

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.

Introduction

Welcome to the latest edition of Quaystone, the quarterly legal update from Burges Salmon's Construction and Engineering Group. This time we look at the new planning regime which should bring major projects to the delivery phase faster and the new construction act which should rectify a number of anomalies with the current legislation. We also discuss the government's proposed crack down on what it sees as bogus self-employment, changes to the law on blacklisting and the appeals resulting from the OFT's recent bid rigging investigation. Finally we report on recent guidance given by the courts on the standards that adjudicators should reach when giving their decision.

We hope there is something here for everyone but as usual all feedback will be gratefully received!

Construction Industry Planning Boost

The new Infrastructure Planning Commission (IPC) has received its first 11 projects for consultation. They are dominated by power generation and transmission projects. The main aim of the new planning system is to speed up decisions on those projects which the government considers are so important to the nation that they cannot be allowed to stagnate in the planning process. Secondary aims include an anticipated saving of £300million per year in planning costs and a welcome boost to the construction industry (by bringing projects to the delivery phase much quicker) at a time when work is scarce.

The IPC was set up under the Planning Act 2008 with the aim of making planning decisions on Nationally Significant Infrastructure Projects (NSIPs) within 1 year. The previous system took at least twice that long. Guidance on what constitutes an NSIP are set out in the Act.

When making its decisions the IPC must apply new National Policy Statements (NPSs). Eventually there will be an NPS for each of the following:

- Overarching Energy Policy
- Renewable Energy (onshore and offshore wind, biomass, etc)
- Fossil Fuels
- Oil and Gas Supply and Storage



- Electricity Networks (power lines)
- Nuclear Power
- Ports
- Transport Networks
- Aviation
- Water Supply
- Hazardous Waste
- Waste Water Treatment

The first six of these have already been published and are currently out for consultation. Between now and 1 March 2010 the IPC will act as a consultation body, advising developers on how to comply with the process. After that the IPC will assume its full powers and consider planning applications on NSIPs.

continued on page 3

Contents

- Self Employment Scrutiny p2
- Standard of Adjudicators' Decisions p3
- Amends to the Construction Act are (almost) here p3
- Blacklisting - The Outcome p4
- Bid-rigging Appeals p4
- Team news p4

Visit our website at www.burges-salmon.com

Self-Employment Scrutiny

The government estimates that £350 million per year is lost through "false self-employment" and appears to be determined to clamp down on it. A recent consultation paper outlined radical proposals to introduce legislation which would deem workers within the construction industry to be subject to PAYE and National Insurance contributions as a matter of course, unless an exemption applied.

The proposed reforms would categorise all construction workers as being in receipt of 'employment income' and, therefore, employees for PAYE and National Insurance purposes, unless they meet one of the following criteria:

- they provide the plant and equipment required for the job (excluding tools which it is normal for individuals to provide themselves); or
- they provide all materials required to complete a job; or
- they provide other workers to carry out operations and are responsible for paying them.

The government's proposals mark a move away from HMRC's traditional approach of applying established case law principles to determine a worker's status. The new criteria would operate as a strict test, and would not take into account the commercial reality of the relationship between the parties; a complete contrast to the current approach of weighing up the various factors making up the employment relationship before determining the worker's status.

Despite this, HMRC has confirmed that the proposed changes would not confer employment rights on a worker and has accepted that as a result, were the legislation to be implemented, a person could be employed for tax purposes but self-employed for employment law purposes.

If these proposals are implemented, construction companies may find themselves having to apply two tests; one for determining employment status and a second for determining tax status. Some comfort may be taken in that HMRC has recognised that these are difficult times for the construction industry and has stated an intention to bring the legislation into effect only when things improve.

Given the continuing application of the wider employment status tests, Burges Salmon has produced an electronic Employment Status Toolkit. The toolkit, containing an interactive colour-coded spreadsheet, checklists and practical tips, helps you assess the risks your business might face in relation to employment status claims both by individuals who are engaged by you and by HMRC.

If you would like further information on the toolkit please contact Chris Seaton on +44(0)117 939 2213 or chris.seaton@burges-salmon.com.

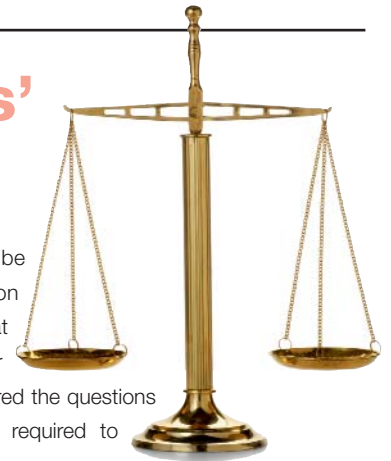
"The government's proposals mark a move away from HMRC's traditional approach of applying established case law principles to determine a worker's status."

Standard of Adjudicators' Decisions

In the recent case of Balfour Beatty Engineering Services (HY) Ltd v Shepherd Construction Ltd the court considered whether problems with an adjudicator's reasoning gave grounds to prevent enforcement of his decision. The judge considered case law on the issue and helpfully summarised the current position. The principles include:

- Decisions need to be sufficiently clear for the parties to understand what the adjudicator decided and why.
- Failure to give reasons for a decision is not a breach of natural justice. If a decision is required to be reasoned (either because the Scheme for Construction Contracts applies or because the contract contains a provision which says it must be) but the adjudicator produces a wholly unreasoned decision, it would not be enforceable.
- If reasons are required to be given they should be sufficiently clear for the parties to follow.
- If the reasons given are wrong in fact or in law this will not make the decision unenforceable. This follows the court's long stated view that an adjudicator's decision

cannot be challenged on the grounds that the adjudicator wrongly answered the questions which he was required to address.



- A decision is not unreasoned just because the adjudicator does not deal with every single argument of fact or law. The adjudicator merely has to deal with those arguments which are necessary to arrive at his decision.
- An adjudicator's reasoning should not be judged by the standards of judges or arbitrators. This reflects the fact that decisions are often reached quickly, adjudicators are often not legally qualified and that there has not been a full judicial process.

It is clear that the judge set the bar for adjudicators pretty low. With the recent surge in adjudications, this serves as a timely reminder that the process can often provide rough and ready justice.

Amendments to the Construction Act are (almost) here

Changes to the Construction Act, seemingly under discussion from the date the act first became law in 1996, are now finally with us. The changes received Royal Assent on 12 November and will be part of the Local Democracy, Economic Development and Construction Act 2009.

The changes will not actually come into force until a commencement order has been made, which, in turn will follow consultation on draft amendments to the Scheme for Construction Contracts. The draft amendments to the Scheme have not yet been published, but consultation is expected to start early in 2010. The Scheme's payment provisions, in particular, will require significant amendment as a result of changes to the act.

The main changes to the act are:

- Construction contracts no longer need to be in writing to fall within the act.
- A statutory 'slip' rule will allow adjudicators to amend typos.
- Parties will be banned from agreeing who will pay the costs of the adjudication before the notice of adjudication is served. However, the parties may give the adjudicator power to allocate his fees and expenses between them.
- Elimination of 'pay when certified' clauses.
- New payment notices and the replacement of withholding notices.
- Enhancements to the statutory right to suspend for non-payment.

What next ?

When the act finally comes into force (likely in early 2011), there will be a transitional period when the old act will apply to existing contracts and the new act will apply to new contracts. Applying this to payment rules could cause complications. For example, on a single project, a



contractor may have some sub-contractors employed under the old rules and some under the new. It remains to be seen how such issues will be resolved.

Further expected consequences of the changes include:

- More disputes being referred to adjudication (as the act will now cover more contracts).
- More disputes as to what the terms of the contract actually are (as the act will cover those contracts not recorded in writing).
- Increase in the number of adjudications governed by the Scheme (the provisions of the Scheme will be deemed to be incorporated in many oral contracts).
- More cases in the courts where one party refuses to recognise the adjudicator's authority.
- Enhanced payment protection (designed to benefit sub-contractors through less opportunity for payment delay) may force contractors to fund more payments to sub-contractors but more likely will encourage contractors to extend payment periods in sub-contracts.

"... on a single project, a contractor may have some sub-contractors employed under the old rules and some under the new. It remains to be seen how such issues will be resolved."

Construction Industry Planning Boost

continued from page 1

So what are the first projects the IPC will look at? These are dominated by power projects including windfarms, biomass and nuclear power plants. This is perhaps inevitable given the concern about the anticipated energy gap and the tight timescale set out by government to bring new nuclear power on stream (see July 2009 edition of Quaystone).

The IPC promises much for the construction industry; shorter and more predictable timescales for work to start on

site. Inevitably the new regime will need time to bed in but unfortunately it may never get the chance. The Tories have said that if they win the next election they will abolish the IPC before it has had a chance to prove its worth. If they do it can only lead to greater uncertainty and further delay for much needed work to reach the industry.

Bid-rigging Appeals

Appeals by sixteen parties who were found by the OFT to have infringed the Competition Act 1998 in relation to bid-rigging in the construction industry have been notified to the Competition Appeals Tribunal (CAT). On 22 September 2009, following a five year investigation, the OFT announced that it was fining 103¹ construction companies, that had been involved in anti-competitive 'cover pricing' between 2000 and 2006, a total of £129.2 million.

The sixteen parties appealing the OFT's decision were fined a total of £59 million by the OFT. Nine of the appeals relate solely to the OFT's approach to calculating penalties. The seven other appeals challenge both the infringement decision and the level of penalties imposed.

With regard to the level of penalty, the various appeals raise a number of similar arguments that the individual penalties were excessive and/or discriminatory because the OFT had:

- calculated the fines by reference to turnover in the year preceding the decision rather than the year preceding the infringement and had wrongly included turnover in markets unaffected by the alleged infringements (e.g. turnover from non-tendered contracts);
- arbitrarily set fines at a level which took no account of the circumstances of individual companies. As a result a number of companies had received disproportionately high fines (e.g. because the OFT had used a parent companies' turnover as a proxy) which bore no relation to the seriousness of the infringement or the need for deterrence;
- wrongly closed the door to further leniency applications

¹Burges Salmon acted for one of the parties under investigation by the OFT.

in March 2007 and failed to take into account the inability of certain parties to accept the OFT's 'fast-track offer' when calculating penalties; and

- failed to take account of low margins in the construction industry and the financial hardship faced by many companies.

With regard to the seven appeals that challenged the OFT's infringement decision, the grounds of appeal are generally specific to the individual parties (e.g. that the OFT had failed to meet the requisite standard of proof that the individual parties were involved in the alleged).

A number of the parties have also challenged the OFT's policy of attributing joint and several liability to certain current and former parent companies and it is hoped the judgements will provide greater clarity on this issue.

Following Crest Nicholson's successful judicial review of the OFT's 'fast-track offer' earlier this year, a number of parties, have also challenged the OFT's approach to granting parties a reduction in their fine in return for an admission of liability, in some cases only weeks before the OFT's decision.

This is the first case in which such a large number of parties have challenged an OFT decision and it is not yet clear how the CAT will deal with case management. The CAT has previously indicated that it may consider consolidating separate appeals or hearing individual test cases. It is unclear when any judgments can be expected, although previous cases involving multiple parties have taken between 18 and 24 months.

Blacklisting: The Outcome

As reported in the July 2009 edition of Quaystone, the government has now made clear how it intends to outlaw blacklisting. It plans to put regulations before parliament that will:

- Make it unlawful for organisations to refuse employment or sack individuals as a result of appearing on a blacklist;
- Make it unlawful for employment agencies to refuse to provide a service on the basis of appearing on a blacklist; and

- Enable individuals or unions to pursue compensation or solicit action against those who compile, distribute or use blacklists.

The plan is to introduce the new regulations under the existing Employment Act 1999 so no new primary legislation should be necessary. This will significantly shorten the time before which the regulations become law. The government anticipates this to happen in early 2010.



Team News



We are pleased to welcome James Horton who recently qualified as a solicitor having completed his training contract at Burges Salmon. James will be working with the team on contentious and non-contentious construction matters.

We also say goodbye to Shan Greer who returned to her native St Lucia after 3 years with the team.

Narrow Quay House
Narrow Quay
Bristol BS1 4AH
Tel: +44 (0) 117 939 2000
Fax: +44 (0) 117 902 4400

Chancery Exchange
10 Furnival Street
London EC4A 1AB
Tel: +44 (0)20 7685 1200
Fax: +44 (0)20 7685 1266

www.burges-salmon.com

To receive your own regular copy of Quaystone email marketing@burges-salmon.com

This newsletter gives general information only and is not intended to be an exhaustive statement of the law. Although we have taken care over the information, you should not rely on it as legal advice. We do not accept any liability to anyone who does rely on its content.

© Burges Salmon LLP 2009. All rights reserved. Quaystone is printed on 75% recycled paper.

Your details are processed and kept securely in accordance with the Data Protection Act 1998. We may use your personal information to send information to you about our products and services, newsletters and legal updates; to invite you to our training seminars and other events; and for analysis including generation of marketing reports. To help us keep our database up to date, please let us know if your contact details change or if you do not want to receive any further marketing material by contacting marketing@burges-salmon.com

Burges Salmon LLP is a Limited Liability Partnership registered in England and Wales (LLP number OC307212) and is regulated by the Solicitors Regulation Authority.

A list of members, all of whom are solicitors, may be inspected at our registered office: Narrow Quay House, Narrow Quay, Bristol BS1 4AH.