



# Construction Law

NEWS AND ADVICE FROM BIRKETT LONG

## A nod and a handshake?



Our last newsletter featured a case that highlighted the fact that the courts will honour a variation to a contract, even if it was only a verbal agreement.

The case in question was *Globe Motors v TRW Lucas Verity Electric Steering*, in which the court of appeal said that a contract could be varied by a spoken agreement, even though - in this case - there was a clause in the written contract stating that any variation must be in writing in order to be effective.

Hot on the heels of that case is a further decision by the Court of Appeal in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd*. Just like the *Globe Motors* case, it was decided that

a clause requiring any amendment to be made in writing does not protect a contract from being varied verbally.

It should be remembered, however, that for an oral variation to be effective, all of the constituent parts needed to form a contract must be present. This means the parties must have the intention to form a new contract and must reach agreement. Furthermore, there must be some form of consideration for the variation. If these elements exist then the oral variation will be effective.

The consideration provided for the variation must be new. For example, part-payment of a sum already due is not normally considered good consideration. In the context of construction contracts, a verbal agreement to carry out a variation and to be paid for doing so, would be good consideration from both parties.

Despite this, there are certain types of contract that cannot be altered verbally because the law says they have to be in writing. The most usual examples are contracts for an interest in land and contracts of guarantee.

This amounts to quite a change in the law of contract and is likely to lead to some uncertainty over terms. If you have questions, please get in touch.



Peter Allen  
01245 453813  
[peter.allen@birkettlong.co.uk](mailto:peter.allen@birkettlong.co.uk)

# Can I take a photo of the Eiffel Tower?

When you're next visiting London, taking in the sights and admiring all that the city skyline has to offer, you might be surprised to learn that many of the buildings you see are in fact protected by a registered trademark.

Famous buildings such as The Shard, The London Eye and Battersea Power Station all have registered trademarks for their names. Fortunately, in this country that doesn't mean you will land yourself in hot water if you take a photograph of the building without the permission of the building owners. Taking a picture of a building which is in a public space is allowed in the UK. However, beware if you are taking a stroll through Paris at night, as taking a photo of the illuminated Eiffel Tower is not permitted, as the light installation is protected by copyright!

Many developers and building owners may not be aware of how or which intellectual property rights apply in relation to construction projects in which they are involved, and therefore may not realise when they are infringing other parties' rights. Many copyright materials will be produced in the course of a construction project; these may include design specifications, photographs, plans and drawings, as well as models and graphic works such as maps and

charts. There is often a misconception that because a developer has commissioned these works they have a right to use them on other projects, but they do not.

In the UK, copyright exists automatically in a piece of work, provided that the work is original, recorded and the result of some effort by the author. There are no specific formalities that need to be observed for a work to receive copyright protection, unlike other intellectual property rights.

For example, design specifications, drawings and plans produced by your architect will be owned by your architect and not you, even if you commissioned the work. Unless there is an agreement to the contrary, you will only have a licence to use the documents for the specific project that they were intended. This means that you cannot use those same drawings for a different project unless you have express permission to do so. In fact, the architect will also own the copyright in the building itself, so copying its design, even where the drawings are not copied, could be a breach of copyright.

If you want to use the same drawings for a different project then you will need to ensure that the right to use them has been properly assigned to you, otherwise you could find that you have infringed another



## The launch of...

...Birkett Long's new regulatory team

**In our last construction newsletter we gave details of a case where two directors were sentenced to imprisonment for breaches of health and safety. Such cases seem to be more and more common.**

In recent weeks Southern Water was fined £24,000 following conviction for environmental permitting offences; a manufacturing company was fined £170,000, a farming company was fined £66,000 and a bakery fined £36,000, all for health and safety breaches. In August, the Information Commissioner's Office fined Whitehead Nursing Home £15,000 for failing to keep personal data secure. In response, we have launched a new regulatory team. The team advises on how to comply with relevant

regulations so that investigations and prosecutions can be avoided if at all possible. We also represent clients who face prosecution or other enforcement action, and advise professionals on actions taken against them for professional misconduct. We have experience in dealing with regulators such as the Health & Safety Executive, Trading Standards, Maritime and Coastguard Agency, Care Quality Commission and the General Osteopathic Council.

Full details are available on our website at - [www.birkettlong.co.uk/site/in-business/protecting-your-business/dealing-with-regulators/](http://www.birkettlong.co.uk/site/in-business/protecting-your-business/dealing-with-regulators/) or please contact Reggie Lloyd on 01206 217347 to discuss any regulatory needs.

party's intellectual property rights. The right to use the drawings can be created either by way of an assignment of the rights, so by sale or transfer of the right to exploit the drawings, or by obtaining a licence to use, which will be subject to certain limits or conditions. Regardless of the option you choose, it is advisable to seek an assignment at the start of any project and for this to be done by way of a formal agreement. If you are the building owner and your building has iconic or landmark appeal then you may also want to consider registering a trade mark to protect your brand.

Our intellectual property specialists Claire Wiles and Stephen Avila will be pleased to provide more information for you.



Claire Wiles  
01268 824930  
claire.wiles@birkettlong.co.uk

## Meet the team

### Natalie Whybrow

Natalie joined Birkett Long in September 2016 as a solicitor in the commercial dispute resolution team. She is based at the firm's Chelmsford office.

Prior to joining Birkett Long, Natalie worked for an insurance litigation firm in London for five years, and it was there that she qualified in 2016. At that time she was dealing with large corporate clients in the construction, retail and leisure industries. Natalie has prior experience in health and safety law, and civil, criminal and commercial disputes, especially within the construction sector.

Through her work with these types of businesses, she has developed an understanding and appreciation that the priorities of each one are different, and she has developed a commercial approach to resolving disputes based on each client's needs.



Natalie Whybrow  
01245 453855  
natalie.whybrow@birkettlong.co.uk



# under the spotlight

## Joint Contracts Tribunal 2016

The Joint Contracts Tribunal (JCT) publishes standard forms of contract for use in the construction industry. At last count, there were over 100 construction-related contracts published by the JCT and it has now announced that new 2016 versions of their contracts are to be made available.

So far, the minor works suite of contracts has been updated, together with the short form of sub-contract and the sub sub-contract. However, further suites of contract are likely to be updated throughout the rest of this year.

The new versions bring simpler payment provisions, with interim and final payments using a common procedure. The insurance provisions have been made more flexible, the CDM Regulations 2015 have been incorporated, and termination rights have been extended to include the Public Contracts Regulations 2016.

Changes being promised for the further suites of contract include:

- fair payment, transparency and BIM
- monthly interim payments, even after practical completion
- prompt assessment of loss and expense
- flexibility of fluctuation clauses
- provisions for performance bonds and parent company guarantees
- Third party rights from subcontractors
- Improved functionality/user- friendliness

When entering into a construction contract that is governed by a JCT contract, it will be important to check which version applies. If no specific version applies, then the latest published version will be the one that governs the terms. As there will be significant changes to the payment process, as well as assessment of loss and expense, parties will have to make sure that they are up to date with the procedures. Not knowing them could result in losing out!

For further advice on any JCT contracts, please contact Peter Allen.



Peter Allen  
01245 453813  
peter.allen@birkettlong.co.uk

### STOP PRESS!

**A new JCT design and build contract was launched in September.**

## Forthcoming events

### Construction lunches

We have held some very successful lunch seminars over the last few years but wonder if people would prefer a seminar at a different time of day. Please tell us which of these times suits you best: 7.30am, 12.30pm or 5.30pm. Send your replies by email to [seminars@birkettlong.co.uk](mailto:seminars@birkettlong.co.uk).

### BIRKETT LONG LLP

PHOENIX HOUSE  
CHRISTOPHER MARTIN ROAD  
BASILDON SS14 3EZ  
T 01268 244144

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

FAVIELL HOUSE, 1 COVAL WELLS  
CHELMSFORD CM1 1WZ  
T 01245 453800

E [CONSTRUCTIONLAW@BIRKETTLONG.CO.UK](mailto:CONSTRUCTIONLAW@BIRKETTLONG.CO.UK)  
WWW.BIRKETTLONG.CO.UK

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