Construction and Engineering

BPE Construction & Engineering Newsletter – October 2014

After a month off from the newsletter in September we have lots to update you on now that Autumn is here.

- Thank you to everyone who attended our party at Six Degrees of Separation in September. We really hope lots of new contacts were made and new opportunities discovered – do let us know!
- Congratulations also to Katie Pickering. We are immensely proud of our Paralegal who has put up with working for Jon Close for 7 years and has passed the final part of her ILEX (level 6) with flying colours so that she can now follow her name with the letters "G.C. Ilex".
- We also welcome the team at the Stroud Office to the BPE Family, following our takeover of Leigh Young. Although this does not directly affect the Construction & Engineering Team, we look forward to working with and for their many contacts in construction, engineering and manufacturing.
- Jon has been busy with both Festomane and the Biodynamic Association playing his part in helping them with exciting new things.
- Jon has been to London to see fit out works we assisted with at Guy's Hospital (frankly his visit is rather conventional – last time Anna Wood was at Guy's Hospital she was abseiling down the main tower with the Marines to raise money for charity).
- Jon also attended the recent Gloucestershire Media Business Awards at the Centaur and the whole team offers our congratulations to the winners and finalists.

Back in the office we've been dealing with the following:

- Nice quick and easy settlement of a £10k dispute (as we said at the time, "look after the £10k's and the millions look after themselves").
- Finally seeing completion on a solar project that Jon and Anna have worked on for over a year – which sees our client take on the biggest roof top solar project ever seen in Europe.

- Advising a client who was tendering for a long term partnering situation, but yet again the proposed contract was not the best form for the job. (Jon's advice is "don't try to be a little bit pregnant"!)
- Helping a leisure sector client move towards doubling its number of sites in 12 months.
- Advising on what to do when you want to novate an appointment but find that the appointment isn't properly in place.

Update on "practical completion"

By Anna Wood

Back in March of this year, I wrote an article on practical completion, how it is defined (or not) and how people interpret phrases such as "beneficial occupation". In the article I encouraged people to be prescriptive, but not too prescriptive.

Turn your mind back even further to some point in 2005. At that time, Laing O'Rourke Construction Ltd entered into a contract with Healthcare Support (Newcastle) Limited whereby Laing would design and build various hospital facilities for Newcastle upon Tyne Hospitals NHS Foundation Trust. This was a project to be carried out in nine phases, and the dispute which was decided by the TCC at the end of July 2014 concerned (thankfully) only Phase 8 and whether or not it was practically complete.

The aforementioned contract seemed to be clear on the meaning of "practical completion" – it even had defined Completion Criteria and an Independent Certifier. Like most construction contracts, the issuing of the Certificate of Practical Completion would not relieve the contractor of its obligations to return to deal with Defects (either latent or patent).

However, despite the apparent clarity, the parties disagreed with the application of the "Completion Criteria" – and specifically whether or not the Independent Certifier could look beyond the Completion Criteria. The Claimant submitted that "the building had to be fit for use and occupation consistent with the purposes for which it had been designed and built, as reflected by the provisions of the Project Agreement" and further that "a breach of the specification that did not have any materially detrimental effect on the amenity value and functional use of the building was not one that should prevent the issue of a completion certificate".

The Trust (the end user) argued for a wider interpretation and submitted that to achieve practical completion the works had to be in accordance with "the Trust's Construction Requirements".

The TCC (Mr Justice Edwards-Stuart) focussed his consideration on the fact that the contract did not state that the practical completion certificate was to be conclusive evidence of the quality of the work or that the buildings as built were in accordance with the specification. The Judge concluded that:

"[The Independent Tester] must decide for himself, having received any representations from the parties, as to whether or not the nonconformity alleged (assuming that he accepts that it is a nonconformity) has or is likely to have a materially adverse effect on the enjoyment and use of the building… in the manner contemplated by the agreements. If he concludes that it will not, then he can issue the completion certificate and leave the Trust to its remedy in damages."

So my own conclusion is that the TCC has kindly confirmed what I said back in March: it is sensible to be prescriptive but the independent certifier will ultimately still have to be free to exercise his discretion as to when/if PC has been achieved.

More haste, less speed? Developers wanting it all – yesterday!

By Jon Close

A couple of examples have arisen recently whereby clients want to cut corners on ensuring proper design has been finalised in order to get a contractor on site. Not even (wait for it) pursuant to a letter of intent but via a heavily amended formal contract.

Now I'm all for agreeing the essential terms quickly on any job but not when the developer's instructions are 'zero risk on design, Jon, but we don't want the construction costs to go up very much so D&B is out." What to do? Well, I didn't go to Hogwarts so the Expelliarmus charm is out….

We lawyers can, of course, get clever with wording so that the burden of proof is reversed or at least a large majority of the risk is placed with the contractor – even using a traditional procurement route. That tactic is, however, limited and it will only get you so far, as it relies upon the contractor playing the game for whatever reason (prospects of a longer term relationship, fill a gap in a quiet period) without the threat of whacking great big variation claims at the back end.

Instructions to dress up one procurement route as another, amount to a step too far. The advice back at clients is that they really need to understand whether what they think they want in the short term, is really to their benefit in the long term. My colleagues and I rarely have to have such conversations these days, I am pleased to say, but every now and again someone wants the unattainable and quickly.

It's all in the planning and project management of a development. Working back from your desired exit is often a useful exercise. Then the important parts all get very simple and very clear and proper apportionment of risk agreed without any wizardry or witchcraft being required.

CDMC changes – you could plan ahead if only it were clear what's happening!

By Katie Pickering

The Health and Safety Executive ("HSE") are planning a complete overhaul of the CDM Regulations including removal of regulations and the introduction of duties for domestic projects.

It is understood that the revised package will come into force in April 2015. Here are 4 key proposed changes to the current Regulations:

1. **Removal of the CDM Coordinator ("CDMC") role.**

This is probably the biggest proposed change. The HSE propose to remove the role of the CDMC and introduce 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.

Currently, for notifiable projects, the CDMC is employed to oversee and coordinate the health and safety projects but the view of the HSE is that a Principal Designer will have more influence and control over the project design than the CDMC in the current structure.

2. **Replacement of the Approved Code of Practice (APoC) with targeted guidance.**

The current APoC is 107 pages and it is thought to be too long and complex causing it to be overlooked on smaller projects. The HSE propose that it will be replaced with a number of targeted, sector specific guidance documents that will be more user friendly.

3. **Amending the threshold for notification.**

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

It will make it possible to have a project on site for 40 days with a maximum number of 12 persons on site (480 person days) or alternatively 60 days with 8 workers.

The purpose of this change would be that because of the 'and 20 persons' element, it is likely that less projects would be notifiable under the proposed changes.

4. **Changes to the threshold for the appointment of co-ordinators.**

The proposed changes aim to set out sensible and proportionate arrangements for co-ordination for smaller projects which fall within the scope of this requirement. The belief is that there should be more effective co-ordination, particularly of

smaller and poorly managed projects that may have significant health and safety risks.

The new proposed change will also get rid of the Domestic Client exemption so general householders will have duties under the new CDM but these can be transferred to the Principal Designer or Principal Contractor.

Timing of the changes

It has not yet been confirm by the HSE what will happen to projects that are already on site when the changes come into force in April 2015. Several CDMC's are concerned they will find themselves without a job.

Recently an architect expressed his concern to BPE that, overnight, architect and D&B contractors might find themselves becoming the Principal Designer. This may prove to be the biggest challenge of 2015 for design professionals.

Cutting through the legalese: "Hot-tubbing"

By Anna Wood

Last week, I travelled to Heathrow Airport to meet with two representatives of my client who were flying in from separate locations, and our expert. We were meeting to discuss design liability in relation to a significant six-figure claim that they are facing. An hour or so into the meeting, after the energy from our airline quality lunch had worn off (and yes, it tastes just as bad on the ground), I managed to get everyone to wake up by simply asking "So are we all aware of what I mean by 'expert hot-tubbing'?" Not everyone, so it seemed, was. And the real image I conjured up was nowhere near as exciting to them as their first thoughts!

To de-mystify and reassure, when experts "hot tub" this is really just "concurrent evidence" – put simply, all the expert witnesses are questioned and cross-examined together in a conversation which includes all experts, Counsel and the Judge(s). The procedure is recognised in the TCC Guide and the idea is that rather than dealing with each *expert* in turn, the parties can deal with each *issue* in turn, letting everyone have their say before moving on. It is intended that this is more efficient, thus saving costs.

Whether or not hot tubbing really is better than the traditional method is one that is the subject of much debate and in some TCC cases it seems that a hybrid approach is emerging. Experts in TCC cases do need to be ready for hot tubbing, but at least they can do so with their suit safely on!

My Perfect Sunday: Ade Gill of Gill Fox James

I've been involved with the construction sector since: earlier this year when we first started advising construction clients. We are proud to work with Britannia Construction, MF Freeman and an exciting new client you'll hear more about soon!

The best thing about my job is: getting to see behind the curtain of very successful businesses, which allows us to be constantly learning.

The worst thing about my job is: being a small consultancy and the lack of capacity caused by it being really hard to find the right sort of staff.

The first album I ever bought was: the Lost Boys soundtrack.

My favourite holiday was to: Malaysia.

My favourite bar/restaurant in Gloucestershire is: Cowley Manor.

Make mine a (e.g., pint of real ale/rum and coke): A vodka tonic (with ice and a slice of course!)

By the end of 2014.... I want Gill Fox James to have moved into purpose built offices (Editor's note: presumably to house the newly won Gloucestershire Media Small Business of the Year Award?), to have secured a corporate financier partnership (for companies looking to sell) and to have appointed three non-executive directors for us to put into client's businesses.

My perfect Sunday would be: Not getting up early! Game of squash, Sunday roast with my wife and two daughters followed by watching either a film or decent box set (House of Cards). Pint in the local before looking at my laptop to consider the week ahead...