SUMMER 2016

Construction Law

NEWS AND ADVICE FROM BIRKETT LONG

Claim settled...without even knowing

Over the last few years a number of cases in which parties attempted to make claims have been defeated on the basis that they have been settled already.

In construction cases, the parties should be mindful of this when they are negotiating their final accounts.

In most cases negotiations relate only to the amount of a final account. However, if there are contentious issues involved, such as the value of variations, extensions of time, loss and expense, and defects in the works, a commercial settlement may be negotiated. When that occurs some sort of settlement agreement can be signed, the wording of which must be carefully considered as otherwise it may infer settlement on other matters such as latent defects. This can be demonstrated by a recent commercial court case.

A £70 million negligence claim was brought against a firm of solicitors, but a settlement agreement was in place and the court said that this meant that the claim had already been settled. In fact, at the time the settlement agreement was drawn up, the only matter that was actually being disputed was unpaid fees to the solicitors; there was no mention of what would happen in the face of a negligence claim. Nevertheless, the wording used in the settlement agreement related to settling *any* claims that the parties had at the time, or could have in the future, against each other, whether or not they were in the contemplation of the parties when the agreement was made. The court decided that this wording was so broad that it covered settlement of the potential negligence claim even though that claim hadn't been in the minds of either party when the agreement was made.

This is a timely reminder about the need for caution when wording a settlement agreement. A little time and money spent on expert legal advice at this stage could avoid accidental inclusion of any areas that the parties would want to settle on an individual basis.

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

Time to reconsider liquidated damages

It is common practice within the construction industry for damages to be paid by a contractor who fails to complete work on time. These are often called liquidated and assessed damages or delay damages and the clauses to which they relate are referred to as penalty clauses. What defines a 'penalty clause' is important because English law says such clauses are unenforceable. The supreme court has recently been looking at this topic in some depth.

Two cases were heard by the supreme court at the same time; neither related to construction but one was connected to a car park at a retail park in Chelmsford. That case asked the question of whether a parking ticket was enforceable, as it exceeded the amount of any loss that could be proved. The court decided that it was!

This may seem far removed from construction contracts but the law as re-stated here is very relevant to liquidated damages clauses. As a result of these cases, employers may look to increase the amount of liquidated damages knowing that the increased amount would be enforceable under the re-stated law.

The relevant part of the law under consideration was whether a liquidated damages clause had to be a genuine pre-estimate of damage caused by a breach of contract. What this means is that an employer would have to calculate the liquidated damages that it would claim in order to cover its losses should the construction works not be completed on time. To protect an employer's position, evidence would often be required to show how those damages had been calculated.

However, the supreme court has confirmed that the question to be asked is not whether the sum claimed is a pre-estimate of loss but whether it is penal. Is the amount set at a level to ensure performance of the primary obligation (in a construction contract this would relate to completing the works on time) or to punish the contractor that does not complete on time? If it is to protect the legitimate interest, i.e. on time completion, then an amount set at more than a pre-estimate of the loss may be able to be claimed without it being considered a penalty.

There could be a number of reasons why an employer could argue that it was entitled to add an extra amount to the liquidated damages. For example, a small developer might state that it had a second development that it wished to commence

Tough health & safety law

could mean imprisonment

The sentences for breaches of health and safety law have become much tougher over recent years. The courts have levied a number of six-figure fines against companies as well handing down some prison sentences. Although most of these are suspended, as the case below shows, some are not!

In February this year two directors were sentenced to imprisonment together with fines and cost orders totalling £590,000. The case involved a demolition contractor who subcontracted the taking down of a roof. The subcontractor's employees were involved in three accidents, the last of which led to a workman falling to his death.

The subcontractor's director was sentenced to six years in prison and the company fined £400,000 with a costs order of £55,000. The director of the contractor was jailed for eight months and his company fined £90,000 with a costs order of £45,000.

This case and many similar ones prove the tougher stance being taken by the courts in successful health and safety prosecutions. You should ensure that your procedures are up to date as it is not possible to avoid responsibility by reliance on subcontractors.

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

and needed to complete the first before it could start the second. Another example may be where the developer wanted a development to be completed before a particular event. Even though there may be no financial losses involved, there could be other commercial reasons why it would want completion on time.

In the light of this, employers may wish to consider whether they have commercial reasons for increasing the rate of liquidated damages. In turn, contractors and subcontractors should consider how liquidated damages are calculated and if the amount is justified. If they fail to do so, they could be faced with a claim for a considerable sum to which they have no defence!

Keith Songhurst
01245 453821
keith.songhurst@birkettlong.co.uk

Meet the team

Martin Hopkins

Martin is one of the firm's partners and specialises in employment. He has in depth knowledge of construction industry issues, such as employment definitions, employment relations, TUPE, change management, redundancy and restructure.

Martin always focuses on taking a commercial approach and defending employers' interests without unnecessary recourse to legal proceedings. In the fast moving and increasingly complicated field of employment law Martin aims to ensure that his clients are aware of and prepared for change. He is also in demand as a trainer of staff and often speaks at seminars and workshops updating employers on employment law changes.

"Martin Hopkins is praised for his ability to produce realistic solutions and appreciated for his "outstanding ability to forensically examine information". "
Chambers and Partners

Martin Hopkins
01268 244145
martin.hopkins@birkettlong.co.uk

under the spotlight

Getting paid for non-written instructions

Many forms of contract state that contractors or subcontractors who receive instructions orally rather than in writing will not be paid for the work they do as a result.

Formal contracts often contain a procedure that says any oral instructions should be confirmed in writing in order for payment to be made. In real life, however, it is often the case that a person is instructed to do something and they have to do it there and then; it is simply impossible for them to wait for a formal written instruction. They get on and do the work but unfortunately the written confirmation never arrives.

A recent case in the court of appeal may help parties who seek payment for such oral instructions in the future. Globe Motors v TRW Lucas Varity Electric Steering is not a construction case but part of the decision deals with whether or not a contract clause stating that variations must be in writing is effective. This is a common clause in most commercial contracts; the reason behind it is to ensure certainty.

In the Globe Motors case, the court of appeal decided that notwithstanding such a clause the parties can agree to oral changes to the contract, it said that the parties agree to a new contract including the change. That agreement includes, in effect, an acceptance of the oral change to the contract. Therefore, if one party instructs an oral variation in a construction contract and the other party agrees to do it, that could be a new agreement. That new agreement overrides the written terms of the contract and the oral instruction would be valid. The proviso is that in the conversation where the oral instruction is given it should be agreed that work carried out as the result of that instruction will be paid for.

This is a very new case and no doubt the law will develop. In view of this, our advice is that it would be very risky to rely on such a stance.

Oral instructions also cause problems because it is difficult to prove what was instructed and what was not. We advise clients always to confirm oral instructions in writing. If the party doing the instructing does not confirm it in writing then the party that received the instruction should. This simply needs to be an email confirming what was instructed, that additional costs will be incurred and that extra time will be required to carry out the works. If possible it should include the value of the works and the amount of time needed.

For advice on this or any other aspect of contract law relating to construction, please contact Peter Allen.

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

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.

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
WWW.BIRKETTLONG.CO.UK

Reference: NEWS/CONSTRUCTION19/2016