Construction and Engineering

BPE Construction & Engineering Newsletter – August 2014

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

July was a fairly quiet month for us: like most people, we're fairly busy but getting hold of people during holiday season certainly adds an extra challenge to every matter. In between reading "out of office" replies, we were out and about as usual:

- Anna attended a construction re-start meeting for a project that has been many years in the negotiation, and may finally see start on site in the Autumn.
- Jon and his team had a winning day at the Crimestoppers Charity Shoot
- We did a lot of "networking" at the Cheltenham Cricket Festival
- We hosted a lot of different work experience students

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

- How "ok" is it to use un-amended standard form contracts?
- The Claimant's entitlement to more than fixed costs on entering Judgment in Default
- What should a contractor do when faced with a Contract Administrator who appears to be failing to administer the contract properly (or at all)?
- Can a party attempt to file/serve an amended Statement of Case two days before the trial? (No!)

So…. in honour of holiday season, this month's newsletter is concise – think of it as the travel version….

Don't go changing…

By Anna Wood

Anna Wood considers whether it really is necessary to change standard form construction contracts

I must admit I hadn't realised how popular Billy Joel's late 1970s hit "Just the Way You Are" still is amongst the construction profession, on the subject of contracts. Clearly once a song wins a Grammy its message remains valid for all time. Despite that misunderstanding, I have always been acutely aware that nobody likes lawyers "over-lawyering" situations and making them more complicated than strictly necessary. That said, is change always a bad thing? Is it really the case that the industry standard contracts (JCT, NEC, ICE etc) are all perfect "just the way they are"?

Clearly I will argue that they are not. One of the key reasons is that a construction contract (particularly as most that we deal with are for six, or more usually seven figure sums) is not a slogan baseball cap – one size does not fit all. Each project is unique: be that because of location, funding arrangements, landlord/tenant interests, whether the priority is time/cost/quality, or because of the known unknowns (at risk of getting all Newt Gingrich on you, readers!).

What amazes me is when tender documents are issued and contractors are asked to price on the basis of a certain form of contract, but no schedule of amendments is issued. The contractor, quite reasonably, has no choice but to price against the un-amended contract (which, frankly, isn't ideal for them either). Post-tender award, lawyers get instructed and, having made a promise to give our employer clients sensible, quality legal advice, we start to discuss the schedule of amendments. When there isn't one, we want to draft one. Not to be a pain, not to fee-create, not to "screw" the contractor, but to make sure that the contract works for this project (and for all parties involved). Any lawyer knows that the main aim of the parties is to sign the contract, put it in a drawer, ignore it for 6 or 12 years and then shred it. (Such a thought warms the cockles of our hearts). By the same token, anyone in construction knows that it would be lovely if things never went wrong, but that when they do, the first thing you need to do is check the contract. Sure, the solution might ultimately be one that is commercially negotiated, but unless the parties understand the bottom contractual line if things went to full blown dispute, any attempt at commercial negotiation is meaningless.

The strangest thing is that some people in the industry seem to think that all contractors hate amendments to contracts and will refuse to sign up to any whatsoever. They think that if we even ask, projects will be delayed or prices will go up. The truth is that reasonable amendments, if justified because of the nature of the employer/project/funder will be accepted by reasonable contractors. However, such acceptance is easier to come by if contractors are given the opportunity to consider these amendments at tender stage.

We are forever saying to clients that the sooner we are involved in a project, the better things will be. We understand that some cynics will disagree. However, if you want the benefit of legal advice on a project, it will help all parties to get things off to a good start, if you get things right at tender stage, and avoid springing any surprises on your build team.

Maybe, just sometimes, the relevant song isn't by Billy Joel, but it's Michael Jackson's classic, Man in the Mirror (more my era anyway to be honest).

Cutting through the legalese: "Design liability for a D&B contractor"

By Anna Wood & Steve Oakes

Steve Oakes and Anna Wood explain the difference between the reasonable skill and care of a Design & Build contractor and the reasonable skill and care of a designer.

The reasonable skill and care of a Design and Build Contractor is more onerous when compared to the reasonable skill and care of a designer. The difference is that the former is obliged to produce an end result that is "fit for purpose": the latter is not. The reason is this:

In the absence of any express term in a design and build contract a term would be implied requiring the contractor to meet a 'fitness for purpose' obligation. So the 'starting point' for a D&B contractor is to design and build a building which is fit for its intended purpose. So the answer to the question is this –in order to decide whether a D&B contractor has exercised reasonable skill and care it would be measured against what standard of care would have been expected of a D&B contractor in the absence of any express term and the answer to that question is that the contractor would be required to design and build a building which was fit for its intended purpose.

When looking at the reasonable skill and care to be expected of a designer or Architect the starting point is somewhat different, because the implied term would be limited to exercising reasonable skill and care and so the 'measure' is lower than that expected of a Design and Build contractor.

The JCT Design & Build Contract contains an express provision relating to design liability, but many employers require the provision to be "beefed up" via the schedule of amendments. We have therefore been really surprised to find many D&B contractors delete the word "architect" and insert "design and build contractor", suggesting that they believe their proposed amendment lowers their liability, when in actual fact it raises it.

We would point out that some lawyers have an entirely different view on this matter and believe that the words used 'reasonable skill and care' would limit any liability to just that, but there are also a number of other lawyers who think that the foregoing interpretation is more likely to be accepted. In simple terms it would be better to limit any design responsibility to 'the reasonable skill and care of a professional designer or Architect'.

My Perfect Sunday: Jon Close, Head of Construction & Engineering, BPE Solicitors LLP

By Jon Close

My Perfect Sunday. This month, as everyone else was on holiday, we've interviewed the boss, Jon Close.

I've been involved with the construction sector since: 2001. My first job was in public procurement for the Home Office dealing with petrochemical industry in North Africa and MoD sites in Germany. I moved to Eversheds in the City in 2003 mainly doing rail adjudications against the then Railtrack. I became the ultimate trainspotter!

The best thing about my job is: having a positive impact on clients' businesses and lives. Fix the person, fix the problem. And my esteemed colleagues, of course!

The worst thing about my job is: telling people things they don't want to hear and the institutional and regulatory bureaucracy which plagues our profession, which gets in the way of being highly commercial at times. It beggars belief in terms of the lack of common sense employed by the powers that be sometimes, who clearly don't live in the real world, it appears.

The first album I ever bought was: probably something by Adam Ant or similar.

My favourite holiday was to: the Maasi Mara on honeymoon.

My favourite bar/restaurant in Gloucestershire is: The Black Horse at Amberley and The Woolpack in Slad in summer for the views, got to be in the courtyard next to the log burner out the back of The Retreat in Stroud on a crisp winter's day. Restaurant-wise: The Wheatsheaf in Northleach and William's Kitchen in good old "Naily" for the fish.

Make mine a (e.g., pint of real ale/rum and coke): Budding (Stroud Brewery) or a Grey Goose and tonic if I am being laa-dee-da!

In 2014.... I want us to be proud about being different and really demonstrate that we and our clients are Business People. Brilliant People. World domination can wait until 2015. On a personal level, get dragging some tyres around the Slad Valley as Tim Williams from Commercial Property and I start training for our North Pole expedition (sponsorship please in return for corporate advertising at 90 degrees North!).

My perfect Sunday would be: not dragging tyres, not working. A lazy start with the papers, proper coffee and a bacon sarny followed by some clay shooting (if possible) and walk/mountain bike through Hazel Wood between Nailsworth and Avening,

Sunday lunch with a decent bottle or two of red with Antonia, our son Seb and friends in front of a roaring fire and much laughter.

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