

CONSTRUCTION LAW

Construction Sector Update from one of Yorkshire's leading law firms

WHAT'S YOUR STRATEGY...

Welcome to the latest edition of Construction Law.



Richard Piper

The economic outlook for the construction sector remains tough. Most commentators seem agreed that there will be a painfully slow recovery and for many of us in (and associated with) the construction sector it remains a case of keeping a tight control on costs, chasing all opportunities hard and controlling business risk.

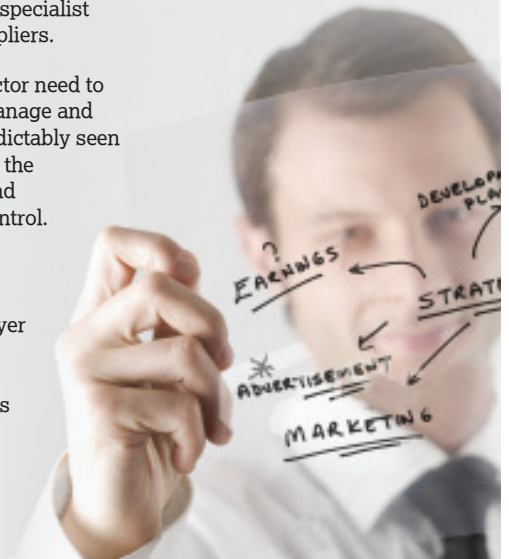
The cuts imposed on the economy by the new coalition Government are biting down hard on the construction industry. The cutting back of the Building Schools for the Future programme will in particular throttle the natural trickling of vast sums through the economy.

However there is a sense that the draconian cuts in public sector permanent employment are likely to see an increase in the outsourcing of essential work to external providers. Other important news for the local Yorkshire economy includes the announcement that Land Securities are to start work on the £350

million Trinity shopping Centre in central Leeds, this is a major boost for the local industry and should create many opportunities for specialist sub-contractors, consultants and suppliers.

All businesses in the construction sector need to manage cashflow but also actively manage and control contractual risk. We have predictably seen an increase in disputes arising where the job was tendered at too low a price and then costs subsequently ran out of control.

In those cases one might imagine the contractor had exposed himself to excessive risk however, we have also seen many disputes where the employer has failed to contain the risk of cost overruns for which he has ended up being responsible. The most notorious cause of this type of employer risk is where an employer fails to appreciate the full implications of his decision to change something during the course of a project...



...the Initial Strategic Review

Consequently we continue to see the volume of litigation that is often experienced both during and on the way out of a recession.

For many of our contractor and employer clients we are finding that they are making increasing use of our Initial Strategic Review product. Known to many of our clients simply as "ISR", they are finding that this is a rapid, cost-effective and dependable tool for managing business problems and disputes.

ISR helps businesses manage the objectives, resources, programmes, deliverables and costs of their contractual problems in an organised and efficient way. Just as they would manage any other business project. Problems are addressed, risks managed and actions agreed in the way that businesses feel comfortable. This means a commercially viable solution is achieved.

Initial Strategic Reviews can be carried out for clients for any size of problem, and not just litigation. The process starts with a quick

assessment of the key facts, an objective analysis of the legal and commercial position, and a rapid evaluation of the merits. The process then identifies the client's agreed objectives, the most realistic practical outcome and recommendations on how to achieve that. Finally we set out an agreed or recommended programme of activities, necessary steps, resources and a budget plan.

“an extremely useful report”

The ISR is presented in a carefully structured "executive report" format which is designed to anticipate all the questions which a board of directors might want answered before making an informed business decision.

It enables a client to carry out a critical risk analysis at the very earliest point of a problem contract. The ISR remains a "live" exercise

throughout the management of the problem, so risk analysis can be reviewed regularly and updated as the programme advances.

A number of our clients have commented on the ISR tool as "an extremely useful report", and "a worthy exercise, very glad we did this at the start".

The reality of this recession, just like the one before it, is that in tough times parties somehow find themselves in more contractual scrapes than usual, and with the parties usually having more to lose it can be more difficult to find a solution. This leads to the heightened risk that positions rapidly become entrenched and parties get drawn into expensive litigation. If the parties do not carry out an initial strategic analysis of their respective positions then one or both of them may end up spending too much of their time and precious resource fighting the wrong battle, or just fighting it on the wrong battleground. That can be a hugely expensive mistake. The right strategic approach at the outset can and usually does avoid this.

CONSTRUCTION SEMINAR

“The World Cup – will the stadium be ready on time?”



The Construction team held their annual seminar at Wetherby Racecourse in March to a packed audience.

For the fifth year running, the seminar adopted the popular format of a video case study littered with a number of highly relevant construction related issues. The 150 attendees, including many of the region's leading developers, contractors and specialist sub-contractors, were entertained with a mixture of legal analysis and practical solutions and the feedback from the seminar was excellent. Thank you to all who attended and we look forward to seeing you again next year.

CASE LAW UPDATE

1. Challenging the right to adjudicate

In *Mentmore Towers Ltd & Ors v Packman Lucas Ltd* [2010] EWHC 457, the Technology and Construction Court, the TCC granted Packman's injunction which restrained the Claimants from taking any substantive steps in three adjudications which they had commenced against the company.

In granting the injunction, Edwards-Stuart J (the new appointment at the TCC) held that the Claimants' behavior towards the Defendant had been "unreasonable and oppressive" – which included taking advantage of its greater financial muscle - and was an attempt to avoid the "pay now, argue later" policy which underpins the Construction Act 1996.

Such an injunction is rare because of the statutory framework of the Construction Act 1996 which allows the parties to refer a dispute to adjudication "at any time". For parties seeking to challenge the right to refer a dispute to adjudication, this judgment may have opened up a new area of challenge with arguments that the other party has behaved "oppressively and unreasonably" as a way of preventing the adjudication from proceeding.

2. Pay-when-paid clauses

In *William Hare Ltd v Shepherd Construction Ltd* [2010] EWHC Civ 283, the Court of Appeal held that William Hare's insolvency did not fall within the terms of a "pay-when-paid" clause in the sub-contract. This judgment is an important result for sub-contractors – and inexact drafting proved to be an expensive mistake for Shepherd Construction.

“Upstream insolvency,”

It follows, therefore, that parties should look carefully at the wording of any pay-when-paid clause dealing with "upstream insolvency" and if a party seeks to relieve itself from legal liabilities (in this case to pay the sub-contractor in the event that the employer becomes insolvent), clear and unambiguous wording must be used.

3. The timing of adjudicator's decision

In proceedings issued to enforce an adjudicator's decision, the TCC held that the Adjudicator's Decision was unenforceable because the Adjudicator had not delivered his Decision to the parties within the time allowed by the Scheme for Construction Contracts 1998. That was the situation in *Lee v Chartered Properties (Building) Ltd* [2010] EWHC 1540 (TCC) where the adjudicator informed the parties that he had reached his decision in time (on Friday afternoon), but waited until after the weekend before finalising the Decision and sending it to the parties. Whilst the Referring Party consented to this extension, the Responding Party did not.

Amongst other consideration, Akenhead J held that an Adjudicator's Decision must be delivered "as soon as possible" after it was reached and there was no evidence or explanation why the Adjudicator needed three days to type up and deliver the Decision, particularly as he worked for a large firm of quantity surveyors.

Who's who in the construction team



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