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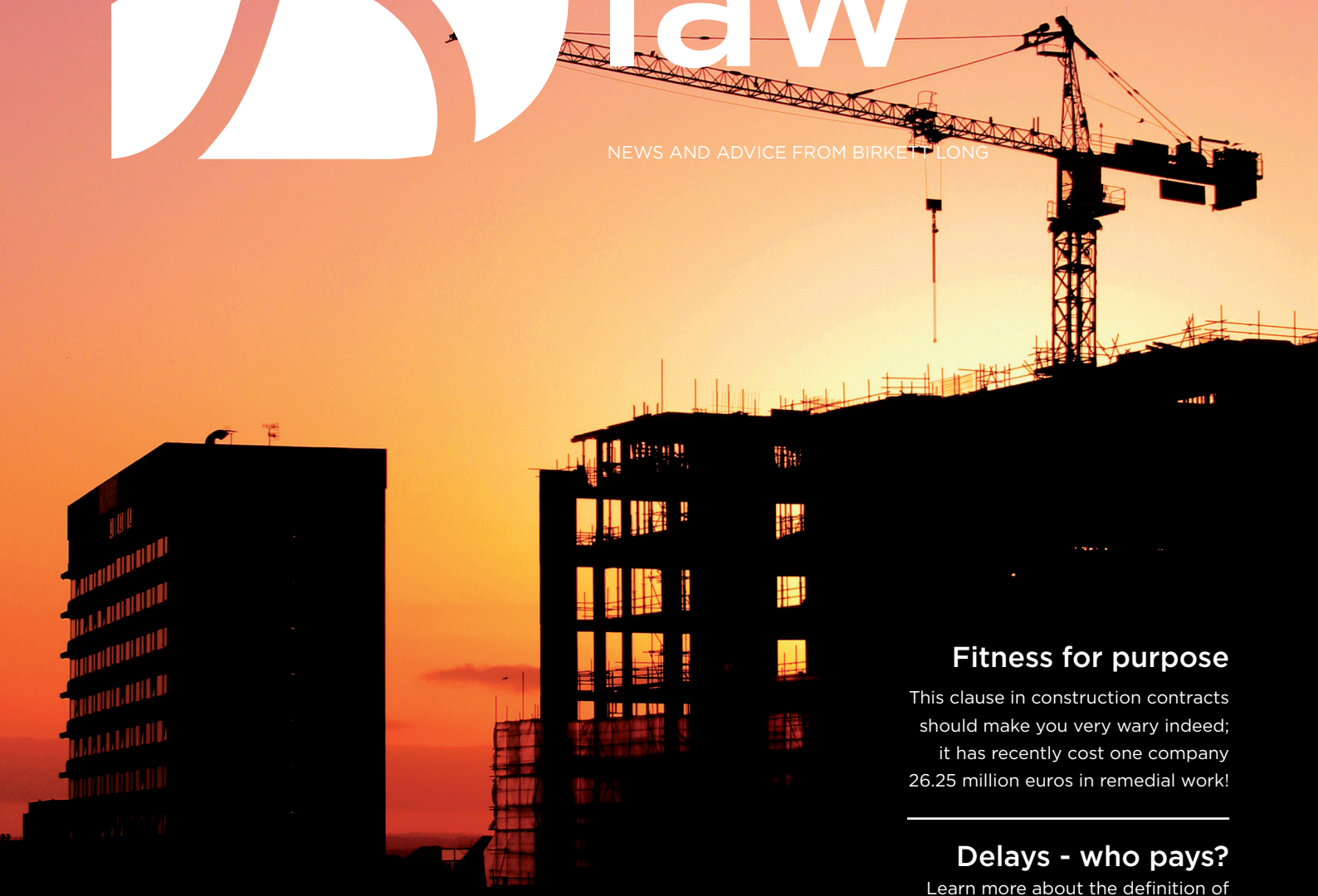
CONSTRUCTION law

NEWS AND ADVICE FROM BIRKETT LONG



Fitness for purpose

This clause in construction contracts should make you very wary indeed; it has recently cost one company 26.25 million euros in remedial work!

Delays - who pays?

Learn more about the definition of concurrent delays and why could they could leave you out of pocket.

Have you got a double cab pick up?

The tax implications are explained in this guest article written by RSM UK.

Payment notices

The courts have recently clarified the position for contractors and sub-contractors when it comes to issuing payment notices.

26.25 million euros remedial work!

beware the 'fitness for purpose' clause

In every construction contract there is a standard to which the building work must be carried out. In the JCT Form of Contract, the general obligation is to carry out and complete the works 'in a proper and workmanlike manner'. There are also more specific obligations to ensure that materials, goods and workmanship are to the standards described in the contract documents.

If no standard is specified in the contract documents then there is an implied term that the services will be carried out using reasonable care and skill. There will also be an implied term that materials will be of satisfactory quality and reasonably fit for their purpose. However, there would not necessarily be an implied term that, when completed, what has been built will be fit for the purpose for which it was intended. A contractor is only obliged to build to the designs that are provided.

There have been instances, however, where parties have tried to incorporate terms into contracts to ensure that what is completed is fit for the purpose for which it was originally intended. This can give rise to problems should a conflict occur between that requirement and other contractual documents.

This point was recently decided in the Supreme Court in the case of MT HØjtaard A/S v E.On Climate & Renewables UK Robin Rigg East Limited. In this case the contractor had designed and built the turbine foundations for an offshore wind farm. The contractor's designs were in accordance with the international standards required by the contractual documents and there was no suggestion of negligence on the part of the contractor.

The issue came about because there was an error in the international standard. The cost of rectifying the defects caused by that error amounted to €26.25 million! If that had been the end of the matter, then the contractor would not have been liable. However, there was a clause in the contract that the works would be fit for purpose when completed. It was also stated that the contractor would satisfy any performance specification. One of these specifications was that the design life would be 20 years but the defects

Sometimes delays are inevitable, especially in more complex construction projects. But will the contractor always be entitled to further payment for the extra time spent on site?

Delays...who pays?

concurrent delays could leave you out of pocket

In many circumstances, a delay on a construction project entitles the contractor to extra time in order to complete the building works. Along with this entitlement goes additional payment for the extra time spent on site.

Such claims can be worth a lot of money as they include claims for both the overheads and the profit of the contractor.

There are types of delays, however, that do not entitle a contractor to an extension of time and therefore do not give entitlement to any further payment. It has become standard practice for construction contracts to contain a clause stating that where there are two or more causes of the delay on site, one of which would not entitle the contractor to an extension of time, no extension of time is given. This

caused by the error meant that the foundations would not last 20 years.

The Supreme Court said that the contractor had to comply with all standards in the contract. In effect, all of its obligations had to be complied with; it was not sufficient to say that it had complied with one of its obligations, even though it had met the international standard. As a result, the contractor was liable for the total cost of the remedial work.

> The contractor will be liable...even where it has not been negligent.

Contractors entering into contracts that contain a term stating that the works, when completed, will be fit for purpose or will meet a specific standard should be very wary, especially if they are not carrying out the design work or if what is being built has specialist technical features. If what is built is not fit for purpose, or does not comply with those standards, then the contractor will be liable for the cost of putting the work right, even if the contractor has not been negligent, has used reasonable care and skill and has complied with other standards.

In addition, this is a reminder that contractors should check insurance policies as such terms are not always covered by professional indemnity insurance.

type of delay is often referred to as a 'concurrent delay'. Effectively, it means that the contractor would not be entitled to any extension of time for the whole length of that concurrent delay.

The recent case of North Midland Building Limited v Cyden Homes Limited, saw such a clause upheld in the Technology and Construction Court.

In the light of this legal decision it seems inevitable that employers will seek to have such clauses incorporated into their contracts, as it offers them a degree of protection against extra costs. But contractors will need to be careful to avoid concurrent delays if at all possible, and to carefully document when such delays do occur so as to keep the period of concurrent delay to a minimum.

If you have questions about any legal aspect of your construction contract, please get in touch.

contact the team on 01245 453813

Is it a van?

what constitutes a van for employment purposes?

You may think the question is simple, but with potentially significant levels of tax at stake, getting an answer to which HMRC will agree, is vitally important. RSM UK explains more:

Although the view on what constitutes a van for employment tax purposes has been well understood for years, a recent first-tier tribunal hearing has produced a decision at odds with parts of current HMRC guidance on what differentiates a van from a car. This creates unwelcome uncertainty for both employers and employees.

The point at issue is that to be a van, a vehicle's primary purpose must be to carry goods or burden. If it cannot meet this test then it will not be a van. The tribunal decision classified the Volkswagen Kombi (generations 1 and 2) as cars, whereas a Vauxhall Vivaro was considered a van. Both manufacturers' vehicles were modified by specialists after production, so that, among other changes, a second row of seats was added behind the driver and the front passenger.

The tribunal said all characteristics of the vehicle - as it was provided to the employee - must be considered, rather than as it comes off the production line. It is interesting to note that the existence of side windows, specifically referred to as a determining factor in HMRC's guidance, was considered irrelevant by the tribunal in establishing the purpose of the vehicle. What seems to have been key for the tribunal was that the Vivaro had significant cargo space in the middle seat section to carry goods, whereas the Kombi did not.

Employers and employees should be wary of relying on current guidance in determining the taxable benefit of vehicles that are not clearly primarily suitable for carrying goods. There is also a wider concern that double cab pickups could come under review, so watch this space.

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The Construction Act gives contractors the right to be paid at certain points in the contract, such as interim or stage payments. It does, however, stipulate that certain procedures must be followed. A recent case has given some clarification on whether an application for payment will be treated as default payment notice.

payment notices

clarification from the courts

Serving payment notices in the correct form and at the correct time is crucial in construction contracts. There are strict rules which must be complied with; if they are not, an employer may find it is paying monies that it does not think are due, or a contractor will not receive a payment to which it thinks it is entitled.

For example, Bloggs Builders must serve a payers' notice to its sub-contractor, Williams Electricals, in which it must state the sum it believes to be due. If Bloggs Builders fail to serve the payer's notice, Williams Electricials can serve its own payee's notice in default. It would need to do this, because if it does not, no payment becomes due in law.

In some contracts, the payee - Williams Electricals in our example - is allowed, or even required, to serve an application for payment. This is sufficient to be considered Williams Electricals' default notice, provided of course that it has served such an application in the correct form and at the correct time.

In a recent case, a question arose with regard to the Scheme for Construction Contracts and whether it permitted or required the receiving party to make such an application.

Some clarification on this point has been obtained from the Technology and Construction Court. In the case of Jonjohnstone Construction Limited v Eagle Building Services Limited, an adjudicator said that the Scheme did permit or require the receiving party to make an application for payment. This meant that the receiving party could rely on its application and that the paying party did not serve any payment notice. The sum in the application therefore became the notified sum and had to be paid, regardless of whether the contractor considered it to be correct. The decision of the adjudicator was upheld when the case went to the Technology and Construction Court.

This means that in contracts where the Scheme applies, receiving parties do not have to serve a further notice after their application if a payer's notice is not served.

This will be a great advantage to contractors and subcontractors as they will not have to, in effect, remind the paying party that they should be serving a 'pay less' notice if they do not wish to pay the sum that has been claimed.

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