WINTER 2015

Construction Law

NEWS AND ADVICE FROM BIRKETT LONG

Payment through adjudication...not insolvency

Changes to the Housing Grants Construction and Regeneration Act were thought to make winding-up proceedings possible when a party failed to pay an interim certificate. But that thinking appears to be flawed!

The amount certified in an interim certificate will often become the 'notified sum', or the sum that must be paid, but a recent decision has cast doubt on whether it is possible to proceed to insolvency proceedings to recover payment of that sum.

The Court of Appeal issued an injunction to stop a contractor from presenting a winding-up petition against an employer who had not paid an interim certificate. There were two grounds for this, the first of which is generic and could apply to all situations. The employer stated that it had serious and genuine cross-claims that exceeded the sum allegedly due and it had the evidence to support those claims. Therefore, it would be entitled to set off those sums against the monies stated in the interim certificate, making insolvency proceedings inappropriate. The court agreed with this as there was no judgement from a court ordering payment.

The second was based on a particular contractual provision in the JCT Intermediate Building Contract, which stated that an employer did not have to pay any further monies if the contractor had become insolvent. In this particular case the contractor had already become insolvent and it was the liquidator that was trying to recover the monies due. The injunction prevented the winding-up petition from being presented and although it avoided insolvency for the employer, there is no escape from paying the bill!

This attempt to short-circuit the process for obtaining payment avoided the need to go to adjudication. However, had adjudication taken place, the adjudicator would have almost certainly ordered that the employer should pay against the interim certificate and, if necessary, a judgment in the Technology and Construction Court would have enforced that.

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A good outcome for our client

Further to the update in the last construction newsletter, Katy Humphreys shares good news in relation to a construction dispute in which Birkett Long has been acting for the defendant.

By way of a very brief overview, the claimant in this dispute had two opportunities to get its claim right, but it failed to do so. It also failed to correctly serve the re-pleaded particulars of claim on the defendant. As a result, the claim was struck out and the claimant had to make an application to the court for relief from sanctions in order to continue with its claim.

The hearing was listed in mid September and, ahead of the hearing, I filed a witness statement on behalf of the defendant to oppose the claimant's application and set out all of the breaches that the claimant had committed in dealing with the proceedings to date.

At the hearing, the claimant argued that his failure to serve the particulars of claim on the defendant's solicitors - as he should have done - was a technical breach and not of a serious nature, and therefore relief from sanctions ought to be granted. The claimant also said that the defendant could clearly understand the case against it simply by using the information that was provided in the second re-drafted particulars of claim.

However, the defendant did not agree, saying that the particulars were unsatisfactory given the specific requirements of both the court order and the Civil Procedure Rules (CPR), and that a number of the invoices provided in support of the claim were incomplete, due to the claimant having submitted poor quality photocopies.

Both parties gave substantive submissions on the CPR to persuade the court of their position.

In giving judgment, the district judge confirmed that he would have no problem granting relief for the defective service alone. He pointed out that the particulars (if they had been accompanied by complete copy invoices), whilst lacking flesh on the bones, did set out the basis of the claimant's claim and contained enough information for the defendant to respond. However, because some of the copy invoices were absent, the defendant could not fully identify the case it had to meet. This, coupled with other matters such as the previous technical breaches committed by the claimant, meant that it

SMEs encouraged

to tender for public procurement work

For many years, it seemed that small and medium enterprises (SMEs) were being pushed out of being able to tender for public procurement work, especially in the construction sector.

However, the introduction of the Public Contracts Regulations 2015 has, as one of its stated aims, the encouragement of more SMEs to tender for such projects. Authorities have to provide a written explanation and justification for not dividing contracts into smaller lots. This may mean smaller contracts are offered and this should encourage them to make projects more accessible to SMEs. There are also new exclusion and selection rules which mean SMEs are more likely to qualify to tender and will find it easier to do so. This includes use of a standardised form which is likely to help save resources for SMEs. In addition, SMEs will not be disqualified simply because they do not meet a minimum turnover figure. Authorities should not stipulate a minimum turnover unless they can demonstrate a good reason for doing so.

A further change on 1 September 2015, affects contracts worth more than £10 million. As part of the bid process the bidder's commitment to apprenticeships will be assessed. As part of any agreement, bidders will have to maintain promises in the tender document relating to apprenticeships; this will include the number of apprentices that will be employed on the project.

was not a case where the court could grant the claimant relief from sanctions.

Therefore the claim was struck out and the defendant was awarded its full costs of defending the application.

As well as being an excellent result for the defendant, this case demonstrates the need for both parties to adhere to the CPR when dealing with their statements of case.

Should you require any legal assistance with issuing a claim or defending a claim, we will be pleased to help.

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Meet the team

Keeley Livingstone

Keeley is a key figure in our residential real estate team, heading up this department in the firm's Chelmsford and Basildon offices.

Joining the firm in 2013, Keeley's responsibilities include progressing property purchases from file opening to exchange, along with assisting the team that deals with post exchange work, particularly with any matters arising up to completion of registration.

Keeley studied Licensed Conveyancing at the London School of Law, qualifying in 2006. Before joining Birkett Long, she worked at Bankside Property Ltd, acting on all types of residential matters within Affordable Housing, and then at Pitmans, Reading, where she headed up a team acting for major housebuilders.

> "You have been absolutely brilliant and I feel so assured that I can rely on you."
> *Client quote*

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under the spotlight

Make sure your interim payment applications are clear

As most people are now aware, ignoring an application for payment will not make it go away! The amount claimed on such applications will usually become the amount that becomes payable if it is ignored. This happens even if the paying party does not believe it to be the correct sum for payment. A number of significant cases have confirmed this law, including one where the payer had to pay £768,000 more than it believed was due!

As a result of these cases, parties involved in interim payments have started to try to clarify what an application for payment should look like and when it should be sent. There have recently been two cases in the Technology and Construction Court dealing with these points.

In one of these cases, there was a specific date in the contract on which interim applications had to be made. The document upon which the contractor was relying as his 'interim application' was titled 'Final Account Application Summary'. It was not sent on the date that the interim application was due but on an earlier date. The court decided that this was not an interim application because it wasn't identified as such and had not been sent on the correct date.

I have recently been involved in an adjudication dealing with a very similar point. An ongoing negotiation was taking place relating to a final account. Suddenly, the contractor said that what had been sent to my client was in fact an interim application. My client argued that it was simply part of the negotiation of the final account and the case went to adjudication, the adjudicator agreed and dismissed the claim against my client

A further case has reinforced the message that interim applications must be clear.

- they should be sent at the correct time and identify themselves as being interim applications
- they should state the sum that the contractor thinks will become due at the relevant due date and how it is calculated

Unless these criteria are fulfilled, even if an adjudicator says that sums are due, if the application can be shown to be invalid, the adjudicator's award will not be enforceable.

So when parties apply for payment they must make sure that they follow the correct contractual format and date for submitting applications, and identify the documents as interim, or final, applications for payment. They should send the supporting documentation. Only by doing this will they avoid the risk that they will not be able to recover money due.

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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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