AUTUMN 2015

Construction Law

NEWS AND ADVICE FROM BIRKETT LONG

Zero carbon homes policy scrapped

An unexpected announcement from the new Conservative Government sees the target for zero carbon homes scrapped.

The 2016 policy, and the accompanying Allowable Solutions carbon offsetting scheme, has been dropped and is to be replaced by the Government's productivity plan, Fixing the Foundations. The document was published on 8 July, following the Budget.

This document states that in repeating the previous Government's "successful" performance of reducing the regulatory burden on house builders, it will not proceed with the original zero carbon offsetting scheme nor the proposed 2016 increase in on-site energy efficiency standards.

The document further states that it would "keep energy efficiency standards under review, recognising that existing measures to increase energy efficiency of new buildings should be allowed time to become established".

Stewart Baseley, Home Builders' Federation's executive chairman, said: "Maintaining the current energy efficiency requirements for new homes is a sensible move by the Government. The UK is already building some of the most energy efficient homes in the world under the current, already exacting standards, that have been developed with the full support of the industry, and considerable progress is being made to deliver ever higher standards in efficiency."

I believe that the nature of the world we live in today will dictate that we will always strive to seek new ways and means to improve on the energy efficiency of the homes and buildings of the future.

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Construction ligitation in practice

I act for a local company that is the defendant in a construction dispute. One of its suppliers is claiming that it supplied goods and services to my client, worth in the region of £50,000.

You're probably wondering what "goods and services" were provided. So did the defendant! The claimant failed to provide this very basic information in the particulars of the claim, in accordance with The Civil Procedure Rules ("CPR"). By failing to provide information such as who entered the agreement, whether the agreement was verbal or written, and what goods were provided, the defendant was unable to deny or admit the allegations against it, as it did not know what the allegations were. The claimant could have supplied 40,000 bananas as far as they were aware!

I filed a defence to the claim on the defendant's behalf, in addition to making an application for "strike out of the claim and/or summary judgment". This application was made on the basis that the claimant had no reasonable grounds for bringing the claim, the deficiencies in the claim were self evident and/or the claimant had no real prospect of succeeding at trial.

The defendant's application was heard before a district judge. Whilst the district judge agreed that it was "one of the most hopelessly pleaded cases he had ever seen", he gave the claimant one last opportunity to get its claim right by making an 'Unless Order', which meant that unless the claimant served better particulars within 14 days with all relevant supporting documentation, the claim would be automatically struck out.

At one minute to the deadline for serving the re-pleaded particulars of claim on the defendant, the claimant attempted to serve it by email. Service of documents by email is not permitted in accordance with the CPR unless express authority has been given by the party receiving the statements of case to do so. The defendant had not given such permission. The claimant had therefore breached the court order to serve the re-pleaded case by 4pm on a particular day. In addition, the re-pleaded statement of case still failed to give the requisite details that the CPR required for the defendant to be able to respond fully to it. This was another clear breach of the court order.

The claim was therefore struck out in accordance with the court order and the claimant must now make an application for "relief from sanctions" in order to continue with its claim. Put simply, the claimant

Where are we heading?

Is Essex feeling stable and confident?

Most involved in construction are hoping for a period of stability to be able to plan for and build the housing and commercial premises that the county and the economy require.

The Queen's speech outlined the Government's intention to bring forward a "Cities and Local Government Devolution" bill, a housing bill and an energy bill. These will be the first steps to implementing some of the Conservative manifesto promises for, amongst others: devolution to large cities who want elected mayors; protection of green belt/an emphasis to build on brownfield; stronger protection of natural landscapes; putting local people in charge of planning decisions, strengthening the community right to build, and pushing forward locally-led garden cities and towns.

Will that bring us stability, or will further changes to the planning system provide uncertainty again? Here in Essex, the South East Local Enterprise Partnership - SELEP – is potentially undergoing fundamental reform which may result in a Greater Essex LEP that will be more flexible and more responsive, helping drive the Essex economy forward and delivering the transformative projects that businesses and residents of Essex wish to see. We can only hope that a settled period will follow, enabling businesses to take advantage of the potential opportunities in the development and construction sectors.

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will need permission from the court to continue with the claim against the defendant as it will need to prove that the breach committed by it was not “serious” or “significant”.

The defendant will, of course, be objecting to any relief being granted by the court as the claimant has had two opportunities to get its claim right.

I will update you with the progress of this case in the next construction newsletter. If you require any legal assistance with issuing a claim or defending a claim, please do get in touch with a member of the construction team.

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Meet the team

Peter Allen

Peter is experienced in advising on and drafting construction contracts and sub-contracts. In January 2012 he was made a member of the Technology and Construction Solicitors Association (TeCSA). Peter works with all types of clients regarding contractual terms and collateral warranties and advises on other associated documents required in the building industry such as guarantees and bonds. His experience covers all the major standard forms including JCT, NEC, FIDIC and ICE.

Peter also deals with mediations, adjudications, arbitrations and court proceedings, advising clients on breaches of contract, non payment, extensions of time, loss and expense and valuation claims. He deals with allegations of professional negligence, taking actions against professionals and defending proceedings for professionals. Clients include businesses, manufacturers, contractors, developers, sub-contractors, local authorities, health authorities, educational establishments, construction professionals/consultants.

Peter joined the firm in 1997, became a Partner in 2000 and is now head of the commercial department and leads the construction team.

Peter Allen
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under the spotlight

Adjudication can get you paid!

As everyone is now well aware, following the correct valuation process for payments due under a construction contract is critical. If you fail to follow the correct procedure then the paying party can often end up having to pay monies that it does not believe are due.

If a paying party does not follow the correct procedure then the quickest way to obtain payment is to refer a dispute to adjudication. We have recently been instructed on a number of cases where contractors or subcontractors have not been paid and there have been allegations that the works are defective. Our clients have always denied that the works were defective and that the paying parties were simply trying to avoid payment for various reasons. The paying parties had not followed the correct procedure for calculating payments that were due. This meant that, by default, sums that had been claimed by our clients were due.

Our approach is to promptly issue adjudication proceedings. Once these are served and adjudicators appointed, the paying parties often pay our client what was claimed because their lawyers have advised that they would lose the case should it go to adjudication. We have had several examples where the adjudication has not proceeded due to such legal advice.

On one occasion however, the paying party obtained some very poor legal advice on the dispute. That paying party lost the adjudication but still did not pay; this led to enforcement proceedings in the Technology and Construction Court, where we obtained summary judgment and costs were awarded against the paying party on an indemnity basis.

Our advice to clients is to act promptly when payments have not been made. If necessary, issue adjudication proceedings to force payment that should have been made; it is also best to obtain specialist construction advice as this area of law is different to general contract law and if your lawyer is not experienced, costly errors can be made.

Please contact Peter Allen for more advice on how adjudication could help your business.

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Forthcoming events

Construction lunches

We are trying to gauge interest in lunches for those involved in the construction sector. These would take place across our three offices. If you would find these of interest, please register through seminars@birkettlong.co.uk.

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