

Construction and Engineering

BPE Construction & Engineering Team's News – July 2014

A round up of what the team has been up to recently.

June was another strange month for the BPE Construction & Engineering Team. In between slaving away in the office during the “heat wave” we had a rather busy month:

- Jon cycled from Luxembourg to Budapest for Footprints Foundation. Do check our website for Jon's entertaining blog entries.
- Katie had her final ILEX exams (which we are sure she will have passed with flying colours)
- Anna had a well-earned holiday
- Steve did none of the above but worked like a dog in our absence!

Back in the office (that would be Steve, the rest of us weren't here!) we've been kept on our toes considering issues such as:

- Disputes on contracts where not all the intended parties to the contract actually signed the written document
- Demands on our clients to remedy defects outside of the DLP
- Just how complex can a Party Wall Act dispute really be?
- Can a litigant in person give oral evidence of fact at trial without having first filed and served a written witness statement?
- What are our client's rights against the court itself when the court has banked cheques for court fees for several applications but failed to deal with those applications and now the matter has settled?

So.... onto business....

FIDIC rocks my world



Anna Wood considers the TCC's latest interpretation of the contractor's liability for ground conditions under FIDIC

By Anna Wood

In a week when metal(lica) has been found at Glastonbury, we turn our attention to the surely less surprising discovery of rock on Gibraltar. A civil engineering contractor tried to argue that rock (along with contaminated groundwater) could be classed as “unforeseen ground conditions”. Not so, ruled the TCC back in April 2014. Anna Wood considers the decision in *Obrascon Huarte Lain SA v AG of Gibraltar* [2014], and comments on how this could affect those using the FIDIC forms of contract.

This case concerns a FIDIC Yellow Book (1999) contract for the design and construction of a road and tunnel in Gibraltar. At tender stage, Obrascon was given an environmental statement and site investigation report. By clause 4.10 of the contract, the contractor was responsible for interpreting the data in those reports. Within a year of start on site in October 2009, the works were already running almost two years late on a two year contract. Obrascon applied for an extension of time under clause 4.12. However, that clause stated that the ground conditions that were reasonably foreseeable by an experienced contractor at the date of submission of the tender must be considered. The delays were caused by issues with rock, unforeseen contaminated materials, contaminated groundwater and weather. The TCC considered all of these issues, together with further arguments in relation to the right to terminate, the time for an application for an extension of time for weather and the proper service of notices. This article will focus on the site investigation issues only.

The TCC concluded that Obrason was wrong to rely solely on the reports prepared by others and provided to it at tender stage. Instead, said Judge Akenhead, what would be expected of an experience contractor was “some intelligent assessment and analysis of why there was contamination there: given the historical... uses to which

the land had been put, there would have been an expectation of a very real risk that there could be extensive... residues in the made ground.”.

The point for contractors using FIDIC therefore must be that where they take responsibility for “unforeseen” ground conditions, this does not allow them blindly to rely on reports provided at tender stage but should instead carry out, and then take account of, their own expert reports prior to finally agreeing the price and programme for the works.

Whilst this newsletter does not advocate any one religion over any other (or the choice of none at all for that matter), one cannot help but be reminded of Matthew 7:24-27 and the parable of the man who built his house on sand.....

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What's in a name?



Katie Pickering reminds readers of the importance of accurately recording the parties' names in contract documents

By Katie Pickering

Liberty Mercian Ltd v Cuddy Civil Engineering Ltd and Another [2013]

In 2013, the High Court refused to change a mistake in a contract which named the incorrect contracting party.

Case: Liberty Mercian (“the Claimant”) are developers and entered into a contract for the construction of a new retail plateau for a future Sainsbury’s. A successful tender for the works named the contractor as “the Cuddy Group”. The Claimant’s solicitor carried out various internet searches to confirm the company trading under “the Cuddy Group”. They found Cuddy Civils Engineering Ltd (“CCEL”) and, despite the company being dormant, assumed this to be the correct party and wrote to “the Cuddy Group” asking for all references to be changed to CCEL.

At trial it was common ground that “the Cuddy Group” was a trading name of Cuddy Demolition and Dismantling Limited (“CDDL”). CDDL and CCEL had the same shareholders and common directors. CDDL undertook the work on the site and payments were made into CDDL’s bank account.

A number of problems arose and the Claimant commenced proceedings against CCEL. The Claimant subsequently said they made a mistake when identifying CCEL as the contracting party and it should have been CDDL. The Claimant wanted the court to rectify the contract so that CDDL were the contractor and not CCEL.

Decision: The court found there was no misnomer and no mistake, either mutual or unilateral, the Claimant failed to show that the parties had intended the contractor to be CDDL and that naming CCEL was a mistake. The Claimant’s solicitor carried out

the searches on “the Cuddy Group” and asked for all references in the contractual documentation to be under the name of CCEL.

This case provides a clear warning that the courts will only allow a mistake to be changed where there is a clear mistake in the document. When setting up a contract, always ensure that you are confident on the name of all of the parties; the courts do not tend to take a very sympathetic approach. Check with the contracting parties for the most appropriate company, do not simply make assumptions. We strongly advise backing this up with properly checked company numbers where possible.

Another thing to be careful about when setting up a contract is to ensure you have all of the parties intended to be bound by the contract named within it. This problem arose recently when contracting with a builder for construction of a property. One of the parties was not named in the contract but appeared to have been at all of the meetings and to have played an essential role with the design. It would have saved the builder a lot of time and money if that third party had been expressly named in the contract.

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Location, location, location



Steve Oakes considers whether, when it comes to adjudication, it matters where the job took place.

By Steven Oakes

A contract is entered into in England and the works are to be completed in Scotland. Now you might not think this would cause any problems, but this may have implications and you may have to deal with a jurisdictional challenge in an adjudication where you have referred the adjudication under the ambit of the Scheme for Construction Contracts (England and Wales).

Now, if the applicable law is not set out expressly within the contract, if the contract is formed in England, then the laws of England and Wales will apply, (and it's been that way since 1955).

However, the issue arises with which Scheme is to be utilised, because if you refer the matter under the wrong scheme then the adjudicator will lack jurisdiction and you will have an unenforceable decision at the end of the process.

The Scheme now has three versions: one for each of England, Wales, and Scotland. Now there is not really an issue with the versions for England and Wales because even if the relevant Scheme was to be selected by reference to the location of the 'construction operations' the law governing of the contract is the same, since we have shared a legal system with Wales for a few hundred years. However, when it comes to Scotland, as most will be aware, they have an entirely different legal system which is often described as a 'hybrid system'.

We have had these three versions of the Scheme since 1998 and you would have thought that the matter of determining which Scheme applied had long since been settled. Well you would be wrong.

The matter was referred to the courts in April this year (Laker Vent Engineering v Jacobs E&C Limited). The matter which fell to the court was whether an adjudicator had jurisdiction when appointed under the Scheme for England and Wales, when the 'construction operations' were undertaken in Scotland. The jurisdiction of the contract was expressed as 'English Law' and the court decided that because of this the Scheme for England and Wales applied and as such the adjudicator had been correctly appointed.

Now most of you reading this are probably saying: "I could have told you that!!" Well the point the court made was that if the applicable laws of the contract are the laws of England and Wales, then it seems simple to say that the applicable Scheme is the Scheme for Construction Contracts (England and Wales) Regulations 1998 (as amended).

I was recently involved in an adjudication with similar facts to those in 'Laker Vent' and argued exactly that: if the contract was governed by English law, then the Scheme for England and Wales was applicable. However, in my situation the adjudicator decided that I was wrong and that although English Law was the applicable law, the Scottish Scheme applied to the contract. I have to say that I thought at the time that this was complete nonsense and still maintain that position. Given the recent decision of the TCC, it looks like my position has indeed been vindicated.

I do wonder what the courts will do if asked to consider which Scheme applies when we have construction operations which span the borders such as roads, rail, bridges and even large sites?

Whilst it appears that my position in the recent adjudication is also the position of the TCC, on this occasion I feel that this matter may not be entirely resolved (or given the drafting of the Schemes whether it ever can be)...watch this space as they say!!!

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Cutting through the legalese: “Arbitration”



A reminder that arbitration is not a generic term

By Anna Wood

Whilst many people now delete the arbitration provisions from JCT contracts for work carried out in the UK, the BPE Construction Team has noticed that many of our clients and contacts use the word “arbitration” fairly loosely when referring to dispute resolution generally. Whilst this is, of course, harmless enough in general conversation (and it’s our job to be pedantic so that our clients can continue to speak like normal human beings!), we thought it worth running through the basics of arbitration so that you can see why it really isn’t interchangeable with “court proceedings” or “adjudication”. Here’s a quick comparison to help you understand the differences:

	Court proceedings	Arbitration
Does it require prior agreement to use this method of dispute resolution?	No	Yes
Can the parties set the rules?	No – the Civil Procedure Rules apply although the parties can agree certain directions.	Yes – although the parties will usually choose an existing set of rules
How long does it take?	The timetable will depend on the Court’s availability, the flexibility of the other side and the complexity of the matter. Standard Court timetables tend to represent the “quickest” a case can proceed. Complex matters can take	The arbitration tribunal has to tailor the timetable and procedural requirements to suit the parties and the facts of the dispute – meaning that the timetable can be better governed by the parties themselves.

	up to 5 years.	
How do the Court/Arbitrator's fees compare?	Based on value of the claim.	Based on the complexity of the issues and time spent by arbitrators.
Are the proceedings confidential?	No	Yes
Can you appeal?	Yes (although you may need to request leave to Appeal)	No – although in exceptional circumstances the Court may set aside the arbitrator's award
How can you enforce the award abroad?	You will need to make applications both at home and abroad to enforce the award in a different country.	The New York Convention means that arbitrator's awards are usually recognised without difficulty in over 149 countries.

As a further thought, whilst arbitration is most commonly used for international disputes, it can be used for domestic cases too.

Finally, if your contract has an arbitration clause, do remember that you MUST go to arbitration rather than taking your dispute to the Courts (save in very narrow circumstances). This also means that if you are on the receiving end of a court claim form but you believe you signed a contract with an arbitration clause, you should challenge the jurisdiction of the court straight away (or at least take legal advice).

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My Perfect Sunday: Mark Ryan, Managing Director of Gloucestershire Airport



My Perfect Sunday. This month we interviewed Mark Ryan, Managing Director of Gloucestershire Airport.

By Mark Ryan

My background is Military having served in the RAF for 15 years as an Electrical Engineer. I then had a short stint (5 years) with Lucent Technologies as a Systems Engineer working with leading edge technology, which I thoroughly enjoyed. When this bubble burst I was extremely fortunate to have been offered a position at Gloucestershire Airport and have not looked back since. In 2007 I was offered the post of Managing Director and have successfully implemented a complex project, raised our profile as a key asset for the county and won a national award for being the 'Best General Aviation Airport in the UK'.

I've been involved with the construction sector since: 2007, when Jon [Close] and his team supported Gloucestershire Airport during our Runway Safety Project.

The best thing about my job is: the excitement - you never know what each day will bring, from a Royal Visitor to a superstar; to seeing the thrill on the face of someone who has just had their first flying experience or having completed their first solo flight.

The worst thing about my job is: Not much

The first album I ever bought was: What's an album? (OK - Madness, One Step Beyond...)

My favourite holiday was to: New York

My favourite bar/restaurant in Gloucestershire is: The Aviator!!

Make mine a (e.g., pint of real ale/rum and coke): Guinness at the Rugby

In 2014.... I'd like to build more hangars to attract and accommodate the Business Jets, and to secure a new destination from the airport for regular scheduled services.

My perfect Sunday would be: Clear blue skies! (...and a bit of F1 on the TV).

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