Construction Law

NEWS AND ADVICE FROM BIRKETT LONG

'Absolute' and 'skill and care' obligations

We see more and more contracts where contractors give an assurance that complete works will meet a particular specification, believing that reasonable skill and care will achieve that specification. But that is not always the case!

A recent case determined that a construction or an engineering contract can contain both absolute obligations and obligations to exercise reasonable skill and care. These are not mutually exclusive and can exist side by side in your contract.

In this case, the contractor agreed to carry out the design, fabrication and installation of the foundations for 60 wind turbine generators for an offshore wind farm. The contract contained a number of obligations, one of which was that the foundations must have a minimum design life of 20 years. In fact, the design failed within two to three years and the contractor was taken to court for the cost of the remedial works, estimated to be 26.25 million euros. The court said that the contractor had warranted a design life of 20 years on the foundations. The employer was entitled to rely upon that and therefore the contractor was in breach of his obligation.

The court noted that it was common for construction and engineering contracts to refer to obligations to exercise reasonable skill and care, to work in a workmanlike manner and to achieve a particular result, the latter being an absolute obligation. It gave this example: a building is designed and constructed robustly so that it lasts its design life and so meets the absolute obligation. However, the workmanship is untidy, for example, the bricks although suitable are mismatched and create an eyesore. An obligation to perform works in a workmanlike manner would not allow for such unsightly brickwork.

Engineering contracts often contain absolute obligations to deliver works to a specification. This case should serve as a reminder to exercise care when agreeing contract terms and ensure that absolute obligations and obligations to exercise skill and care are clearly indentified as such. Our team of lawyers would be happy to advise you on your contract and assist with your negotiations.

Claire Wiles
01245 453811
claire.wiles@birkettlong.co.uk

That's blocked our sewer!

The recent case of Northumbrian Water Ltd-v-Sir Robert McAlpine Ltd has offered some relief for developers and builders.

McAlpine's had been sued for loss and damage caused by an escape of concrete from one of their building sites into one of Northumbrian Water's sewers. The Court of Appeal found them not liable either for negligence, nuisance or under the rather more obscure rule in the case of Rylands-v-Fletcher.

McAlpines were sinking a number of shafts across their site and then filling them with concrete to create piles. The site had been redeveloped on a number of previous occasions, most recently in the 1970's, when significant excavation work had been carried out. McAlpines carried out extensive investigations of the ground conditions before works started and concluded that there were no unidentified obstructions below ground level that were likely to be affected by - or would affect - their works. Unfortunately, they were wrong. There was an old private sewer which connected to the public system, 3 metres below ground level. It wasn't shown in any readily available plans and was only discovered after the event, and after many hours of research in the Newcastle Discovery Museum on a plan dating from 1908.

When McAlpine sank a shaft close to the sewer, concrete poured into it and then into the main sewer where it caused a partial blockage.

Everyone accepted that McAlpines owed the water company a duty of care to avoid causing damage to its works, including the sewer. The court decided that McAlpines had not been negligent, neither for failing to have checked the museum's records for hours - it was felt that a reasonably competent and careful contractor would not have done that - nor by the way they carried out the piling work. It also decided that there was no liability in nuisance, as this was an isolated escape of materials for which liability could only arise under Rylands-v-Fletcher, and that didn't apply here, because the damage caused to the sewer by the escape of concrete was not foreseeable and that was a pre-requisite of making the claim. The conclusions were first, that although liability in nuisance is

Legal update

Can you stop a call on a bond?

Bonds are used in construction contracts to ensure that the contractor carries out and completes the works in accordance with the building contract. If the contractor does not do so then the employer can simply call on the bond provider for the value of the bond.

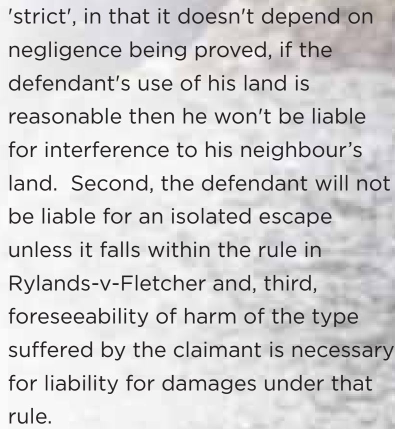
Normally, an employer does not have to justify why the call has been made and the monies simply have to be paid out. This can have devastating financial and commercial consequences for a contractor.

Until recently, it was often thought that only fraud could be used as a ground for restraining a bond being called upon. However, a couple of cases over the last few years have confirmed that this is not the case.

It has been decided that if the underlying contract prevents the employer from calling on the bond then the court can restrain that payment. A court only has to be satisfied that the contractor has a strong case as to why the employer should be stopped from calling upon the bond.

If you have any issue with a bond then please contact Peter Allen.

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



'strict', in that it doesn't depend on negligence being proved, if the defendant's use of his land is reasonable then he won't be liable for interference to his neighbour's land. Second, the defendant will not be liable for an isolated escape unless it falls within the rule in Rylands-v-Fletcher and, third, foreseeability of harm of the type suffered by the claimant is necessary for liability for damages under that rule.

This decision will come as some relief to contractors. If they act carefully and competently they may well be able to avoid liability for unforeseen events.

For any issues or questions raised by this article, please contact David Rayner.

David Rayner
01245 453826
david.rayner@birkettlong.co.uk

Meet the team

David Rayner

David joined Birkett Long LLP as a partner in our real estate team on 1 November 2010, and leads the energy and environment group.

David has worked across all aspects of commercial property but has particular expertise in commercial development, investment work, landlord and tenant and secured lending. He also specialises in environmental matters and has recently been advising clients on Carbon Reduction Commitment as well as renewable energy, contamination and other 'green' issues. In addition to the commercial development and lending sectors David has an active interest in retail and leisure sectors and has historically carried out some charity and insolvency-related property work.

“David Rayner handles commercial development and lending work, and is a specialist in environmental matters. He heads the environment and energy team at the firm and is praised by one client for having a "very sound legal and commercial brain."”
Chambers Legal Directory 2014

David Rayner
01245 453826
david.rayner@birkettlong.co.uk

under the spotlight

Adjudication can be quick and efficient

If you have experienced adjudication first hand you will be aware that whilst the outcome is somewhat unpredictable, it is a quick and efficient way of dealing with a construction dispute. The timescale is 28 days from the submission of the dispute through to a decision.

Adjudicators' decisions are only temporarily binding and it is often difficult to predict how an adjudicator may decide a particular issue or how that issue has been decided previously (decisions are not published and the decisions do not set precedents). It is only if the matter comes before the court for enforcement that the adjudicator's decision and reasoning is seen.

The Technology and Construction Court has made it clear that it will enforce an adjudicator's decision unless the adjudicator:

1. Exceeded his jurisdiction; or
2. Materially breached the rules of natural justice

For many parties in construction disputes adjudication is therefore a very effective process. This was certainly the case for our client, J G Walker, who recently successfully enforced an adjudicator's decision against Priory Homes for an unpaid valuation. The adjudicator awarded J G Walker the sum claimed (circa £40,000 plus interest). He also directed that Priory Homes should pay his fees and expenses of £10,000. Unsurprisingly, Priory Homes failed to pay J G Walker the sum due or the adjudicator's fees and it was necessary to enforce the decision through the TCC by way of an application for summary judgment.

Priory Homes attempted to use jurisdictional arguments to avoid enforcement of the adjudicator's decision and raised arguments about the "serious errors" in the adjudicator's decision. The TCC described these arguments as "wholly misconceived" and "without merit". The court awarded summary judgment to J G Walker, ordering Priory Homes to pay their costs on an indemnity basis.

This case reinforces three important messages regarding adjudication:

1. The TCC will enforce adjudication decisions whenever possible.
2. It demonstrates the serious costs risks that parties face when resisting enforcement.
3. It also shows that adjudication is a quick and cost effective way of dealing with construction disputes. It took approximately two and a half months from the date of the Notice of Referral to the hearing at the TCC for J G Walker's application for summary judgement.

If you are considering referring a construction dispute to adjudication, please contact us for further information on how we can assist you.

Katy Humphreys
01245 453865
katy.humphreys@birkettlong.co.uk

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

Birkett Long LLP is authorised and regulated by the Solicitors Regulation Authority (Number: 488404)
Birkett Long LLP is authorised and regulated by the Financial Conduct Authority (Number: 481245)

Whilst every care and attention has been taken to ensure the accuracy of this publication, the information is intended for general guidance only. Reference should be made to the appropriate adviser on any specific matters.
© Birkett Long LLP 2014 We hope you find this newsletter of interest, but if you would prefer not to receive it or wish to receive a copy via email, please contact the Business Development and Marketing Team on 01206 217334.

Reference: NEWS/CONSTRUCTION14/2014