been?
Answer: None that we're aware of.
But that in itself is not a reason for being a non-compliant business, is it?

Editor's Post Script: Ignorance is never a defence but now you've read Iain's helpful note, please ensure all your own business emails (and those of your colleagues) comply with the law, and please add a telephone number for good measure. (Anna)

The Best of British

By Anna Wood

Whilst having a clear out over the Easter Bank Holiday weekend, I stumbled across a Radio Times supplement entitled "The 50 greatest British inventions". I was amazed and delighted to see so many materials, processes and even everyday items connected to the construction and engineering industry that have their roots firmly on British soil. Whilst St George's Day (today as I type) is typically about the English, I thought a celebration of British success would be great for our May newsletter. So here is a rundown of 10 of the great British things construction would not be the same without:

1. Sewage system (1865, Joseph Bazalgette)
2. Float glass (1959, Alastair Pilkington)

3. Modern fire extinguisher (1818, George William Manby)
4. Carbon fibre (1963, Royal Aircraft Establishment Engineers)
5. Linoleum (1860, Frederick Walton)
6. [Portland] Cement (1824, Joseph Aspdin)
7. Stainless Steel (1913, Harry Brearley)
8. Steri-spray (2008, Ian Helmore)
9. Bessemer Process (1856, Henry Bessemer)
10. Thermos Flask (1892, Sir James Dewar)

Cutting through the legalese: "Assignment and Novation"

By Katie Pickering

We are often asked about the difference between assignment and novation. The two are similar, but not interchangeable. Here we clarify:

Novation is used to replace one party to a contract with a new party. A novation is only valid with the consent of all parties to the original contract. A contract transferred by novation will transfer all of the benefits *and burdens* of that contract. For example an Employer appoints an Architect to design a building and pays him some fees for the initial drawings. Later, the Employer appoints a Contractor to build the build under a "design and build" contract. In order to keep continuity of design, the Architect is novated from the Employer to the Contractor so that the Architect now works for the Contractor, and it is the Contractor who pays the Architect's fees going forward.

Assignment is the complete transfer of the rights to receive the benefit of the contract. When assignment takes place and the benefit is transferred but the burden/obligation will always stay with the original party. For example on completion of building works (and after release of retention) the original Employer sells the building. The Employer assigns the building contract to the Buyer. The Buyer does not have to pay the Contractor anything but the Contractor now owes the duties previously owed to the Employer, to the Buyer instead. It is the Buyer, not the Employer who has the right to sue.

The difference between novation and assignment is that novation transfers the *burden* as well as the benefit. Novation should therefore be used where there are ongoing obligations on both parties.

My Perfect Sunday: Bob Holt, Chairman of Mears Plc

By Anna Wood

Bob Holt is the former CEO of Mears Plc and alongside his continuing duties as Chairman he devotes a lot of time to his charity, the Footprints Foundation. BPE has

been delighted to support Footprints for several years and sent a team of 9 to the Zenzelini Village Centre, South Africa in October 2012 to provide vital construction work for this amazing orphanage. In June 2014, Bob will be providing driver support to John Workman, Jon Close, Tim Williams and Adrian Peake (all of BPE) as they cycle 900 miles across Europe to raise further funds for Footprints.

I've worked in/with the construction sector since: I joined MITIE in the early 1990's

The best thing about my job is: that I don't have to do a lot these days since I handed the CEO role over to David Miles

The worst thing about my job is: Actually I have no regrets or issues: refer to the last answer!!

The first album I ever bought was: My sister worked in a record shop in the 1960's and I remember that I bought THE MAHARAJA OF BRUM by ..... Does anyone know ? I doubt if Google has that detail!

My favourite holiday was to: I travel extensively and adore visiting the orphanages in Johannesburg with my Foundation The Footprints Foundation.

My favourite bar/restaurant in Gloucestershire is: Montpelier Wine Bar.

Make mine a (e.g., pint of real ale/rum and coke): A real pint of Rum and Coke

In 2014....I will be 60!!

My perfect Sunday would be: Having lunch with all my kids, my partner and her kids

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