BirkettLong

Construction Law

news and advice from Birkett Long

Autumn 2012

Project managers and letters of intent

A project manager has recently been found liable for their employer's losses caused by not ensuring that a contract was completed for a construction project. This was decided in the case of Ampleforth Abbey Trust v Turner & Townsend Project Management Ltd.

The facts of the case are that Ampleforth employed Turner & Townsend as its Project Managers to manage the construction of a new boarding house at Ampleforth College. For various reasons, the works were commenced under a letter of intent provided by Ampleforth to the building contractor. The letter of intent was drafted by Turner & Townsend.

As the works were carried out, the letter of intent was extended and superseded, by further letters of intent. No building contract was ever executed. Once the building works were completed, disputes arose between Ampleforth and the building contractor. One of the disputes involved late completion of the construction works and the ability of Ampleforth to claim liquidated damages of £50,000 per week. This was the sum included in the draft contract which was never executed.

The dispute between Ampleforth and the building contractor was resolved at mediation. However, Ampleforth then decided to take proceedings against Turner & Townsend for professional negligence in not ensuring that a building contract was executed. Ampleforth had not been able to recover the liquidated damages of £50,000 per week in the mediation.

There were a number of substantial points that were argued at trial. These included causation, mitigation of loss and reliance on limitation of liability clauses. However, the first principle was whether or not Turner & Townsend could be liable in the first instance for professional negligence. The court held that Turner & Townsend owed a duty of care to act with reasonable skill and care in the performance of its duties, both at common law and by Section 13 of the Supply of Goods and Services Act 1982. It was held that part of a project manager's duties could include advising on, and assisting with, the contractual documents. It was held that it is not an absolute obligation to ensure that a building contract was executed. However, it could be for the project manager to take reasonable steps to ensure a building contract was completed. It was held that in this case, Turner & Townsend did take on these responsibilities but had not taken reasonable steps to ensure the building contract was completed. Also, Turner & Townsend had failed to advise Ampleforth of the need to have the building contract completed and to take the necessary steps to put pressure on the parties to ensure that it was completed. There appears to have been no warning to Ampleforth of the consequences if the contract was not completed.

As a result, Turner & Townsend was found liable for Ampleforth's losses. It seems clear, therefore, that it is dangerous for project managers to allow building projects to be completed under letters of intent. If they do not advise employers of the problems that may arise if a contract is not completed and do not take reasonable skill and care in trying to ensure that the contract is completed then they could be liable for losses caused by the contract not being completed. Those potential losses could be considerable; they could include liquidated damages as in this case but there would be many other circumstances where losses may arise. For example, if the contractor decided not to complete the works as there was no contractual duty to do that then it might be possible to claim the extra costs of employing a different contractor to carry out the works.

The duty would not be restricted just to project managers. It would apply to all professionals and consultants who are contracted by employers to complete the contractual documents for a building project. This case demonstrates the importance of such professionals ensuring that contractual arrangements are completed and are not forgotten about once the building works are actually commenced.

Extensions of Time, Loss and Expense and Global Claims

The recently decided case of Walter Lilly & Company Limited v Giles Patrick Cyril MacKay has clarified a number of issues relating to extensions of time, loss and expense, and global claims. Some of these clarifications were just a restatement of the law as understood in England. That had, however, been put into doubt by a Scottish case. In the case of City Inn Limited v Shepherd Construction Limited the court held that where there was concurrent delay it was possible for the architect to apportion that delay between both relevant events and contractors' delay. The High Court has now clarified that this is not correct in England and that in such a situation the contractor would be entitled to an Extension of Time and Loss and Expense.

It should be remembered that in most construction contracts, there is a process for allowing contractors extra time to carry out their works if "Relevant Events" occur. Some of those relevant events will also entitle a contractor to loss and expense. Relevant events will include delays in receiving instructions from the employer and also bad weather conditions.

There also may, of course, be delays on site due to the contractor. For example, the contractor may not be able to provide sufficient labour or may not have organised materials to be delivered on time. If a relevant event occurs at the same time as a contractor delay, the question is whether or not the contractor is still entitled to an extension of time.

Mr Justice Akenhead has made it clear that the City Inn case applies in Scotland only. In England, if there is concurrent delay, one of which is a relevant event and one of which is not, then the contractor will be entitled to an extension of time based on that relevant event.

For some relevant events, a contractor may then be entitled to their loss and expense caused by the delay in carrying out the works. The contractor will have to provide detailed information and material showing that the delay has caused the losses. It has to be proved on the balance of probabilities that such loss and expense was incurred.

Claims for loss and expense are claimed usually in two ways: the first by identifying the specific cause of the delay and then identifying the specific losses caused by those delays; the second method is to use what is known as "global" claims, which had been considered very difficult to prove.

It had been thought that such claims needed the contractor to prove that the costs being claimed would not have been incurred in any event. Also, it was thought that if in a global claim one element was not proved then the whole of the global claim would fail. It was decided that in fact was not the case.

With regard to head office overheads and profit, the court considered the use of the "Emden Formula". This is a formula that has been devised to prove the losses incurred by the contractor for their head office costs and profit. It was held that such formulas could be used to prove the value of the loss once it had been proved that loss had actually occurred.

Contractors may therefore wish to use the Emden Formula to calculate their head office and profit claims. Direct costs that contractors incur as a result of delays on building sites would be added to this calculation.

The decision in the Walter Lilly case was welcome clarification of the law on these points and will benefit contractors in the future.

For advice on construction contracts and disputes, contact Peter Allen on 01245 453813 or email peter.allen@birkettlong.co.uk

VAT and listed buildings

In the last budget it was announced that the zero rating of VAT on building works to certain listed buildings was being removed, effective 1 October 2012.

There were, however, some transitional arrangements which have now been slightly altered so that they are more generous.

Provided listed building consent was applied for prior to 21 March 2012 then the zero rating of the building works would apply until 30 September 2015. Obviously, this could be a huge saving of 20% of the cost of carrying out such works.

Reference: NEWS/CONSTRUCT09/2012

BIRKETT LONG LLP

PHOENIX HOUSE, CHRISTOPHER MARTIN ROAD
BASILDON SS14 3EX
T 01268 244144

ESSEX HOUSE, 42 CROUCH STREET
COLCHESTER CO3 3HH
T 01206 217300

NUMBER ONE, LEGG STREET
CHELMSFORD CM1 1JS
T 01245 453800

E CONSTRUCTIONLAW@BIRKETTLONG.CO.UK
WWW.BIRKETTLONG.CO.UK