

QUAYSTONE

Further information

For further details on the issues raised in this bulletin or generally on the services we offer please email marcus.harling@burges-salmon.com or william.gard@burges-salmon.com or your usual Construction and Engineering Group contact.

Welcome

Welcome to the second edition of Quaystone, the quarterly legal update from Burges Salmon's Construction and Engineering Group.

This issue features an introduction to mediation as an alternative means of construction dispute resolution based on recent experience of the team. We also continue our series of articles on the impact of the credit crunch, focussing this issue on

ownership of materials on site. (Look out also for our credit crunch special bulletin, out later this Spring.) The usual updates on recent case law and legislation are also here.

Finally we highlight a number of recent cases clarifying some of the instances in which the courts will intervene in adjudicator's decisions.

Mediation: The 'right' result, or one you can live with?

Disputes are a fact of commercial life, now more so than ever. But the price of pursuing the 'right' result before a judge or arbitrator based on your adviser's legal analysis of the dispute may be too high when irrecoverable legal costs, the risk of losing, management time and the damage such a process can have on a commercial relationship are taken into account.

Mediation can be an effective alternative method of achieving a result that both parties can live with, and one that avoids the downside of formal dispute resolution. The process also has the advantage of being supported by the courts; in fact, if you don't have a go at mediating your dispute, the chances are a judge or arbitrator will suggest you do.

Mediation is an entirely voluntary process which involves the parties to a dispute setting aside a day or two for the key decision makers to discuss and hopefully settle their differences with the support of a mediator.



The day starts with all parties together in a room with the mediator. Each party outlines their case (based on case summaries exchanged prior to the mediation) and what they perceive to be the key barriers to settlement. The mediator will ask questions to clarify his understanding of the parties' positions and invite the parties to do the same. The parties will then go to separate rooms where they will be visited alternately by the mediator who will seek to identify ways of 'closing the gap' by challenging aspects of their case

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Case Law Update: Challenging adjudicator's decisions



Traditionally if a losing party thought it had good legal grounds for appeal it would choose not to comply with an adjudicator's decision and challenge that decision once the winning party commenced enforcement proceedings. Few challenges to enforcement proceedings were successful and the 'good legal grounds' were limited to two limbs; either the adjudicator acted without or in excess of his jurisdiction, or the adjudicator acted in serious breach of the requirements of natural justice. Recent cases suggest the hurdle in both limbs remains high but there is now scope for tactical challenges, both during and after the adjudicator's decision via Part 8 applications to court:

In **Bovis Lend Lease Limited v The Trustees of the London Clinic** [2009] the defendant to enforcement proceedings claimed that it had not been given

enough time to address the issues in dispute and that on one of the issues the adjudicator had ruled upon no dispute capable of referral had crystallised. The defendant lost on both counts. The defendant had not raised the issue of needing more time during the adjudication and therefore could not rely on this argument on enforcement. On the facts the court decided there had been crystallisation of the dispute although interestingly the court commented that even if there had not been crystallisation it still would have enforced the decision on the other issue.

In **Dorchester Hotel Ltd v Vivid Interiors Ltd** [2009] the TCC had to consider to what extent it should intervene in an ongoing adjudication in connection with potential breaches of natural justice. In considering (but ultimately refusing) to grant the Part 8 declarations sought, the TCC confirmed that it does have jurisdiction to consider an application before an adjudicator reaches his decision.

Walter Lilly & Co. Ltd v DMW Developments Ltd - [2008] All ER (D) 214 (Dec) involved another Part 8 application, this time after the adjudicator had made his decision. Again, the court decided that it was able to consider and make appropriate Part 8 declarations.

It follows that there is undoubtedly scope for the tactical use of Part 8 applications during or after adjudication proceedings in lieu of a full Part 7 claim.

“...the TCC confirmed that it does have jurisdiction to consider an application before an adjudicator reaches his decision.”

Standard Form Contract Update

Launched in November 2008 the JCT Pre-Construction Services Agreement comprises both contractor and specialist versions for pre-construction works and can be used whether or not the contractor or specialist is responsible for design.

Although the NEC also promotes its contracts for pre-construction services the fact that the JCT versions offer a tailored form may be more popular with parties than a heavily amended NEC contract. It will however be interesting to see whether the JCT forms achieve dominance in this area or whether NEC contracts will still be preferred in practice.

A further coup for the JCT is the recent news that Office of Government Commerce (OGC) has

'endorsed' the JCT Constructing Excellence Contract (2006) as a form which satisfies its 'Achieving Excellence in Construction' initiative.

A study prepared by Arup Project Management also found that the ACA Project Partnering Contract (2000, amended 2003) also satisfied the OGC principles. Previously OGC had only 'endorsed' the NEC3 suite of contracts. The JCT commented that this study has created a "level playing field in terms of standard contract forms in the public sector" and will give greater scope for the use of partnering contracts. The only thing now is to convince the sceptics to actually embrace collaborative working!

Health and Safety: Higher penalties for breach?

Considering all of the attention given to the introduction of the Corporate Manslaughter Act in April last year, it is perhaps surprising that there has been relatively little news relating to the Health & Safety (Offences) Act 2008 (the "Act") which came into force on 16 January 2009. Under the Act:

- maximum penalties in the Magistrates' Court for breaching health and safety regulations increased from £5,000 to £20,000 (the Crown Court can still impose unlimited fines); and
- the range of health and safety offences for which individuals can be imprisoned (in both the Magistrates' and Crown Court) has been widened and sentences can be for up to 12 months in the Magistrates' Courts and 2 years in the Crown Court.

For companies, the Act could result in higher fines. This change, coupled with expected guidance from the Sentencing Advisory Panel for health and safety offences involving a fatality (that fines should be set on a "tariff" basis with a **starting point** of 2.5% of turnover), makes the consequences of a prosecution potentially much more costly than has previously been the case.

For individuals, imprisonment is a possibility in most cases. Previously, individuals could only be imprisoned for a health and safety offence if they were charged with manslaughter.

The Act doesn't, however, create any new duties or offences and companies with robust health and safety procedures are not at any greater risk of prosecution than before.

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Contractor Insolvency: Title in goods and materials

Imagine the following scenario: you are a developer and your contractor becomes insolvent. You have paid the contractor for materials, which have been delivered to site. The contractor has not paid the supplier and the supplier removes the materials on hearing of the contractor's insolvency. What are your rights to the materials?

This will depend on:

1. whether the materials have been fixed to the site or not; and
2. whether the supplier's contract is for the supply of the materials only or whether it is also for their installation.

Fixed Materials

The developer will own the materials as they have been fixed to the land.

Unfixed Materials

Supply only contracts: the developer's rights will depend on whether or not the supply contract contains a retention of title clause and whether or not the developer has notice of this clause. A retention of title clause is designed to prevent title in materials passing until payment is made.



However Section 25(1) of the Sale of Goods Act 1979 operates to pass title to a third party who pays for goods, without notice of the original seller's rights in relation to those goods. An employer who has paid its contractor for materials will have good title to those materials provided that it is not aware of the retention of title clause.

Supply and installation contracts: if the supply contract does not state when title is transferred, title will only pass when the materials are fixed to the site. If the supply contract does state when title to the materials will pass, the supplier cannot remove the materials if the conditions for passing title have been met.

Getting the Basics Right: How to execute contracts

It sounds straight forward, but how does a company execute a contract? A recent case (*R (on the application of Mercury Tax Ltd) v Revenue & Customs Commissioners*) provides a useful reminder of how **not** to do it. The Judge emphasised that transferring signature pages from an incomplete version of a deed to a later, amended version of that deed will **not** constitute effective execution. It is also unlikely that this would be effective for a simple contract (a contract which is not a deed).

This is an important decision if parties have been used to signing contracts in advance of a final agreement being reached, where, for example, there are logistical problems in obtaining all of the necessary signatures on final agreement.

If this situation arises, consider the use of **counterparts**: if this is done, separate copies of the agreement may be executed by the different parties and each copy will be considered to be an original.

Also, if timing is an issue, remember that while contracts should not be back-dated, they can be expressed to have **retrospective effect**.

Finally, here's a quick reminder of how companies can execute contracts:

Simple contract

any person (eg a director) acting under express or implied authority can contract on the company's behalf;

Deed

- (a) by affixing the company's common seal; or
- (b) signature of a director and secretary of the company or two directors (and the document is expressed to be executed by the company); or
- (c) by a director in the presence of a witness who attests the signature (and the document is expressed to be executed by the company).

Mediation *continued from page 1*

and/or by encouraging them to consider the alternatives to settlement. This series of private meetings may go on for a long time; the author of this article recently participated in a mediation that lasted 24 hours straight before a settlement was reached! If agreement is reached, it should be set down in a legally binding agreement which will be

signed by the parties on the day.

Following mediation, parties sometimes feel they have given too much away. But when the price of achieving a settlement is compared with the price of pursuing the 'right' result, it is often a price worth paying.

Upcoming Seminar

Hot Topics in Construction



Where: Burges Salmon LLP, Narrow Quay House, Narrow Quay, Bristol BS1 4AH

When: Tuesday 31st March 2009, 5:00 pm to 6:30 pm

Who: The seminar is principally aimed at members of the professional team but others involved in the construction industry are very welcome.

If you have not already received your invitation and would like to come please contact Becky Hunt at seminars@burges-salmon.com or on (0117) 307 6995 who will be pleased to supply you with further details.

Further seminars are planned for later in the year so if you have a particular subject you would like to see covered please contact Becky as above.

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