Construction and Engineering

BPE Construction & Engineering Newsletter – February 2015

Is it just us or did January seem to fly by? Well, February is here which means New Year's Resolutions may be starting to fall by the wayside. We hope at least some readers are still sticking to the good habits encouraged in our last newsletter. Since we last wrote:

- Our new colleagues have been out and about meeting our clients and contacts, and introducing us to a few of their own.
- We hosted two very successful Women in Property events (Networking Mum's Lunch and Chocolate Tasting).
- We have been busy preparing for next week's seminar (now fully booked)

Back in the office we've been dealing with:

- A notable increase in the number of clients issuing applications relating to extensions of time, liquidated damages and loss and expense.
- Drafting an EPC for multi-site development, together with a linked international sub-contract and series of international sub-subcontract frameworks and call off contracts.
- The construction elements of a number of GP surgery developments as part of BPE's healthcare team.
- Setting aside a judgment in default (new instruction!)
- Helping a client to formalise a series of professional appointments (to improve the "sale-ability" of the project on completion as well as protecting the client in the interim).
- Providing tender support for a UK government body who is opening new premises in Brussels.
- Pushing the other side to select a Single Joint Expert from a list we put forward (and regrettably being forced to request a Court hearing as the other side continued to fail to co-operate).

What Price Justice?

By Neil Mason

The contrast between the Ministry of Justice's stated intent that 'We want to make sure that access to courts and tribunals is available to all', shown on the fees page of the Court Service Website, and the Ministry's proposal to increase court fees this April, could not be clearer. The judiciary's critical views, expressed in the Civil Justice Council's response and reports in the Law Society Gazette, are worth reading, and they rightly point out that these increases will deter SMEs from seeking to recover what is due to them, and make it more likely that debtors will evade justice.

It is proposed that where the debt or damages claimed are in excess of £10,000, the court fee will be increased to 5% of the amount of damages claimed, up to a maximum fee of £10,000 for claims of £200,000 and over, while claims for an unspecified sum will be charged at the full £10,000 fee. The application of the 5% flat rate means that the fee for a claim of £15,000 would rise from £610 to £750 (a 23% increase), while the fee for a £100,000 claim would rise from £1,115 to £5,000 (a 348% increase); see the table in the Civil Justice Council's response to see how this is likely to affect you. If you have a claim worth more than £10,000 which you need to have resolved in court, we suggest you issue proceedings before the end of March 2015.

There is no such thing as perfect justice no matter how well funded the court system, so with the proposed court fees increase adding to the overall costs of litigation, it is worth considering the alternatives which might deliver a result you can live with. In the construction industry, the wider availability of adjudication following the Local Democracy, Economic Development and Construction Act 2009 (still often known as the "new construction act") means that for most cases you might as well pay an adjudicator's fees instead of a court fee and get an enforceable decision far more quickly than you would in litigation. If you can convince your opponent that you intend to litigate, they may agree that a pre-action mediation is worth trying rather than incur the risk of having to ultimately reimburse your hefty court fee. Any settlement agreement arrived at in mediation but which the payer fails to honour is likely to be upheld by a court via summary judgment, which can be enforced far sooner than a judgment obtained after a full trial.

As you may be aware, applications to enforce adjudicators' decisions and/or settlement agreements are still subject to court fees. We await the full Fees Order and will issue updated guidance as soon as it is available.

You can contact Neil Mason on mailto:neil.mason@bpe.co.uk or 01242 248432.

Signed sealed delivered…I'm yours?

By Emilie Sclater

Deeds are very common in the construction industry due to the two factors which set them apart from a simple contract: the longer limitation period of 12 years and the fact that no consideration is required in a deed. The former is clearly an important issue to anyone procuring construction works or services which may contain latent defects that remain hidden for years. The latter is particularly helpful in relation to collateral warranties where the beneficiary is unlikely to be giving anything in return to the warrantor.

However, deeds have been known to fail for simple and avoidable reasons and it is worth bearing these points in mind whenever you enter into a deed or indeed where you are in dispute with a party relying upon a deed – you may just find that the deed is not valid!

The key requirements for a deed to be effective are that the document be described as a deed, signed, delivered and, occasionally, sealed.

Described as a deed
This will normally take the form of some wording on the front of the deed to indicate that it is a deed and wording in the attestation clause stating that it is being executed as a deed.

Signature
The requirements for execution vary depending upon whether the deed is entered into by an individual or a company but the basic requirement is that all parties to the deed must have signed the document (and in some cases, e.g. for individuals, the signature must be witnessed). Signature and handing over of the deed is not sufficient however, as explained below in relation to delivery.

Delivery
In 2011, the case of *Bibby Financial Services and others -v- Magson and Others* highlighted the need to be careful to ensure there was effective delivery of a deed. In that case, a deed in draft form containing manuscript amendments was signed and handed over by the parties with the intention that a final clean copy would be prepared and executed. This was never done and Bibby sought to rely upon the signed draft version. The Court decided that in order for delivery to have occurred, there must have been an intention that the deed by delivered and that in this instance, there was no such intention.

The most common method of ensuring delivery relies upon the deed being dated. A deed does not have to be dated, but deeds often state that they are "delivered when dated". This not only makes it clear when the deed was entered into but helps to ensure (provided the deed is then dated of course) that the deed meets the delivery requirement.

Sealing
There is no longer any statutory requirement for deeds to be sealed by individuals or companies, however there are still some companies which require use of a seal. Public bodies incorporated by statute or royal charter are still required to use a seal but those registered under the Companies Act are not required to do so. The key point is: it is always worth asking the other party (where it is a company or public body) to provide evidence that the method of execution and/or sealing being used is correct and valid.

A final point on consideration…

It is worth noting that although consideration is not needed, nominal consideration is sometimes included for two reasons:

1. so that there is a 'simple contract' fallback position in the event that an error has been made rendering the deed invalid and
2. because the remedy of 'specific performance'* is an equitable remedy and cannot be relied upon without consideration.

*See January edition's 'Legalese' for a definition of **specific performance**.

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Cutting through the legalese: "Gross negligence"

By Katie Pickering

The terms negligence and gross negligence often appear in contracts. The tort of gross negligence is not recognised by English Law as a concept distinct from negligence. It is generally used in contracts when parties limit their liability to each other. A few examples are listed below:

- a right to terminate right may arise in the event of gross negligence;
- a professional consultant may exclude liability save for instances of gross negligence;
- consequential loss may be excluded except where the loss is caused by gross negligence

There is usually no definition for the term "Gross Negligence" even though there can be serious financial consequences from its reliance. It is left up to the court to interpret it.

The courts have been reluctant to provide any strong guidance on what will constitute gross negligence, other than noting it as differing from negligence as a matter of degree. In the case of *Camerate Property Inc v Credit Suisse Securities (Europre) Ltd* Andrew Smith J re-visited the meaning of gross negligence. He concluded that although the distinction between negligence and gross negligence is on a degree, gross negligence is clearly intended to be something more fundamental than failure to exercise proper skill and/or care constituting mere negligence.

When negotiating a construction contract it is best to try and avoid using the term gross nebutegligence unless it is clearly defined, otherwise, in the event of a dispute it will be up to the courts to interpret the works used according to their natural meaning in the context of the contract.

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.

You can contact Katie Pickering on katie.pickering@bpe.co.uk or 01242 248271.

Uncapped Liability - What's the worst that can happen?

By Kerrie Jones

I liken uncapped liability to staring into the abyss of a bottomless money pit. Put simply, failure to cap liability means that there is no limit to the damage a party incurs if things go wrong, and thus no limit to the money to be paid out in respect of that damage.

Liability takes different forms, namely direct, indirect and consequential. It is not possible in law to exclude or limit liability for death or personal injury. Legally the distinction between "direct" and "indirect" losses is based on what was reasonably foreseeable or what was in the contemplation of the parties at the time when the contract was made.

This was confirmed in Hadley *& Anor v Baxendale & ors [1854] 9 Exch. 341:*
"Where two parties have made a contract which one of them has broken, the damages which the other parry ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself or such as may be reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result if it."

(Editor's "fun" fact: the case of Hadley v Baxendale (which is a firm favourite of every law student) concerned the delivery of a steam engine required to drive a mill…. in Gloucester.)

Unforeseeable loss such as economic loss, loss of profit and loss of saving are generally considered as indirect or consequential loss, also referred to as uninsurable loss. Liability and insurance levels are frequently confused to mean the same but this is not the case. A policy will have a limit on the amount that the insurance will pay out. Once this limit has been reached, no further payments will be made. When a contract does not incorporate a cap and the damages exceed the amount recoverable from the insurance, the damages still have to be paid! Exposure to uninsured loss can amount to catastrophic sums- in the worst cases uncapped liability has sunk businesses!

Suggested liability caps must be discussed and agreed with the other party to the contract. Once agreed it should be included as a written provision of the contract. If this is done correctly, it will provide protection for the term of the limitation period.

If you have managed to negotiate capped liability in your contract, it doesn't been that you can kick back and relax just yet. When liability has been capped in the contract there is still a risk that a company could get stung via the warranties. It is important to check that any warranties connected to the contract include sufficient wording limiting the liability to the same level as the contract. Without this the warranties could expose your business to open-ended loss.

Kerrie will be discussing liability limitation in more detail at the BPE Construction & Engineering team's lunchtime seminar on 13 February.

You can contact Kerrie on kerrie.jones@bpe.co.uk or 01242 248297.

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Guest Article: Pre-nups – a marital letter of intent?

By Helen Cankett

Whilst it may not be the most romantic item on a wedding list, a pre-nuptial agreement is increasingly a consideration for couples, particularly those who are marrying second time around. So, they are not just for the rich and famous!

Planning for the worst-case scenario may seem unduly pessimistic but a well-drafted agreement could save you thousands of pounds in legal costs and give you and your business some certainty for the future.

Many businesses have been in families for generations and protecting that legacy is an important consideration. A pre-nuptial (or post-nuptial, if entered into after marriage) agreement can protect a business if the relationship fails.

Pre- and post-nuptial agreements are still not legally binding in this country but they can be highly persuasive to a divorce Court. The key ingredients of a well-constructed agreement are:-

- with pre-nuptial agreements, these must be signed at least 28 days before the wedding;
- material disclosure of each other's financial circumstances;
- independent legal advice about the terms and implications of signing the agreement;
- no pressure on either person to sign the agreement.

These agreements can be particularly useful for business owners who may be reviewing their exit from the business and who want to consider contingencies should their marriage run into difficulties in the future. You should also review and update your Will, Power of Attorney and any Shareholders' Agreements, to ensure your intentions are clear and consistent.

In February 2014, the Law Commission recommended that the law should be changed to allow couples to enter into "Qualifying Nuptial Agreements" (QNA) either before or after marriage. This still needs to be considered by Government so it will be a while before any progress is made.

The Family team at BPE work with business owners to help them plan for the future, drawing on their significant expertise in advising commercial clients on divorce and separation.

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For more information, please contact Elizabeth Saunders, head of the Family team, on 01242 248450 or email elizabeth.saunders@bpe.co.uk.

Guest Article: Relief from sanctions - British Gas Trading Ltd v Oak Cash and Carry Ltd

By Angharad Rees

Where a party fails to comply with a court deadline, if that failure means the set trial date is lost, there is a strong chance that the case will be struck out and no relief from sanctions will be given.

Oak Cash and Carry Ltd ('**the Defendant** ') failed to file its listing questionnaire by the specified date in the Court directions; it also failed to file it correctly in the two week extension given by the Court.

Due to this, British Gas Trading Ltd ('**the Claimant**') obtained a default judgment.
The Defendant successfully obtained for relief from sanctions and the judge set aside the Claimant's default judgment.

The Claimant appealed on two grounds:

1) The judge had misapplied the Civil Procedure Rule covering relief from sanctions; and
2) The judge should not have set aside the judgment as the Defendant did not make an application for this.

The appeal judge gave judgment for the Claimant as follows:

Ground 1 - taking each of the three aspects to which the court must have regard,to grant relief from sanctions:

1. "Identify and assess the seriousness and significance of the failure to comply"

   The failure to comply here was serious and significant as the trial date was lost due to the Defendant's failure to submit the questionnaire on time, despite being given an extension.

2. "Why the default occurred"

   Whilst the court was sympathetic that the Defendant's instructed solicitor had personal issues, the facts showed that he did nothing regarding the questionnaire until the first deadline had passed and then he failed to give the job to one of the other solicitors in his practice with the relevant experience.

3. "Evaluate all the circumstances of the case to enable the court to deal justly with the application"

   Whilst not the most important document for litigation, the failure to submit the listing questionnaire on time meant that the trial date was lost. The judge considered the likelihood that the Defendant would sue their solicitor if relief was not given but the key issue in this case was that the trial date was lost due to that solicitor's failure.

Ground 2 - whilst a judge may feel that it is appropriate for a judgment to be set aside, a judge should not do so without an application being made.

The ultimate outcome, therefore, was that due to an administrative failing on the part of Oak Cash & Carry's solicitor, British Gas got a "knock out" win without the expense of a full trial (although they will have incurred costs in preparation for trial, which, under normal rules, will be recoverable by British Gas from Oak – the Court's comments on costs are awaited).

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For more information, please contact Angharad Rees, Trainee in the Litigation Team, on 01242 248447 or email angharad.rees@bpe.co.uk.