Construction and Engineering

BPE Construction & Engineering Newsletter – November 2014

October was another busy month for the team with a lot of new instructions on projects. We also celebrated being ranked in Band 1 by the Chambers & Partners Legal Directory – the only Construction team to be ranked in the Cheltenham area. We have been out and about as usual:

- Jon met up with clients in London to make introductions in the urban regeneration world
- He's also been assisting our Stroud office to build upon their manufacturing & engineering profile, as well as providing a steer on short form EPC contracts to those in the renewable energy sector
- Anna attended a fantastic Constructing Excellence Gloucestershire Club event focussing on collaborative working
- Anna went for a site visit to the re-development of Cheltenham Racecourse with Women in Property

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

- Lots of redevelopment work, particularly relating to leisure, healthcare and heritage residential – all over the country
- Defending a tripartite c. £ ½ million contract claim in the TCC relating to allegedly defective design
- Helping various clients get their sub-contractor T&Cs in better shape.
- More adjudications: including dealing with yet more novel jurisdictional challenges
- Advising on good bread and butter provisions relating to early warning and compensation events as part of a further education project

Flowing your obligations down the line

By Anna Wood

Please note: whilst this article is phrased as if advising contractors in relation to sub-contractors, it applies equally to sub-contractors and sub-subcontractors, and to consultants and sub-consultants.

For contractors a lot of the "good" work out there is with experienced employers. There is a lot to be said for working with people who know what they're doing. However, an obvious downside is that they usually have better (i.e., more onerous for you) contracts!

Later this month, we will be presenting to Constructing Excellence Gloucestershire Club about contractual "nasties" that parties try to impose on others. Here, I advise about what to do with those "nasties" if you want to insulate yourself (to a degree) by passing them down the line. Better still, ensure that adequate procedures are in place to mitigate them yourself if they cannot be dispensed with.

When you sub-contract some of your works or services, remember to sub-contract the legal obligations too. This may sound simple but, in reality, mistakes are often made that can be costly.

A classic example is collateral warranties – if you sign up to an obligation to provide and procure collateral warranties within 21 days of a request from your employer, you need to make sure there is a contractual obligation on your own sub-contractors to provide you with warranties on demand (and preferably within 7-14 days!).

Many of the "big boys" have onerous main contracts that they require contractors to sign up to. When contractors take on sub-contractors they therefore need to flow down those obligations. The simplest way to do this is to ensure that your own standard sub-contract terms contain a provision that incorporates any main contract disclosed to your subbies and requires that subcontractor to indemnify you against any losses you may suffer if he (the subcontractor) puts you in breach of the main contract.

Simples? Well – it is if you can get the subcontractor to sign up! I know that many sub-contractors reading this won't be very happy at my suggestion. However, my suggestion is merely the best way for the sake of legal completeness: I am not suggesting it is necessarily commercially reasonable – that is something to be assessed on a project by project basis.

I mentioned collateral warranties earlier. Please do remember that warranties simply give the beneficiary an *option* to sue the warrantor. That doesn't mean that they won't sue you as well or instead! When we are advising a potential claimant, we will advise them to go after the person who is contractually liable and has the

deepest pockets. If you are a contractor with a healthy balance sheet, why would the employer go to your considerable smaller sub-contractor if you were on the hook for the same obligations? And if they are successful against you, can you flow the entire claim down to your sub-contractor? Only if your contracts are truly back-to-back.

The key thing to remember is that if you sub-contract *work*, you need to sub-contract *obligations* in clear and express terms. If you fail (or are commercially unable) to do so, then you are contractually at risk.

Guest article: Business interruption – an insurance broker's view!

By Chris Lockton

A number of high profile events including extreme weather and well publicised flooding serves to highlight that major unforeseen events can have a profound impact on homes and businesses and can be difficult to recover from. Insurance is often referred to as if it is a solution to put everything right. This is true, but only if the insurance programme is correctly placed and caters for the exposures to the business and the prolonged consequences. Replacement of equipment, stock, machinery and buildings may be easy to quantify. But what about lost business?

If your business is unable to trade or if you are unable to access your premises what impact will this have on revenue? In the modern world many businesses will be able to maintain a trading presence, but only if they are prepared for disasters or interruptions. Whilst thankfully flooding to the extent of that seen last winter is rare, damage to and loss of telecoms, utilities and increasingly internet services is more common. If your premises was unable to sustain your business even if only for a limited time what would you do?

The insurance industry recognises the basic principles and practices of business continuity and any programme of Business Interruption Insurance (BI) should complement this.

Business Interruption requires concentrated attention because it cannot be altered after a disaster occurs. BI insurance is inextricably linked to property damage insurance and is sometimes termed 'consequential loss' or 'loss of profits/revenue' insurance. Many aspects of BI insurance replicate business continuity planning, especially the business impact analysis aspects of it.

The intention of BI insurance is to restore the business to the same financial position as if the loss had not occurred.

BI insurers insist that any property (which may lead to an interruption) is insured against loss or damage so that funds are provided to pay for the repair or replacement. This policy requirement is known as the Material Damage Proviso and typically;

"….. the Company will not be liable for any loss under this Policy unless the Insured's property destroyed or damaged at the premises is insured against such damage and the Company by which such property is insured shall have paid for or admitted liability in respect of such damage."

When deciding on the best means of protecting the business, thought should be given as to whether substitution of lost Revenue/Profit is the best protection for the

business or whether the business could better operate with a provision for costs incurred to avoid an interruption?

A recent example serves to highlight why thought should be given as to the programme for protection. In July 2014 a major recycling depot in Swindon suffered a fire which resulted in a sustained period of interruption. Averies Recycling was ablaze for almost two months while the Fire Brigade tackled the fire. The extinguishing costs are reported to be c£500,000 (BBC website, 15th September 2014 - http://www.bbc.co.uk/news/uk-england-wiltshire-29207129) and this will be inevitably followed by a period of clean-up and debris removal. If this is achieved relatively quickly the business will have lost at least a quarter of the years trading to this loss and potentially a sustained interruption as contracts and business has been moved to competitors. Without the facilities/infrastructure to divert trade and provide a contingency it is clear that this loss would not be prevented by a provision for increased costs.

If a business has limited capacity for alternative manufacture/processing then it should consider selecting a Revenue/Profit protection programme, the business activities to be insured must be identified and need to capture all of the organisation's business, including future acquisitions, or newly created entities or new ventures.

When deciding on a Maximum Indemnity Period you should consider what the maximum period could be before normal trading is resumed. Is the business dependent on a core item of plant/machinery? What is the delay period in sourcing a replacement? What is the commissioning and set-up period? How long before you can be trading as you were before?

An important component of BI insurance is the coverage for what is termed 'Increased Costs of Working' – these being the extra costs that Businesses have to pay to keep in business. These can be difficult to estimate and, in some cases, can be the principal exposure of an organisation. Most "Package Policies" will limit liability to a defined limit/sum insured and costs that are "reasonably incurred". In short, you can spend £1 to save £1 but no more.

Therefore if a constant service is required for your clients come what may, and being unable to service your clients could result in the loss of relationships and future income, thought should be given to arranging Increased Costs on an Uneconomic (or Additional) Basis.

Is the business dependent on a limited/single supplier? If so what would be the impact of a loss at their premises, what if they had a business interruption that impacted on their trading relationship with you and what if as a result of their loss you suffered? The same is true of key customers. If you are involved in a supply chain it is critical that thought be given to identify risk exposures throughout the supply chain. This can be insured under your Business Interruption programme but only if specified.

If you are in any doubt or would like clarity on the basis of your own Business Interruption Insurance and/or Business Continuity please speak with your insurance adviser.

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New RIBA contracts for small scale commercial and domestic projects

By Katie Pickering

On 5 November 2015 the Royal Institute of British Architects (RIBA) launched two new building contracts: The RIBA Concise Building Contract and The RIBA Domestic Building Contract. They are designed to be used in conjunction with RIBA's Architect's Appointment Agreement for Small Projects.

The RIBA website states that the Concise Building Contract provides a simple yet fully comprehensive contract between an employer and a contractor. It is suitable for all types of simple commercial building works.

RIBA also states that the Domestic Building Contract provides a simple and clearly laid out contract between a customer and a contractor. It is suitable for all types of non-commercial work, such as work done on the customer's own home including renovations, maintenance and new buildings. The contract is endorsed by the HomeOwners Alliance.

Speaking about the new contracts, Stephen Hodder MBE, RIBA President said "The new RIBA Building Contracts… complement our existing suite of architect's appointment agreements for small scale residential and domestic building projects and have been written in straight forward language that can be completed with confidence, without the need for legal advice."

Although according to RIBA the new contracts are not aiming to compete with the current JCT contracts on offer they are similar to the JCT Minor Works contract and JCT Home Owner contracts, a brief overview of each of the JCT forms is below:

JCT Minor Works Contract

- It is intended for smaller projects (domestic or otherwise) but can be used on larger ones provided that the works involved is simple in character.
- It is appropriate where the works is designed by or on behalf of the Employer.
- There is also a Minor Works "with contractor's design" and "with sub-contractor's design".
- It can be used by both private and local authority employers.

JCT Home Owner contract

- This is used for small domestic building works such as extensions and alterations.

- This contract is appropriate where works are to be carried out for an agreed lump sum.

- It is also a good contract to use where no consultant acts on behalf of the home owner to administer the contract.

As you will see, the projects for which the JCT and RIBA contracts are intended are fairly similar: next month's newsletter will include a full comparison between the contracts.

Facilitating long-term partnering agreements

By Jon Close

The whole concept of partnering is a funny one. True partnering is, arguably, a matter of conduct; not contract.

We've all seen partnering charters, good faith provisions and other warm and fuzzy expressions of mutual appreciation. The reality is (or was in the Noughties, when all this was last fashionable) that a lot of it was merely aspirational and not contractually binding. You just need to refresh your memory back to the 'naughtiest of the Noughties' itself, the Year Two Thousand, and the case of *Birse Construction v Exeter St David Ltd [2000] ABC.L.R. 08/17* at para 37 onwards to see what a pickle parties can get themselves into when it comes to incorporating partnering arrangements into contracts.

When it comes to local authorities, they are great advocates of NEC3 with the partnering option weaved in. I don't particularly have a problem with that as it does what it's supposed to do, provided (i) the exact activities indicating what constitutes "partnering" behaviour are clearly defined and (ii) risk is apportioned appropriately between those parties who are best placed to bear it. No wonder it is endorsed by the Construction Clients' Board and Facilities Management Board of the Cabinet Office in Achieving Excellence in Construction and hailed as good practice in facilities management.

Provided everyone understands how it works, and the project management team are a pro-active bunch, it's an effective procurement route for multi-party, complex projects. Problems only tend to arise with NEC3 when the parties significantly amend the standard form to the point where the ethos of NEC principles (and the partnering provisions) start to get eroded.

But there is another way and one which is often overlooked by procurement officers. The Term Partnering Contract (TPC) published by the Association of Consultant Architects is intuitive in its partnering nature. The MoJ and MoD certainly have their own 'long term' versions of this form where partnering is truly integral to the ability of design and tasks to be carried out.

There are a number of benefits to TPC including it:

- being a natural fit for Building Innovation Modelling (BIM) meaning better information and potentially lower administration for ongoing maintenance if TPC is used;

- allowing more readily, without significant amendment, the provision of 'call off' contracts with Specialists on a rates basis. NEC3, by contrast, is more appropriate where there is a precise amount of work identified at the outset defined in the Service Information for which the Contractor is paid, as opposed work instructed by the Employer, as and when required;

- avoiding much of the z clause amendments required to adapt the NEC to project specifics. The paradox of NEC has always been that it is written in plain English but, at times, to the detriment of contractual certainty without substantive amendment to the wording which can itself lead to more uncertainty;

- minimising discrepancies/errors from arising between contract documents due to the establishment of a Core Group of relevant parties, whose role it is to review and 'stimulate' the programme, including dealing with any proposals for remedying any matter which threatens the progress of the services. In this way, TPC goes a step further than NEC in the even closer administration and pro-active management of the quality of the services provided;

- allowing contracting parties more readily, via the open book accounting embedded in the TPC way of working together, to demonstrate substantive cost savings and streamlining of systems overall; and

- encouraging triple bottom line accountability of the Contractor in its obligation to employ sustainable and continuous improvements in its processes as well as value management and value engineering practices.

Not a bad list, is it? Ultimately, it's a question of Employer choice. As with most things in life, however, informed choice is the best position to be in.

Guest article: Holiday pay ruling could damage construction businesses

By Steve Conlay

Last week, workers throughout the construction industry celebrated a landmark judgment, ruling that overtime will now be included in their holiday pay. The news however has been met with dismay from businesses who will now have to consider the financial implications of the judgment heading into the festive period, which always presents complicated overtime scenarios in the construction sector.

The judgment, which is expected to benefit over 5 million workers nation-wide is a result of joint Employment Appeal Tribunal ("EAT") cases from workers claiming that voluntary overtime pay should be included in their holiday pay. Prior to the 4 November decision there was no requirement for such a payment to be included.

There was some light relief for employers however as the EAT rejected claims from the workers that they should be paid for historic underpayments of holiday pay, potentially dating back to 1998.

This part of the judgment will come as a great relief to employers, some of whom would have faced uncertain future had they been held liable for claims dating back to 1998. Whilst employers will be celebrating the judgment in respect of backdated claims, there is an indication that workers may still be able to claim underpayments for the previous 3 months if holidays have been taken in that period. This however is a drop in the ocean compared to the worst case scenario going back to 1998 which, frankly, could have been sufficiently financially damaging to the construction sector as to wipe out the growth we have finally been seeing over the last quarter".

However, the judgment itself, if taken literally, may cause extra administrative burden for businesses as it applies only to the 20 days holiday granted under European law and not the minimum 28 days as provided by UK law. Whether businesses think that the saving of not applying the ruling to those extra 8 days is worth it from an administrative point of view will need to be taken by each business individually".

Cutting through the legalese: "contributory negligence"

By Anna Wood

A successful defence of contributory negligence can significantly reduce the amount of damages that must be paid. An obvious non-construction example is where a car crash victim proves that the other driver was at fault, but has their compensation reduced due to their own failure to wear a seat belt.

In professional negligence claims against designers, a contributory negligence defence can be beneficial not only in court proceedings but also in bringing about settlement. It is worth remembering that this only relates to fault of the claimant, not of a third party (third party contribution is a different topic) and that you must be able to prove (a) that the claimant was also at fault and (b) that there was a causal link between that fault and the damage it is alleged that the defendant caused to the claimant.

Examples may be, if the claimant did not take reasonable care to protect himself or if he took some unreasonable step that increased his own exposure to risk of loss.

In the construction context, this argument is most frequently run in relation to lenders' claims against surveyors relating to errors with mortgage valuations.

How much can this help? The Court will first consider the damages it would have awarded, and will then reduce them by a "just and equitable" amount having regard to each party's responsibility for the loss.

These notes have been prepared for the purpose of an article only. They should not be regarded as a substitute for taking legal advice. "Cutting through the legalese" in particular is intended to be a short and introductory feature which does not provide comprehensive guidance on the topic in question. Legal advice should always be sought.