Construction Law

NEWS AND ADVICE FROM BIRKETT LONG

Acting as an expert?

If you are acting as an expert in legal proceedings then you need to make sure that you do not fall foul of the judge hearing your case, as a number of experts recently have!

Quotes include: "... there is no explanation which exonerates Mr Smith of incompetence"; or "I do not consider that he is a fit person to act as an expert witness". The judge in this particular case went on to say about another expert: "Unless the expert is able to point to some objective evidence to demonstrate the reliability of his judgement – which Mr Chettleborough was not – it is not acceptable in the context of litigation to be asked to take an expert's opinion on trust. Experts' opinions, if they are to be accorded any weight, need to be supported by a transparent process of reasoning."

Expert evidence is governed by Part 35 of the Civil Procedure Rules. The Civil Justice Council has just issued its latest guidance for the instruction of experts in civil claims, which comes into force in October 2014. All those acting as experts in litigation should read this guidance so that they are fully aware of best practice and what will be expected of them when they provide expert evidence. Experts have a duty to use reasonable skill and care. Their overriding duty is to the court and not their client. Experts must provide independent opinions, regardless of the pressures of litigation. They should not take it upon themselves to promote the point of view of the party instructing them or engage in the role of advocates or mediators. Experts should confine their opinions to matters which are material to the disputes and provide opinions only in relation to matters which lie within their expertise. They should take into account all material facts; their reports should set out those facts and any literature or material on which they have relied in forming their opinions. They should indicate if an opinion is provisional, or qualified; where they consider further information is required or, if for any other reason, they are not satisfied that an opinion can be expressed without qualification.

Failure to comply with the rules or court orders may result in the parties who instructed them being penalised or debarred from relying upon the expert evidence. It should also be remembered that experts are no longer immune from liability for the evidence they give.

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Remedial work - recovering the costs

When a building contract comes to an end, there are often snags or remedial works that are already known about or become known about shortly afterwards. A number of questions can arise, such as: does the contractor have to return to site? Can the employer force the contractor to return to site? What costs can be recovered if the contractor does not carry out the remedial works?

In most circumstances the contractor is contacted, informed of the defects and attends site to carry out the remedial works. When the contractor does this, it is at no cost to the employer.

However, sometimes the contractor will refuse to return to site. If this happens the employer is entitled to arrange for an alternative contractor to carry out the remedial works and to charge the original contractor for the costs incurred. Those costs have to be reasonable and the works carried out should be to the same standard as the contract for the original works. The employer will also be entitled to recover any other costs it incurs as a result of having to carry out those remedial works.

A more tricky situation occurs if the employer does not want the contractor to return to site in order to carry out the remedial works. An employer can only do this if it has good reason, otherwise it will not have mitigated its loss and may only be able to recover what the cost of carrying out the remedial works would have been to the original contractor. If those works were carried out by a subcontractor, the cost to the original contractor might, in fact, be zero as the subcontractor may perform remedial works at no cost.

However, there are a number of good reasons why an employer could be entitled to refuse to allow the original contractor to return; these include:

- the defects are so large that no reasonable employer would allow the contractor to return
- the contractor has behaved fraudulently
- the contractor has made it clear that it is unwilling to rectify any defects
- the contractor has attempted to remedy the defects previously and has failed, therefore it should not be given a further chance
- the contractor is offering to undertake different remedial works to the ones required
- the contractor has delayed in carrying out the remedial works

Legal update

Public procurement timescales to be reduced

The Public Procurement Directive 2014 is likely to be brought into UK law towards the end of 2014 and will bring significant changes to the tender procedure for public contracts.

The major change is that the timescales for submitting tenders will be significantly reduced - by approximately 30%. The longest minimum timescale becomes 37 days whilst the shortest minimum is a mere 5 days. The usual period will be either 25 or 30 days.

There will also be two new procedures: the "Competitive Procedure with Negotiation" and the "Innovation Partnership". These allow the final terms of contracts to be negotiated before a contract is awarded. Procurement documents will also have to be available electronically, ensuring that parties wishing to tender for public contracts can obtain such documents easily and quickly.

The changes mean that parties wishing to tender for public contracts will need to move quickly to submit their bids. Other new procedures may help avoid awards being challenged post negotiation, due to failure to adhere to the procedural rules.

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These reasons, depending upon the specific circumstances, could all provide grounds for the employer to reasonably refuse to give the contractor the chance to carry out remedial works. In most circumstances the employer would then be entitled to recover the costs of doing the remedial work from the contractor. The employer would also be entitled to claim for any extra costs incurred as a result.

Both employers and contractors should therefore be very careful when it comes to carrying out remedial works. The contractor who does not carry them out may face a bill that is considerably higher than the works themselves would have cost. Conversely, if an employer refuses unreasonably to allow a contractor to carry out remedial works, then it may incur costs with another contractor that it is unable to recover. Such an expensive mistake can be avoided by obtaining early legal advice from your solicitor.

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Meet the team

Martin Hopkins

Martin is a partner at Birkett Long, who has specialised in employment law since qualifying in 1998.

Martin acts on behalf of both employer and employee, although today he predominantly offers employer support, undertaking all aspects of employment related legal work from drafting contracts to representing clients at tribunals.

He has a wide experience of the employment issues in the construction industry, particularly employee status, holiday pay, union representation, collective agreements, transfer of undertakings, redundancy, change management and restructure.

Martin takes a commercial approach, defending employers' interests without unnecessary recourse to legal proceedings. He is also in demand as a trainer and often speaks at seminars and workshops offering legal updates to employers.

"Many thanks for your support and advice...I will not hesitate to recommend you in future should I or any of my friends/colleagues need professional advice."
A client recommendation.

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under the spotlight

Consequential loss exclusion clauses

There is a great deal of confusion about what is meant by the term "consequential loss".

Case law has established that there are two kinds of losses that flow from a breach of contract:

- loss that arises naturally from the breach ("direct loss"), or
- loss that arises from the special circumstances of a contract that would have been in the parties' reasonable contemplation when the contract was entered into ("indirect loss").

Consequential loss has been held to mean the latter of these. The problem is that many people think that losses such as loss of profit, loss of business and loss of contract, are consequential but that is not the case as usually these are direct losses. This is because the damage flows directly as a consequence of the breach of contract.

It is not uncommon to find a Consequential Loss Exclusion (CLE) clause in a commercial contract, particularly in construction and energy projects. A typical CLE clause is as follows (taken from FIDIC Red Book): "Neither party shall be liable to the other party for loss of use of any work, loss of profit, loss of any contract or for any indirect or consequential loss or damage which may be suffered by the other party in connection with the contract".

Does a CLE clause prevent recovery?

It is important to ensure that the wording of the exclusion clause on which you intend to rely covers the losses which you intend to exclude. If the clause simply states it excludes indirect or consequential loss then many losses which a party is trying to exclude will not be covered.

In one case a party excluded indirect and consequential losses which included a list of items such as loss of profit, loss of goodwill and loss of contract. The court interpreted this to mean only those losses which were indirect were excluded and the losses which were direct could still be recovered. In effect the clause failed to give the protection sought.

The key when drafting a CLE clause is to consider carefully what losses are likely to flow from a breach of contract (relevant to your circumstances) and to identify those types of losses in the CLE clause. It is necessary to be precise as the courts will interpret your words in a strict, rather than a broad, sense.

If you require help drafting or reviewing a construction or commercial contract, please contact us for further assistance.

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Forthcoming events

Discovering Business Exhibition Thurrock, 6 November 2014

Come and visit us at our stand at the Discovering Business in Thurrock Exhibition on 6 November 2014.

For details of this or any other event, please visit our website at www.birkettlong.co.uk/events

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