Construction and Engineering

BPE Construction & Engineering Newsletter – January 2015

Happy New Year to you all! We hope you all had a good break over Christmas, whether or not you had the benefit of the traditional shut down. The New Year has certainly got off to a busy start and since we last wrote:

- Kerrie Jones and Neil Mason have joined the team
- Jon has been meeting with explorers, bankers, a housing association, property developers, and many more besides
- Anna and Emilie have launched a Women in Property Networking Mums initiative in Cheltenham (Dads welcome too) – do email Anna for more information

Back in the office we've been dealing with:

- More solar development
- Helping clients to update their standard T&Cs
- Chasing sub-contractor/sub-consultant collateral warranties
- More professional negligence claims
- A dispute on a re-measurement contract relating to asbestos removal from the ground – encouraging mediation

Jon would also like to update you all on the changes and additions to our team:

I am delighted to introduce four new fee earners who have joined the team in recent months. As well as broadening our range of experience and expertise this gives me added confidence that we will uphold our ethos of providing decisive, fuss-free, excellent advice in a timely manner, billed in a fair way.

Anna Wood will be on maternity leave from the end of February returning in the autumn. If you currently have a file where Anna is your lead solicitor, please be assured that we will be in touch in the coming weeks to introduce you to your new lead fee earner, and we will not be charging you for their 'reading in' time.

A bit more about my new colleagues:

- **Gemma Bill** – based in London, ex-Pinsent Masons and Manches. Gemma has more of a lean towards contract drafting, especially in the large development and energy markets, but is a seasoned litigator as well.

- **Emilie Sclater** – based in Cheltenham, ex-Hammonds and Kennedys. She has particular experience in professional negligence and contractual breaches – especially insurance related ones.

- **Kerrie Jones** – based in Cheltenham, ex in-house at Kier and British Gas. Kerrie has particular experience in regulatory, environmental and energy matters but also litigates.

- **Neil Mason** - based both in Cheltenham and Bristol, ex-Clarke Wilmott. A litigator through-and-through. He comes with a solid grounding of high value construction disputes.

Many of you will also regularly deal with our Paralegal, Katie Pickering, who continues to be based in our Cheltenham office providing invaluable support to the team and our clients.

You may wonder what this leaves me doing! As well as managing the team and continuing to oversee all matters, I have an active role in developing our Stroud office (acquired on 1 September 2014) and our Renewable Energy and Manufacturing offerings.

A look at the year ahead

By Anna Wood

So apart from New Year's resolutions that most people will break by middle of January (not you though, dear reader, I'm sure), what has 2015 got in store for the construction sector?

- Prompt payment is high on the government's agenda for 2015 with consultations on changes to the Prompt Payment Code and on forcing large business to report on their payment performance running until 9 January and 2 February 2015 respectively. The latter is intended to lead to the implementation of "concrete proposals" in Spring 2015.
- The changes to the CDM Regulations come into force on 1 April 2015 although the detail/interpretation is not yet entirely clear (even to experts).
- The HSE plans to focus its construction efforts on occupational ill health (particularly respiratory risks, hard-arm vibration and occupational cancers), although it will also increase the attention it pays to one-off residential developments. In line with the CDM changes, they will also be looking "beyond the site gate" at the role of designers and clients in influencing health and safety standards.
- Onwards and upwards? Construction-related economic activity increased fairly steadily through 2014 although the rate of growth did slow. We understand (from www.theconstructionindex.co.uk) that over 52% of construction businesses surveyed expect a rise in activity over 2015 although the optimism is cautious given that we are now in a General Election year. We look forward to supporting our clients and referrers through the positive times that you have all earned by slogging out the bad times of recent years.
- The holiday pay ruling made by the Employment Appeals Tribunal in autumn 2014 will begin to have a real impact on construction companies in 2015.

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For the record – one New Year's resolution you really should keep

By Emilie Sclater

We are well into January now and your New Year's resolutions may have been abandoned or even long forgotten – but it is never too late to pick up good habits! The habit of good record-keeping is one which I would urge you to develop.

Record-keeping during construction projects is crucial for many reasons, not least allowing you to build or defend a claim should you need to. Even evidence of any delays or shortcomings on your part is important as it will allow your advisors (should you need them in the event of a claim) to develop a strategy which takes into account all of the strengths and weaknesses in your position. As they say, forewarned is forearmed.

With that in mind, some key points to remember are:

1. The people who eventually look at your records may have no first-hand knowledge or experience of the site and/or project (e.g. a judge or adjudicator)
2. Photos and videos require the photographer's name, the time and date and a frame of reference to locate them on the site (e.g. a photo of a window is of little use without something to demonstrate its location within the building)
3. Photos and videos need to be clear so that an outsider can understand what is shown so try to avoid taking them in dim light, etc.
4. Don't dispose of records – even seemingly insignificant diary entries might be important later on and when viewed in the context of other documents and communications
5. Keep written records of all instructions and variations and ideally obtain and keep written confirmation of those instructions or variations
6. Record weather conditions daily
7. Note dates on which access to site or parts of a site is given
8. Record all delays and their causes immediately rather than retrospectively
9. Where there is likely to be substantial email correspondence or electronic documents, organise these into logical folders at an early stage for ease of reference later – the same goes for paper documents (not only will this save time it may save you legal fees as well if you have to instruct lawyers to deal with a claim)
10. Where possible, keep daily records of time on site, equipment use, material deliveries, etc.
11. Keep written and photographic records of progress on site.

The above is by no means an exhaustive list and it goes without saying that in addition to the above, pre-contract and contractual documents, correspondence, programmes, requests for information, contractual notices and meeting minutes should be preserved.

Developing a good record-keeping habit will involve very little time and effort on a daily basis but may pay huge dividends if things turn sour.

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Are subcontractors 'taking a Liberty' by failing to return collateral warranties?

By Kerrie Jones

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

As we are all well aware, getting back executed collateral warranties can prove a rather trying exercise, to say the least.

A common solution to speeding this process is to include a provision in the contract stating that the return of the executed warranties will be condition precedent to payment. But, what happens if this provision or a similar provision to encourage the return of the warranties has not been included?

All too often contractors find themselves in a state of limbo between a subcontractor that has failed to return the warranties, and an employer and/or funder that is demanding the return of the warranties, and refusing to pay as a result.

But how far is a contractor expected to go to procure the warranties? Is it enough to show that reasonable attempts have been made or would the Court be willing to order a contractor to procure the warranties that they are contractually obliged to deliver?

In the case of Liberty Mercian Limited v Cuddy Civil Engineering Limited and others [2013] EWHC 2688 (TCC), a standard building contract was amended to contain provisions that the contractor ("Cuddy") must provide collateral warranties from its subcontractors. The client ("Liberty") claimed that Cuddy had failed to rectify defects, resulting in the termination of the contract, which Cuddy accepted as repudiatory breach. Liberty commenced proceedings against Cuddy which included a CPR Part 8 application seeking specific performance and requested that the Court used its discretion to force the contractor to provide the client with the collateral warranties as obliged by the contract.

Cuddy initially argued that due to conflicting contracting names (due to errors made when the contractual documents were drafted) the obligation to provide the warranties was not valid. This argument failed.

Cuddy then argued that they had attempted to get the warranties, but unfortunately the subcontractor had gone into liquidation and therefore it would no longer be possible to procure the warranties from the subcontractor. Interestingly, the Court did not consider the fact that the subcontractor was in liquidation a sufficient reason for Cuddy not to provide Liberty with the warranties. This was also the opinion in Oakapple Homes v DTR when the Court ordered an architect in liquidation to provide collateral warranties to tenants. To summarise briefly, the Court held that if there are reasons to suggest that the warranties may be backed by insurance they will still have some value if returned.

Recent case law certainly suggests that the Courts are willing to enforce provisions in the contract to provide warranties. In short, if you have a contractual obligation to provide collateral warranties there is very little you can do to get out of this obligation.

My simple advice to contractors would be:

- be upfront with the subcontractor at the outset - an early conversation about collateral warranties could prevent future problems

- include a condition precedent to payment or retention clause in your subcontracts allowing you to withhold money unless/until collateral warranties are provided. Payment or retention is a great motivation for Subcontractors to return collateral warranties swiftly

  or, failing this:-

- include a clause with an obligation for the subcontractor to provide a warranty within a set time, stating that failing to meet this requirement will be deemed a material breach of the contract which will constitute grounds for termination

It goes without saying that contractors are going to struggle if their employer has failed to warn them from the outset about the requirement for collateral warranties. In turn the employer should check with any funder. Yet again this is an example of a situation where joined-up thinking (and dare I say a 'collaborative' approach) from the start will avoid potential problems in the future.

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A reminder about mediation…no, seriously!

By Jon Close

Here in the UK, we have pre-action protocols which seek to encourage the parties to meet at least once to narrow the issues for trial or resolve their differences amicably. More often than not, this is replaced with mediation especially if it's apparent that the parties are polarised and simple bi-lateral negotiation is unlikely to progress matters further.

Many of our courts publish guidance actively encouraging the parties to mediate. It's also a direct question on the pre case management questionnaire whether the parties have given "serious consideration" to mediation or not. It is a brave (and wealthy) party who refuses to consider mediation - the risk of adverse costs is great unless a party can demonstrate that it was reasonable not to mediate at a particular time, or at all (very rare indeed).

If parties mediate early (and there is much speculation here as to when it is premature- I personally think that it's once the issues have been clearly stated by both sides - nothing more complicated than that) there is a chance that issues will be more clearly defined and the parties focus much more with expert reports and other evidence, than if they had not gone through the process at all.

Barriers start to come down, dialogue between lawyers becomes more fluid and the whole process is energised and not allowed to drift. It means that the parties really do know if they litigate then they are doing so for (in their minds) valid reasons and not simply to brow-beat the other side with some vague threat. It's for real and gives people a fresh perspective. Matters that are not resolved at a one day mediation often settle within 3 weeks after the event. The number quoted is as high as 75%. I see little downside and much to gain for the parties by mediating, yet getting agreement to do so can be trickier in reality.

We're still in a cultural shift here that you only mediate if your case is weak, which is completely wrong. It'll take more time before that perception dies out but, from discussions elsewhere (in NSW Australia, for example) our approach here backed by the courts is one worth adopting and evolving.

Practically, a well thought out day's mediation with the right mediator is often the catalyst for commercial resolution of even the most insurmountable of legal issues. It's worth taking seriously.

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Cutting through the legalese: "Specific performance"

By Katie Pickering

Specific performance is an order the Court will give which requires a party to perform a specific act. While it forces a party to perform an act, it is usually used to complete an established agreement: it is most effective where the parties have a written contract and helps the interests of the innocent party when the other party is not completing their obligations. In some ways it could be described as the opposite of an injunction.

Specific performance is an equitable remedy (which means it is not given as a right, only at the discretion of the Court). Equitable remedies are awarded when damages do not adequately compensate the innocent party.

There are circumstances in which an order for specific performance will not be granted:

- The claiming party did not act with "clean hands", the claiming party must act in good faith;
- Specific performance would cause severe hardship to the defendant, or if performance was impossible to preform;
- The contract requires constant supervision (it would be deemed too difficult to enforce specific performance);
- There was no consideration under the contract;
- The contract was extremely unjust or too vague to enforce;
- The contract is terminable at will (meaning either party can terminate without the other being in breach);
- Specific performance consists of a personal service;
- Mutuality is lacking in the initial agreement of the contract.

The Courts will only award specific performance if the underlying contract was fair and equitable and none of the conditions above apply. If a common law remedy (such as compensation) will put the innocent party in the position he or she would have been in had the contract been fully performed, the courts will usually use that option instead.

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