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CONSTRUCTION law

NEWS AND ADVICE FROM BIRKETT LONG

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Adjudicating the true value of an interim payment

Everyone in the construction industry should know that it is vitally important for parties to contracts to serve the correct notices relating to interim and final payments.

A party wanting to be paid must serve its application. The party paying must serve a payment notice and/or a payless notice. These must all be served at the correct time and in the correct form. If these notices are not served, there can be disastrous consequences with one party having to pay the other monies that it may feel are not due.

The problem has been further compounded by the decision of the Technology and Construction Court in the case of ISG Construction Limited v Seevic College. The paying party, Seevic College, had not served either a payment notice or a payless notice in the correct form or at the correct time. It was held that it had to pay the sum claimed by the contractor.

Two insurances: Which one pays?

Insurance provisions in a construction contract can be complex and confusing. There is public liability insurance, employer's liability insurance, professional indemnity insurance and project specific insurance.

Furthermore, it was held that Seevic College was not able to commence an adjudication to decide the correct value of the application. They were deemed to have accepted the value in ISG's application until the final account process.

However, this case looks to have been overturned so that paying parties would have the chance to value an interim application even if a payment notice or payless notice has not been served.

If these notices are not served, there can be disastrous consequences

In the case of Grove Developments Limited v S&T (UK) Limited the interim account in question was served just after practical completion and the amount payable on the application would have been about £14 million; an adjudicator had held that a payless notice was not valid and therefore the amount claimed by the contractor was due.

A number of points were decided in this case. However, one of the most useful for paying parties will be that if you fail to value an application and serve either a payment notice or a payless notice you would still be able to challenge the actual value of the interim application. The amount applied for would still be the amount that would be payable and the party expecting payment would still be able to refer that dispute to adjudication and be successful. The paying party would have to make payment.

However, the paying party would then also be able to commence an adjudication to actually value the account. An adjudicator would have to go through all of the representations and value the works. In such circumstances, it may well be that the value of the interim application would be considerably lower and therefore the paying party would only have to pay the reduced sum.

This is a considerable change in the law. It means that employers and other paying parties have, in effect, a third opportunity to challenge interim applications.

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Who has to obtain planning permission?

In most cases, planning permission will already have been obtained prior to any construction contracts being entered into. However, occasionally planning permission may not have been obtained. There may then be a question as to which party should be obtaining planning permission.

Sometimes contracts have clauses stating that the contractor will be liable to obtain all necessary permissions and licences. This may well cover planning permission, and such a clause would be dangerous to agree to, bearing in mind that planning permission may not be granted.

If the contract is silent, who is liable to obtain the planning permission? In Clin v Walter Lilly & Co Ltd the Court of Appeal upheld a High Court decision that there would be an implied term in the contract requiring the employer to apply for planning permission. The implied term would be that the employer would use "all due diligence" to obtain the planning permission.

This is a very important point, because, if planning permission cannot be obtained and one party had a contractual duty to obtain it, then that party may be in breach of contract. This would then entitle the other party to take proceedings to recover their losses as a result of that breach.

The project specific insurance may be taken out by the employer or the contractor. It may also have to be in the joint names of all parties and it will cover only certain risks.

In a recent case, there was both a joint name project insurance policy and a term under a subcontract that the subcontractor would maintain its own insurance. Fire damage occurred during building works to a school in London. The project insurers paid for the claim but then sought to claim against the subcontractor who had been responsible for the fire. They sought to recover from the subcontractor's insurers.

The subcontractor argued that it was a named third party under the project insurance and therefore it could not be sued. It was the intention that the project insurance cover subcontractors. However, the subcontract had an express insurance requirement that the subcontractor take out insurance for the same risk. It was held in the Technology and Construction Court that the subcontractor could not rely on the project insurance policy and that their own insurers were liable for the loss.

This means that where there is project insurance which covers subcontractors, subcontractors must make sure that their contracts do not require them also to take out the same insurance. If there is such a clause then it will be their policy that pays out and not the project insurance, even if this was not the intention.

Is time ticking on your right to be paid?

As you are probably aware, there are time limits known as "limitation periods" within which claims governed by English law must be brought, after which the right to bring a claim can be lost. The limitation period for a claim for breach of contract is six years from the date of the breach. However, it is not always clear from exactly what date this time limit starts to run.

Unless the parties to a contract agree otherwise, the position is that the limitation period on a claim for payment for works or services starts running from the date that those works or services were carried out. But what is the position where the contract provides that payment for that work only becomes due upon the contractor raising an invoice? What if the contractor only raises an invoice two years after the work was completed and that invoice is not paid? How long does the contractor have to bring a claim for breach of contract in respect of the non-payment of that invoice? Well, it would seem that the breach of contract occurred when the invoice wasn't paid, so surely the contractor would have six years from the date of non-payment to bring a claim? But that would mean that the contractor would have eight years from the date that the work was completed in which to bring a claim, which would perhaps be rather unfair on the paying party?

The High Court clarified the position in a case decided earlier this year. The Court held that even where there are contractual terms relating to payment for work or services which provide that payment only becomes due once the contractor has raised an invoice, the limitation period on the contractor's right to issue proceedings for non-payment of that invoice will still run from the date that the work was completed, not the date that the contract says the invoice should have been paid.

The decision serves as a reminder to contractors of the serious consequences that can arise as a result of delays in raising or pursuing accounts. Six years may sound like a long time, but it is not unknown for contractors to fail to issue final accounts within this period, particularly where perhaps there are ongoing disputes between the parties relating to the works.

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