

A standing novation or one big headache?

Design and build contracts often provide for the novation of appointments of the various design consultants from the employer to the contractor. This is effected by a contract between the employer, the consultant and the contractor under which the contractor becomes the new employer of the consultant.

There must have been an appointment by the employer of the consultant in the first place, and that appointment must require the consultant to enter into a novation agreement to accept the contractor as his new employer. Similarly, the building contract must require the contractor to enter into the novation agreement to take on the role of the employer of the consultant.

The appointment continues – the contractor, as the new employer, has the contractual rights under the appointment to the performance of the services, and the consultant has the right to look to the contractor for payment of the fees payable under the appointment.

The old employer no longer has any rights to the service of the consultant, and no liability for the fees.



As the novated consultant no longer owes any duty of care to his former employer, the novation agreement usually provides for the consultant by executing a warranty to continue owing to the former employer a duty of care.

So, the original employer's interests are protected – he no longer has to pay the fees, the contractor has taken on his chosen consultant, and that consultant owes him a duty of care.

What about the consultant? He has a new employer, one that he did not contract with in the first place. The consultant may have concerns about payment and possible conflicts of interest as between his former and present employers. And the contractor? He has to take on a consultant on terms he has not negotiated.

Still, it's a small world, and the parties may have



PETER TUGWELL considers the complexities of novation – when responsibility for a consultant switches from the employer to the contractor.

worked together before successfully.

Problems do of course arise from time to time. For example, in *Blyth & Blyth Ltd v Carillion Construction Ltd*, the contractor found himself unable to claim against a novated engineer in respect of an underestimate prepared by the engineer prior to novation. This was because the loss was not suffered by the original employer to whom the duty of care at that time was owed. Often this is now dealt with by the addition of a clause preventing the consultant raising the "no-loss argument".

A more basic problem arose in *Galliford Try Infrastructure Ltd v Mott MacDonald Ltd* – that of actually getting the documents executed. The parties contemplated that a novation agreement would be entered into by the engineer. The design and build contract required it, but the engineer's appointment did not. Despite negotiations over terms, no novation agreement was entered into. Without it there was no contractual relationship between the engineer and the contractor. When the contractor suffered losses in respect of extra costs, following a substantial redesign by the engineer, it sought to rely on negligence, claiming a duty of care arose by virtue of a "special relationship" existing between them, but it failed to establish the existence of this duty.

So, what should the parties look out for?

- The contractor – that the tender documentation shows the appointments and the obligations on the various parties to enter into novation agreements.
- The employer – that he gets warranties back from the novated consultants.
- The consultant – whether there are any potential conflicts.
- All parties – that all the documents contemplated are actually executed.

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Law Bytes speakers include Bank of England representative

Graeme Chaplin, from the Bank of England, will be the guest speaker at Wright Hassall's law bytes seminar on June 5.

The talk, one of a number throughout the year, will take place at Wright Hassall's Olympus Avenue offices in Leamington Spa.

Tim Pollard, who was included in *Building* magazine's Top 40 list of "Green Gurus" is the speaker in April. He is head of sustainability for Wolseley UK and believes passionately in the provision of sustainable construction solutions which are practical, effective and economic.

Diary dates (all to be held at Wright Hassall unless otherwise stated):

Date: Friday 24 April 2009

Venue: The Wolseley Sustainable Building Center, Harrison Way, Leamington Spa, Warwickshire, CV31 3HH

Speaker: Tim Pollard

Topic: Sustainable construction.

Date: Friday 5 June 2009

Speaker: Graeme Chaplin, Bank of England

Topic: tbc

Seminars will also be held on July 10, September 11, October 23 and December 4. Speakers and topics to be confirmed. For more details contact Caroline Venuto on 01926 886688 or email caroline.venuto@wrightthassall.co.uk.



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Malcolm Hacking

Experienced duo join WH team

Wright Hassall's construction department has been strengthened by the arrival of Malcolm Hacking and Stuart Thwaites.

Malcolm is an experienced lawyer dealing with both contentious and non-contentious aspects of construction law. He is on the panel of arbitrators for the Law Society and is a registered adjudicator and CEDR accredited mediator. He is a great advocate for alternative dispute resolution and presents seminars and lectures on the topic.

Stuart, who joined WH in the autumn, has

specialised in construction and engineering work for the past 12 years, both in relation to resolving disputes and in the drafting and negotiation of contractual documentation.

He has acted for a wide range of clients including international main contractors, central government departments, funders and developers. He has wide experience of resolving disputes through adjudication, in the Technology and Construction Court, in arbitration, and through alternative dispute resolution procedures.



Stuart Thwaites

Can adjudicator's decision be affected by ability to pay?

Avoncroft Construction Ltd -v- Sharba Homes Ltd – Building Law Monthly, July 2008

This case was concerned with whether the employer could set off liquidated damages against an amount decided by an adjudicator. A separate issue was whether the court should stay enforcement of the adjudicator's decision because of doubts over the financial position of the contractor who was seeking to enforce.

The defendant was prepared to pay the monies into court providing they were not distributed until the outcome of a second adjudication.

In *Balfour Beatty Construction -v- Serco Ltd* [2004] EWHC 336 the court had said:-

a) where it follows logically from an adjudicator's decision that the employer is entitled to recover a specific sum, by way of liquidated and ascertained damages, then the employer may set off that sum against monies payable to the contractor pursuant to the adjudicator's decision.

b) Where the entitlement to liquidated and ascertained damages has not been determined . . . then the question whether the employer is entitled to set off liquidated and ascertained damages . . . will depend on the terms of the contract and the

circumstances of the case.

The above paragraph (a) was not applicable. The adjudicator had not decided that the defendant was entitled to deduct liquidated and ascertained damages. Paragraph (b) was not applicable either since there was no express provision in the contract which entitled the defendant to deduct and withhold liquidated and ascertained damages.

The application for stay of execution was made on the grounds of reports from a credit reference agency and also a number of County Court judgments against the claimant. However, the claimant's parent company had provided a guarantee and had substantial assets. It was not appropriate therefore to stay execution pending the outcome of a second adjudication in a few weeks' time. Following the decision in *Interserve Industrial Services Ltd -v- Cleveland Bridge (UK) Ltd* [2006] EWHC 741, the existence of a second adjudication did not entitle the defendant to a stay.

P C Harrington -v- Multiplex - CILL March 2008

This relates to the concrete works package at Wembley Stadium and depended upon the wording of a specific form of contract used.

Clause 21.9 required Multiplex to issue a certificate of payment, certifying payment due to Harrington less any amounts to be deducted under Clause 21.10. All certificates were to specify the amount to be paid and the basis of calculation.

Clause 21.10 provided how deductions were to be made in computing the amount of any payment.

There was a dispute over interim certificate No. 44 which specified a substantial sum for payment after retention but then made a substantial deduction which resulted in nothing being due to Harrington.

The court was asked to decide whether the amount due in the certificate was the amount before or after the deduction. The court decided on the latter. The court was asked whether this contract mechanism was contrary to the Housing Grants, Construction and Regeneration Act 1996 and concluded that it was not.

In conclusion, there is nothing legally wrong with providing in a contract that the amount due under a certificate is the amount due after any withholding has been made.

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Retention funds – whose money is it anyway?
Liverpool's magnificent cathedrals

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Avoid retention tension by opening a dedicated

Many of the commonly used forms of building contract provide for a retention fund, typically of 3% of the amount(s) certified as due to the contractor to be withheld by the employer when payments are made during the contract period.

Half of this money is then released when practical completion of the works is achieved and the other half remains in the employer's possession either until the defects liability period has come to an end, or the making good defects certificate has been obtained. Although this money remains in the possession of the employer, it belongs to the contractor and is held for the contractor's benefit. The contractor has the right to insist that the retention is placed in a separate bank account, which should be clearly named in favour of the contractor.

Over the years, a number of useful principles have been established by the courts. These are:-



It is essential that employers act promptly when a contractor requests that a new account be set up for retention funds. MATTHEW PHIPPS reports.

■ A contractor does not have to make a separate request to the employer that the retention money is placed in a separate bank account each time a certificate is issued. A single request is enough.

■ Under some of the JCT forms of contract, an employer has an obligation, upon request, to keep the retention money in a separate bank account even if there is no clause to that effect, or if the relevant

part of the clause has been deleted.

■ The employer is required to use the retention for its own purpose in breach of trust, but legitimate against the retention.

■ Under some JCT contracts, the employer invests the retention monies for the contractor. The contractor does not have a right to interest that may accrue.

■ If an employer goes into administration or insolvent, and the retention has been placed to the contractor. The contractor does not share along with any other creditors. He must be established before the contractor otherwise the contractor may lose the retention.

The decision of Mr Justice Akenhead

We're all in this together

The Project Partnering Contract 2000 (PPC2000) was launched at the start of the millennium. Like the Term Partnering Contract 2005 (TPC2005), it is used for public and private projects ranging from social housing to airport facilities.

These forms of contract are multi-party partnering contracts. As such, they are entered into by all the parties to the project. The client, contractor (known under the forms as the "constructor"), consultants and specialists (sub-contractors) all sign the same, single contract. The result of this is that each party owes contractual obligations to every other party to the agreement.

Because of this multi-party approach, the parties are at greater risk than under more traditional forms of procurement, where there are a number of separate contracts between the relevant parties.

For example, if the contractor causes a delay to completion, it potentially faces multiple claims in respect of that delay. Clearly it is liable to the client for the effect of that delay. But unlike more traditional forms of procurement, it will also face a liability to each and every other party to the agreement which has suffered a loss as a result of that delay.

By contrast, in the more traditional forms of



STUART THWAITES considers multi-party partnering contracts which, despite being revised last October, still remain risky for everybody involved.

procurement the contractor would only normally have a liability to those with whom it had directly contracted.

PPC2000 and TPC2005 were re-launched with revisions in October 2008. The forms retain their existing structure. There have been limited substantive changes. The increased risk profile referred to above has not been addressed. As a result the standard forms will still need amending, where possible, to address the increased risk inherent in their multi-party approach.

The following are the key changes that have been introduced to the PPC2000 and TPC2005 forms:

1. KPIs and targets

The forms now provide for a schedule of targets and Key Performance Indicators ("KPIs"). These are aimed at incentivising improved/best

performance. For example, there could be shared costs savings, shared losses, and incentives for performance above KPI levels.

2. Project bank accounts

To assist cash flow to subcontractors and suppliers, there is now an option for payments to be made directly into a designated project bank account.

3. Partnering timetable and risk register

PPC2000 now includes model forms of partnering, timetable and risk registers. This brings it into line with TPC2005.

4. Feedback

The period for objecting to instructions from the client representative has been increased from two to five working days. Similarly, the period for the client representative to respond to the constructor's proposals for mitigating delay and disruption has been increased from two to five working days.

5. Clarifications

There were some discrepancies between TPC2005 and PPC2000 but the forms have now been brought into line with each other as far as possible without having to redraft them.

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ted bank account straight away

d. act in good faith and has no right to ses; otherwise the employer will be rights of set-off can be operated an employer has no obligation to benefit of the contractor, who will cre whilst the retention is held. administration or otherwise becomes en set aside, it can still be paid direct es not then have to take his chances owever, the separate bank account employer goes into administration, its right to the money. head in *Bodill & Sons (Contractors)*

Ltd v Mattu [2007] EWHC 2850, TCC, also provides some further guidance for both employers and contractors. Towards the end of September 2007, Bodill requested that Mattu place approximately £125,000 of retention in a designated bank account, in accordance with the provisions of the contract. By mid-October the account was open and funds had been earmarked, but owing to an oversight on the part of Mattu's bank, no money was transferred. Bodill subsequently applied for an injunction requiring the retention to be paid into the new account.

The judge considered the extent of the employer's obligation. He found that a reasonable period, within which a separate account should be set up following a contractor's request, was two to three weeks. The judge emphasised that such accounts should be clearly described as trust accounts. In this case, the name "Harmail Singh Mattu, trading as Urban Suburban, re Bodill retention money account"

was not sufficiently clear to make it obvious that the funds were held on trust. By reason of these joint failures to promptly open the account and transfer funds, Mattu was in breach of contract.

This case makes it clear that an employer must act promptly when a contractor requests that a new account be set up for the retention funds. The employer must take steps to ensure the account is clearly designated as a trust account. If the employer unreasonably delays in opening such a new account following a request, then that employer is in breach of trust and/or contract and the contractor is entitled to apply to the court. In the present economic climate, contractors are advised to ensure, during pre-contract negotiations, that there is a term in the contract that the contractor may require all the retention monies to be paid into a separate, properly designated trust account.

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Two cathedrals and a baa-nana

Think of Liverpool and the Beatles or Anfield might spring to mind. Last year the city was also the European Capital of Culture. Among its other claims to fame, however, are its many notable buildings, in particular, two magnificent cathedrals. At the southern end of the aptly named Hope Street is the Anglican cathedral, officially the Cathedral Church of Christ in Liverpool; about half a mile to the north on Mount Pleasant is the Roman Catholic Metropolitan Cathedral of Christ the King (pictured below).

The Anglican cathedral was designed by Sir Giles Gilbert Scott. Work started in 1904, it was consecrated in 1924 and completed in 1978, alas too late for Scott, who died in 1960. Its style is described as "gothic revival", with one of the longest naves, largest organs and heaviest peal of bells in the world. It also has one of the largest and tallest towers in the world (the view from the top is well worth the climb and on a clear day you can see Blackpool Tower). The interior is lofty, spacious and awe-inspiring, with pillars towering upwards to the vaulted ceilings and with the interesting feature of a bridge crossing the nave at its west end.

The Roman Catholic cathedral was designed by Sir Frederick Gibberd (1908 -1984), and stands adjacent to the Crypt designed by Sir Edwin Lutyens, the only part of his design built, the rest abandoned for financial reasons. The spire represents the Crown of Thorns, and is supported by a tent-like circular structure, with buttresses around its perimeter, leaning



inwards and joining at the base of the Crown. The foundation stone for the original Lutyen's building was laid in 1933, but work proper on Gibberd's design did not start until 1962 and it was consecrated five years later. The interior both leads the visitor inwards, towards its centre, and upwards, to the roof, thought to be the largest of its kind; the wealth of stained glass creating transcending light and colour.



Among Scott's other "signature buildings" are

Battersea Power Station, the Chamber of the House of Commons, the new (1937-1940) Bodleian Library in Oxford and Waterloo Bridge but mention has to be made of his red telephone box. Known as K6 and designed in 1935, it became commonplace the length and breadth of the country.

Gibberd became established as the "flat" architect with his design of Pullman Court, Streatham Hill, London, and with Yorke he wrote *The Modern Flat*. He was the consultant architect planner for Harlow New Town; among his other works are the London Central Mosque, terminal buildings at Heathrow, Derwent Reservoir and Priory Square, Birmingham.

Having started with a reference to Liverpool's status as Capital of Culture, I couldn't conclude without mentioning the Super Lamb Banana, (pictured above). The original work of Taro Chiezo, these iconic street art sculptures warning of the dangers of genetically modified food, started appearing in various guises about the city, a welcome and humorous feature. One appears on the street near to the steps to the Roman Catholic Cathedral - the backbitternbanana - which has numbered sections showing nominated groups or local organisations. Another, outside the University, wears a cap and gown and on graduation ceremony day bears the academic hood of those graduating.

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