CONSTRUCTION

AUTUMN 2009

NEWS UPDATE

www.wrighthassall.co.uk

Speakers at Wright Hassall's 2009 Construction update conference held at the Heritage Motor Centre at the beginning of October.

Impressive cast at annual update

A formidable line-up of speakers took part in this year's update Conference which was held at the Heritage Motor Centre in Warwickshire.

The main theme revolved around costs, budgeting and payment terms. Liz Bennett, of Habilis Health & Safety Solutions, began the proceedings emphasising that, by fully incorporating H&S requirements at the beginning of a contract, costs will be considerably reduced in the long run. Andy Appleyard, of Tenon, explained what companies caught in a lengthy supply chain can do if one of the parties is declared insolvent.

John Riches, of Henry Cooper Consulting delivered a wry look at the proposed changes to the JCT 05 suite of contracts. He was followed by Professor Rudi Klein reviewing the proposed changes to the Construction Act (the Housing Grants, Construction and Regeneration Act 1996), focusing on the thorny issue of improving cash flow. Tim Pollard, director of sustainability for Wolseley's Sustainable Building Center, sought to persuade the audience to invest in sustainable building materials and finally, Philip Harris cantered through some of this year's more interesting case law.

JCT conundrum that is difficult to resolve

In the good times, contractual termination provisions did not really impinge on the consciousness of the parties. In recessionary times, they are writ large.

PHILIP HARRIS considers the termination provisions as set out in JCT Contracts and wonders if sufficient thought has been given to them.

For a long time, there has been a view amongst users and students of JCT Contracts that the termination provisions give an advantage to the terminating party. This is because the party who properly terminates gets to take the account between the parties and that account determines which party is to pay the other and in what amount. So far as the taking of the account goes, the terminator is in the driving seat.

The theme of this article is that the JCT has either not given sufficient thought to the inter-relationship of these provisions or, if it has, that it has not spelt out the consequences so as to make them clear to the users of the contract. The article will consider the practical effects of termination under the DB2005 regime.

In fairness to the draftsmen of the JCT, it may be their intention that the mechanism of taking the account on termination is to be completely comprehensive and exhaustive of all monies due and payable from either party to the other. Therefore, the JCT may have reasoned, the taking of the account is to be exclusive of any further right of set off. However, the point is the DB2005 Contract does not expressly state this.

Elsewhere, it deals with rights of withholding in considerable detail in relation to interim payments and the final payment upon the final account and final statement. There are no similar withholding provisions under Clause 8.12 dealing with payment on the taking of the account on termination.

One possible effect of this is that there is a loophole in the contract under which a party that is liable to make payment under the account taken on termination can simply set off against that account provided that Notice of Withholding is served in accordance with the Scheme for Construction Contracts. The scheme would apply in the absence of a contractual regime.

The termination of the contractor's employment under the contract, whether by the employer or the contractor, does not terminate the contractual machinery. Disputes over the account taken on termination can therefore be referred to adjudication, or arbitration or litigation depending on the chosen regime for dispute resolution.

The inter-relationship between the adjustment of the completion date and termination mechanisms gives pause for thought. Suppose the situation is that the contractor has terminated on the grounds of the employer's default in making payment of interim payments. Suppose by that stage, the contractual completion date has been reached. It seems to be apparent that the mechanism for adjustment of the completion date and for stating non-completion and for levying liquidated damages, remains alive and active, although Condition 8.12.1 will preclude any further payment of liquidated damages, prior to the account being taken.

The contractor, who considers that he has been delayed, will wish to claim additional preliminaries and may wish to claim loss and expense within the account as a consequence of delay.

Continued on page 2

INSIDE: Withholding notices: court gives further clarification

WH appoint civil engineer

WRIGHT HASSALL SOLICITORS

JCT contract favours the terminator

Continued from page 1

Where practical completion has been achieved prior to termination, then the employer shall, pursuant to Condition 2.25.5.1, within 12 weeks after practical completion determine whether to grant a completion date later than that previously fixed. This may mean that the contractor has to wait for 12 weeks following practical completion before taking the account, in order to know whether he is given an extension of time up to practical completion or not.

On the other hand, if the taking of the account by the contractor is an exhaustive and comprehensive process, then the taking of the account by the contractor, with the inclusion of additional preliminaries, could determine the contractor's entitlement to those additional preliminaries.

Alternatively, must the contractor, who seeks but is not given an extension of time, adjudicate to determine his entitlement to an extension of time first and then take the final account on the basis of the adjudicator's decision?

If liquidated damages have already been levied and deducted at the time of termination, does the contractor have to concede those liquidated damages within his account, even though he disputes that he was responsible for delay, or, again, does he adjudicate to challenge the levy of liquidated damages and then take the account?

If the contractor takes the account on the basis that he is entitled to a full extension of time and loss and expense and effectively awards himself additional preliminaries and loss and expense in the final account, is that account binding upon the employer and payable under 8.12.5? Does the employer have to adjudicate to review and revise the final account, or can he merely point to the fact that the final account is inconsistent with the mechanism for fixing the completion date under Condition 2.25 and is therefore invalid?

The JCT appears to have created a conundrum. It may be that the conundrum is easily solved but the JCT does not appear to have resolved it and case law on the point is hard to find.

The relationship between taking of an account on termination, set off and withholding notices and the mechanism for fixing the completion date needs some clarification.

philip.harris@wrighthassall.co.uk

Adjudicator on shaky "ground"?

An adjudicator was judged not to have exceeded his jurisdiction in a recent case. MADELAINE HANNON reports.

We are probably all familiar with the wording of Section 111(2) of the Housing Grants Construction and Regeneration Act 1996 (the Act), i.e. that to be effective a withholding notice must specify the amount to be withheld and the ground for withholding.

In the recent case of *Windglass Windows Ltd v Capital Skyline Construction Ltd & Another [2009] EWHC 2002(TCC)* (an enforcement of an adjudicator's decision), Mr Justice Coulson examined an argument put forward by Capital that the adjudicator had exceeded his jurisdiction when he concluded that the withholding notices were invalid because they did not set out any valid grounds for withholding. Capital's argument was that the Act does not require that the ground for withholding payment, set out in the notice, be valid for that notice to be an effective withholding notice.

Windglass had issued two applications for interim payment, to which Capital had responded with two identical withholding notices. The withholding notices stated: ". . . Our financial director . . . is not willing to process this amount due to insufficient supporting information. Please note that our company policy is such that each sub-contractor valuation must be presented in a standard format . . . and authorised by the appropriate site manager before your application can be processed . . ."

Windglass argued that there was no contractual agreement stipulating that applications for interim payment were required to be in certain format. The adjudicator agreed, and decided accordingly that the withholding notices did not meet the requirements of the Act in that "they did not seek to propose the ground(s) for withholding" and therefore "Capital have not issued effective Notices of . . . Withholding under Section . . . 111 of the Scheme".

Mr Justice Coulson held that there were four reasons why Capital's allegation that the adjudicator exceeded his jurisdiction must fail:

i) In deciding that there were no effective withholding notices such that Capital could reduce, or not pay at all, sums otherwise due to Windglass, the adjudicator had decided the issues put to him, i.e. that decision was within his jurisdiction;

ii) The Judge did not accept the suggestion that section 111 of the Act does not require a withholding notice which sets out valid grounds for withholding money otherwise due; nor did he agree that, as long as there is something which purports to be a withholding notice, then that is sufficient to justify withholding, regardless of the contents of the notice itself. From an examination of the express wording of the Act, the Judge concluded that there was no meaningful distinction between a 'valid' or an 'effective' notice.

iii) The adjudicator set out why he considered the withholding notices were not effective and was right to reach the conclusion that he did.

iv) Even if the adjudicator should have looked at and taken into account the alleged counter-claim for defects and delay, it was so vague, so unlinked to the terms of the contract, that it could not operate as a valid set-off and counter-claim in any event.

Capital also argued that ". . . the notice should act as a 'gateway' by which it gains entitlement to raise any other defence in the adjudication". Mr Justice Coulson rejected that argument saying: "The 1996 Act does not permit a party to put in an effective withholding notice and then, in the subsequent adjudication, seek to put together an entirely different justification for withholding payment. Such . . . [an] approach . . . is contrary to the 1996 Act, which emphasises the obligation on the paying party to give good reasons, there and then in advance of the date for payment, if any part of a sum otherwise due is not going to be paid. If that paying party does not do so, then, in the words of Chadwick LJ, it has to pay now and argue later".

The adjudicator's decision was duly enforced.

madelaine.hanlon@wrighthassall.co.uk

Puzzle your way to right answer

It could be a suitable question for Radio 4's *Round Britain Quiz*: what do a nom de plume, an aspiring sculpture, a geometrical shape, the Millennium Bridge and the 2012 Olympics have in common?

Like most of the teams we'll take the last item first, and with a bit of a nudge from the question master, we are told that that we are looking for an Olympic venue – not a big one, not one hosting field or track events, but one where the competitors usually achieve black before gold. We duly rack our collective brains and tentatively suggest judo as a sport where black belts abound, and with the question master not dissenting – bingo, we arrive at a dojo. So we are looking for a specific dojo being a venue – and that takes us to East London as the site of the 2012 Olympics.

Not able to proceed further, we turn to the aspiring sculpture and, noting the curious clue we are given – aspiring rather than inspiring – we establish that we are looking for a particular sculpture, and that it is outside rather than inside – but it is not the Angel of the North. The question master takes pity and "arrows" us towards Nottingham – and the sculpture called "Aspire" – at Nottingham University. Still in the dark about the connections, though.

The Millennium Bridge – our first instinct is the Millennium Bridge in the Goyt Valley in the Peak District but we are told to look a little further south – which takes us to the one that crosses the Thames from St Paul's to Tate Modern

So, by now we guess that the common connection that we are looking for is a designer.

Two parts left to identify. A geometrical shape – pyramids – not exactly contemporaries of the bridge

Distinctive landmark: Kenneth Shuttleworth's 60 meter high "Aspire" sculpture at Nottingham University's Jubilee Campus.

sculpture or dojo – but what else? A cube – and yes, we think we have it – not just a cube, but The Cube – the planned development in Birmingham adjacent to the Mailbox.

We have nearly solved the question now – Ken Shuttleworth is the architect of the Cube!

Shuttleworth was born in Birmingham in 1952 and studied architecture at what is now the Leicester School of Architecture, de Montfort University. While with Sir Norman Foster's firm he worked on the "Gherkin" and across the river, City Hall, and the Millennium Bridge. Wembley Stadium was another of his projects, but the smaller venue we noted earlier, the judo centre in Dartford, south east London, was his first project since leaving Fosters. Opened in 2006, it is the first completed purpose-built facility for the London 2012 Olympics.

Next we have The Cube – a 17 storey mathematical cube, mixed development, award winning, destined to be "iconic", with a rising, twisting, asymmetric lightwell inside geometric metal and glass cladding

Then "Aspire" – 60 metres high (to celebrate the University's Jubilee Campus 60th anniversary), a tapering steel lattice, unfurling, aspirational to those fortunate to pass daily its distinctive, landmark presence.

And the "nom de plume"? Reputedly, Shuttleworth's fluid draftsmanship led to the nick name "Ken the Pen" while a student [cue groans all round].

peter.tugwell@wrighthassall.co.uk

Tessa McInnes, Madelaine Hanlon, Stuart Thwaites, Philip Harris, Peter Tugwell, Helen Kenyon and Matthew Phipps of the WH construction team.

WH make contentious appointment

Wright Hassall has seen its construction department go from strength to strength during the recession – and has brought in a chartered civil engineer to bolster the team.

The firm has appointed Madelaine Hanlon, from BPE Solicitors, where she primarily dealt with contentious construction work.

"Having been actively engaged in the construction industry for some 18 years I've got a different background to most in the team," Madelaine said.

"That should bring an added dimension to the discussions we have with clients and to our understanding of the problems that our clients face.

"My training as a chartered civil engineer and chartered arbitrator means that I try to provide clients with practical and cost effective results – and that's an ethos the team at Wright Hassall believes in too."

The role of the contract administrator

What exactly should a contract administrator do? MADELAINE HANLON looks at the role.

Terms like employer's agent, construction manager, project manager and contract administrator are often used interchangeably, but the exact role performed by someone with any one of these labels can vary enormously.

The starting point for defining the responsibilities and liabilities of a contract administrator are the terms of engagement between that person and the employer, in conjunction with the construction contract. Only then can the body of case law which refines the contractual position be considered. Underpinning the contractual position are further duties to use reasonable skill and care and to act impartially.

Traditionally employers have engaged professionals to manage construction and engineering contracts. While the scope of their duties depends on the terms of the particular contract, usually they perform two distinct roles.

The first is as agent of the employer – for example in issuing instructions and ordering variations. The second is as a decision-maker – for example in certifying payments, assessing claims for loss and expense and in awarding extensions of time.

A contract administrator, acting as a decision-maker, has to act independently, impartially, honestly and fairly. He must not favour either contractor or employer. However, he does not have to apply the rules of natural justice when making his decisions.

Contractors and employers are entitled to expect that contract administrators will be fair in their decision-making. They cannot be independent in the (common) situation where they are engaged by the employer, but they can be expected to act impartially as between contractor and employer in their decision-making role, in the sense of favouring neither. The concept of acting independently is still relevant.

If the administrator negligently over-certifies in the contractor's favour he can be held liable to the employer who engages him. In special circumstances he might also be liable to third parties, such as institutions lending money to the employer.

In normal circumstances an administrator who negligently under-certifies will not be liable to the contractor. However, if for example, he makes gratuitous representations to the contractor he may be found to have assumed a responsibility to him and be liable in negligence.

If the employer exerts pressure on the administrator so that he loses his impartiality and independence then the administrator's certificate may be invalid and his decision ignored. Furthermore, if the employer knows that the administrator is not carrying out his functions properly then he may himself be liable to the contractor for breach of contract if he does not take steps to correct the position.

In principle, there is nothing to stop parties agreeing that the contract administrator should be an employee of the client/employer. In theory, the employer itself could act as contract administrator but this is unusual and potentially fraught with difficulty. The clearest express terms are needed to bring this about.

These principles have long been applied to 'traditional' construction and engineering contracts. Recent attempts to argue that they do not apply to decision-makers under new forms of contract have been rejected by the courts.

A longer version of this article, including examples of case law, can be found on our website http://www.wrighthassall.co.uk/resources/articles

For more information please contact Madelaine Hanlon.

T: 01926 884620
E: madelaine.hanlon@wrighthassall.co.uk

Make a snap decision and join us at seminar

Andrew Lester, the managing partner of Carr-Michael, will offer advice on how to seize the opportunities presented by a recession at a Wright Hassall seminar on Thursday, November 12.

Andrew has a successful career of growing companies in corporate life (in particular, in prior roles as managing director of Jaguar UK and Alfa Romeo UK).

To book your place at the seminar, entitled **Winning by Making Better Decisions Faster**, please email Caroline Venuto at caroline.venuto@wrighthassall.co.uk.

It starts at 3.45pm and will be held at Wright Hassall's Olympus Avenue offices.

An **Employment Law Update** will also take place at the same venue on Thursday, November 5 from 9.00am-11.00am.

Matt's in the chair

Matt Phipps, above, a solicitor in our construction team, has been appointed chairman of the Forum for Tomorrow which is the Young People's division of the Forum for the Built Environment (FBE). This has been established to enable young professionals, working within the construction and property industries, to come together and develop skills that will enhance their careers. The FBE has members from across all disciplines and focuses on the business generation and networking aspects of the industry.

CONSTRUCTION News Update contains material for general information purposes and does not constitute legal or other professional advice. Every effort is made to ensure that the content is accurate and up to date but users should always seek specific legal advice before taking, or refraining from, an action or relying on the legal information given here.

CONSTRUCTION News Update is published on behalf of **Wright Hassall LLP**, Olympus Avenue, Leamington Spa, Warwickshire CV34 6BF
T 01926 886688 F 01926 885588 E email@wrighthassall.co.uk W www.wrighthassall.co.uk