



SILVER SHEMMINGS SOLICITORS

Business Information Update

April 2010

Issue 5



Sarah Shemmings
Partner

Welcome....

Welcome to the spring edition of our Business Information Update. I hope that you find our articles of interest and if there are any topics you would like to see featured then please let me know.

In January 2010 we started our round of breakfast seminars. With over 90 people attending this meant those arriving late not only missed the bacon rolls but also had to stand. Our March seminar on Avoiding Liability again proved to be popular and your positive feedback was greatly received. Our next seminar on Obtaining Payment will be held on 19 May 2010. Places are limited so if you have not yet booked your place and are interested in attending please contact us at office@shemmingsllp.co.uk or alternatively visit our website at www.silver-shemmings.co.uk

In This Issue

- Construction
 - NEC3 Engineering & Construction Contract
 - Smoke without Fire? Global Claims
 - Beware of PFI risks!
- Employment
 - The "Fit Note" Regulations
 - Training Rights
- Seminar Series 2010

As far as our website is concerned, we are delighted to have launched our new look website so please do take a few minutes to have a look and explore all that it has to offer.

We are also offering a Helpline Service providing initial practical advice. This service is available Monday to Friday between 9.30am – 4.30pm and again details can be found on our website.

Finally, congratulations to Robert Shawyer of our Cardiff office who has now been appointed a visiting Fellow of the University of Glamorgan.

Sarah Shemmings
Partner

Construction Law

NEC3 Engineering & Construction Contract - delay and assessment of extensions of time

By Richard Silver, Partner

The NEC3 Engineering and Construction Contract has a different approach to delay and the assessment of extensions of time.

Employers when going out for tender generally dictate the Contract period for the Works. Contractors, however, in tendering may consider that they can complete the Works in a shorter period than that envisaged by the Employer and whilst agreeing to the Completion Date set nevertheless price their preliminaries on the basis of the shorter period thereby underpricing their competitors enabling them to secure the Contract.

Having won the Contract, the Contractor then issues a programme for the shorter period aiming for completion prior to the Completion Date stated in the Contract.

But what happens if the Employer prevents the Contractor completing the Works to the shortened programme by reason of the late issue of information and/or additional works, but the Contractor nevertheless completes by the Completion Date stated in the Contract?

These issues were examined many years ago in the case of *Glenlion Construction Ltd v The Guinness Trust* where it was held that whilst a contractor was entitled to complete the Works early, they could not impose unilaterally an obligation upon the employer to facilitate that early completion by, for example, ensuring that the architect provided design information in accordance with the early completion programme.

But that was under a JCT Contract where entitlement to an extension of time is based upon completion of the Works being or likely to be delayed beyond the Completion Date stated in the Contract.

The NEC Engineering and Construction Contract, however, is very different; it says a delay to the Completion Date is assessed as the length of time that, due to the compensation event, planned Completion is later than planned Completion as shown on the Accepted Programme.

So where the Contractor has submitted a shortened programme, and he is subsequently delayed by events for which the Employer is culpable the Contractor under the NEC Engineering and Construction Contract is entitled to an extension of time.

It should be noted that when receiving a programme under the NEC Engineering and Construction Contract the Project Manager is not permitted to reject the programme simply on the grounds that it is for a shorter period.

So whilst contractors' programmes are very important when considering entitlements to extensions of time under most forms of contract, under the NEC Engineering and Construction Contract they are fundamental to the very basis of assessing entitlement.

For more information on this article, please contact Richard Silver at rns@shemmingsllp.co.uk

You can have smoke without fire - Global Claims

By Robert Shawyer, Partner

As a representative I am often asked to advise or indeed undertake the role of preparing claims. As an Adjudicator or Arbitrator I am often asked to consider claims. What is amazing is that Parties still ask me to prepare or Decide or Award on global claims when they are wholly inappropriate, purely on the basis that their cannot be smoke without there being fire, i.e. an extension of time must beget loss and expense or instructed additional works must beget additional overheads, etc.,.

This is of course wrong. I remain amazed and dismayed when an Adjudicator gives a sum of money for loss and expense on the basis of *'they must be entitled to something'*. Why? If I were to knock on your door and ask for money would you get your cheque book out and pay. Of course not. You would probably at first ask why and then probably you would say 'prove it'. So why should a global claim, when it is not impossible to evidence cause and effect, ever be a panacea to getting paid without evidencing why or proving the loss was incurred due to the other Party's breach.

Global claims are of course acceptable but there is a test for their applicability. The case of *John Doyle Construction v Laing Management*

Need expert advice?

**Call our Legal Helpline
between 9.30am -
4.30pm for clear and
practical advice
0845 519 2921**

(Scotland) OH, Court of Session, 18 April 2002 considered the manner in which global claims for loss and expense can be advanced. Lord Drummond Young in the Inner House clarified that:

As a prerequisite for a global claim to succeed, the claimant must eliminate from the causes of his loss and expense, **all matters that are not the responsibility of the defendant**. That position was however mitigated by three key considerations.

1. It may be possible to identify a **causal link** between specific events for which the employer is responsible and particular items of loss. By such an approach parts of the claim are able to be extracted from the global claim and separately allocated to individual events;
2. If an event or events for which the defendant is responsible could be considered as the dominant or primary cause of an item of loss, that would be sufficient to establish liability, notwithstanding the existence of other causes that are to some extent at least concurrent or secondary; and
3. If it cannot be said that events for which the defendant is responsible are the dominant cause of the loss, it may be possible to apportion the loss between the causes for which the defendant is responsible and other causes. This **apportionment** would be more readily achieved where the loss was being calculated by reference to delay in the works for the loss could be apportioned on the basis of the time during which each of the causes was operative, or responsibility could be divided on an equal basis

We now have further clarity on this matter from another recent case in Scotland between *Castle Inns (Stirling) Ltd. (t/a Castle Leisure Group) v Clark Contracts Ltd.*; 22 December 2009. This case goes to the root of substantiation, or rather the effect of failing to substantiate sufficiently.

The Contract was a Scottish Building Contract Without Quantities (January 2000 Revision). The case concerned one aspect of a larger dispute, otherwise settled. This one aspect was the claim for loss of profits arising from the defendant's alleged breach of contract causing a delay to the opening of the claimant's premises.

In considering the claim the court found that the claim failed. The reason being that the claim failed to establish the cause of the delay or prove actual loss incurred arising from said alleged delay. In essence the use of claiming globally was not considered acceptable.

The problem was that the information relied upon in the report prepared by Mr Graham was considered by the court as defective. The reason being:

1. The loss of profit was based on the claimant's figures, that had not been audited by Mr Graham;
2. failure to supporting material was a serious defect;
3. some of the wasted costs claimed could not be categorised, as claimed; and
4. the claim lacked no explanation about why travelling costs had been incurred.

The effect of the above was that the claim was dismissed and moreover was criticised by the Judge in respect of the lack of supporting documentation. In my opinion this case is helpful to Adjudicators and Arbitrators and of guidance to claimants and defendants.

Throw away the adage of no smoke without fire and concentrate on

Need expert advice?

Call our Legal Helpline
between 9.30am -
4.30pm for clear and
practical advice
0845 519 2921

considering the following:

On the balance of probability have you evidenced cause attributable to an event claimable under your contract; effect attributable to the cause and actual loss attributable to the effect. To answer the question you shall have to research most of what you require to particularise your claim. Remember next time you knock on someone's the appropriate tribunal may ask you 'why' and then say 'prove it' and if you can not they may just dismiss your claim.

For more information on this article, please contact Robert Shawyer at rjs@shemmingsllp.co.uk

Beware of PFI Risks!

By Matthew Dillon, Consultant

In the current economic climate the opportunity to undertake public sector infrastructure work provides many contractors with a welcome boost to their revenues. Although the availability of PFI work has slowed down, there is still plenty of opportunity for Contractors to get involved in projects within the Building Schools for Future Programme, the Decent Homes Programme, LIFT, and also the emerging market in Waste Projects.

Indeed working on such projects provides Contractors with the ability to secure increased profit margins, with typical margins being many times greater than that obtainable within more traditionally procured projects. However, Contractors and Subcontractors must be alert to the additional risks to which they are exposed and resist pricing the work as if the risks were akin to a standard Design and Build contract. Contractors should also be alert to the Special Purpose Vehicle attempting to allocate risk to it when such risk should ordinarily be retained by the SPV. It is often the case that even where the Contractor is comfortable with the pass through of risk from the Project Agreement, there are a number of other risks that it unwittingly assumes. Some of these risks are addressed below:

[This is a shortened version of the full article which can be downloaded from our website]

- **Extensions of Time, Loss & Expense and Liquidated Damages**

The usual rules on EoT and Loss & Expense do not apply.

- **Limitation of liability**

It is relatively common practice for the Main Contractors' liability under the Building Contract to be capped at a sum equivalent to 50% of the Contract Sum.

- **Design Liability**

The Contractor should ensure that it does not acquire fitness for purpose obligations under the Building Contract.

- **Practical Completion**

- **Equivalent Project Relief and Dispute Resolution**

- **Interface Agreements**

For a more detailed consideration of managing PFI risks within both Construction and Facilities Management Contracts please refer to the articles posted on our website www.silver-shemmings.co.uk

Need expert advice?

Call our Legal Helpline
between 9.30am -
4.30pm for clear and
practical advice
0845 519 2921

Employment Law

The “Fit Note” Regulations

By Tony Philpott, Consultant



The Social Security (Medical Evidence) and Statutory Sick Pay (Medical Evidence) (amendment) Regulations 2010 come into force on 6 April 2010 to replace the current system of obtaining GP sick notes or medical certificates with that of GP “fit notes”. The new regulations replace the outdated paper based sick note with an electronic “fit note” stating what people can and cannot do.

The current sick note asks a GP to state briefly what a person’s health condition is and how long he or she should be absent from work as a result of this.

The contents of the current sick note

The current paper based sick note includes a “remarks” section but does not encourage GPs to explore a prompt return to work and suggest workplace adjustments to be made. It is evidence to support payments of Statutory Sick Pay and other health related benefits.

The new “Fit Note”

Under the new regulations when issuing sickness certificates GPs will now have to certify either:

- That the employee is “not fit for work”, that is not fit for any work at all, or
- That the employee “may be fit for work taking account of the following advice”,

If the GP certifies that the employee is fit for work the GP then has four boxes to complete, namely a phased return to work, altered hours and amended duties, workplace adaptations. Workplace adaptations can only be suggested if available and with the employers agreement.

The “fit note” can be provided for a maximum of three months at a time, rather than the current six months. If the employee has had six months sickness absence the GP can sign the employee off for an “indefinite period”.

The regulations do not contain an option that the employee is “fit for work”. This is because it was felt that this would lead GPs to become swamped with requests for “fit for work” certificates.

Returning on reduced hours

When the employee returns on reduced hours the employee is able to decide upon the rate it will pay the employee. There is no guidance on how this will operate. The Regulations are drafted on the basis that it is the within the Employer’s discretion to set the appropriate rate.

The new regulations and Disability Discrimination Act 1995 and Unfair Dismissal claims

The Disability Discrimination Act 1995 outlaws disability discrimination. A

Need expert advice?

Call our Legal Helpline
between 9.30am -
4.30pm for clear and
practical advice
0845 519 2921

person is disabled if they have a physical or mental impairment having a substantial and long term effect on their ability to carry out normal activities.

In addition under Section 4A of the DDA Employers have a duty to make reasonable adjustments to their premises, practices and procedures to enable a disabled person to not work at a substantial disadvantage compared with non-disabled workers.

Recommendations in the fit note that the employee is fit for work will not bind the employer but the employee will argue that they contain "reasonable adjustments" which the employer is under a duty to make.

In Unfair Dismissal claims the test of fairness of a dismissal for ill health is whether the employer can be expected to wait any longer and if so how much longer? (*Spencer v Paragon Wallpapers Ltd* [1976] IRLR 373).

The employer will have to convince the Tribunal that its investigation was based on an informed medical position and that they acted reasonably in taking the decision to dismiss.

The fit notes will represent a powerful starting point in establishing whether an employee is fit to return to work and if so what duties they should be carrying out. Equally the onus will be on the employer to suggest alternative employment or tasks the employee could undertake in accordance with the GPs advice.

The point of no return

If there is indefinite "sign off" after a period of six months absence there will come a point where it is reasonable to dismiss the employee who is absent for a long period of time. If after being signed off indefinitely the employee does not say when he or she is likely to return the Tribunal is likely to find the dismissal fair, particularly if the employer can show that they had great difficulty of managing without the employee (*Luckings v May and Baker Ltd* [1974]).

The indefinite "sign off" by the GP may represent a poisoned chalice for the employee because it may play into the hands of the employer who says he cannot wait forever for the employee to return.

The employer is not expected to create a job for an employee but it might be considered reasonable for the employer to have offered the employee the opportunity to carry out alternative work (*Merseyside and North Wales Electricity Board v Taylor* [1975] ICR 185).

The collaborative approach of "fit notes encourages the employee to return to work. Ultimately it will be for the Tribunal to decide whether an alternative job should have been offered and the employer is not expected to go to unreasonable lengths to accommodate the employee. (*Garricks Caterers Ltd v Nolan* [1980] IRLR 259).

For more information on this article, please contact Anthony Philpott at ap@shemmingsllp.co.uk

Need expert advice?

**Call our Legal Helpline
between 9.30am -
4.30pm for clear and
practical advice
0845 519 2921**

The right to train

By Sarah Shemmings, Partner

From April 2010 employers who employ over 250 staff will have to consider requests from its employees for time off in order to study or attend a training course. This right will be extended to all organisations from April 2011.

The requests have to be reasonable but the employer does not have to pay the employee's salary during the training period or the cost of the training course.

And finally,

2010 Seminar Series

For those of you that are yet to attend one of our breakfast seminars, we will be holding the following seminars:

Date	Topic	Venue
19/05/2010	Obtaining Payment from Contractors & Employers	Chartered Institute of Arbitrators, London
15/09/2010	Defending Claims from Contractors & Subcontractors	Chartered Institute of Arbitrators, London
17/11/2010	Termination	Chartered Institute of Arbitrators, London

Silver Shemmings LLP are also happy to offer training tailored to your particular requirements, especially on a specific form such as a JCT or ICE contract, the NECECC 3rd Edition, PPC 2000; or a particular topic such as Construction Law, Adjudication, Arbitration, Mediation or Programming and Planning. We can provide speakers who have both in depth construction experience and a thorough knowledge of the law applicable.

Please contact Alex von der Heyde, Practice Manager for more information avdh@shemmingsllp.co.uk

If you have any topics you would like to see reviewed please email us at office@shemmingsllp.co.uk and we will try to include these in later editions.

Contact Us

For more information on any of the issues raised in this business information update please visit our [website](http://www.silver-shemmings.co.uk) or email at

Website:

www.silver-shemmings.co.uk

Email:

office@shemmingsllp.co.uk

Silver Shemmings LLP
18 Westminster Palace
Gardens
Artillery Row
London
SW1P 1RJ

Tel: 0845 345 1244

Fax: 0845 345 1039