



SILVER SHEMMINGS SOLICITORS

Business Information Update

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Issue 6



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Welcome....

Welcome to the Summer edition of our Business Information Update.

Since the last edition the general election has been and gone with a somewhat surprising outcome. As a result it would seem some uncertain but interesting times lie ahead for businesses and the construction industry. The Coalition Government has had to make a number of compromises in respect of their various election statements especially as balancing the books take priority. As far as the construction industry was concerned we saw the immediate cancellation of the third runway at Heathrow and confirmation that no further runways will be allowed at either Stansted or Gatwick, the abolition of HIPS but a go ahead was given on nuclear power stations and more green initiatives. How the budget restrictions will affect the construction industry is still to be seen but from soundings we have taken from clients and contacts, it would appear that whilst the industry is still suffering, there is an air of cautious optimism.

If you have any suggestions for articles that you would like to see featured please contact us at office@shemmingsllp.co.uk and we will see what we can do in the future.

Richard Silver

Construction Law

Adjudication - can an Adjudicator's decision be severed?

By Richard Silver, Partner

In *Cleveland Bridge (UK) Ltd v Whessoe-Volkerstevin Joint Venture* [2010] EWHC 1076 (TCC).

The Court was asked to consider whether an Adjudicator's decision could be enforced even though part of the dispute fell outside the definition of "construction operations" as set out in section 105(2) of HGCRA 1996.

The questions the Court had to consider were whether the Adjudicator had jurisdiction to determine the claim referred; whether any of the work was not construction operations in accordance with the Act and thirdly whether the decision was enforceable. After consideration the Judge found that some of the works were excluded from the Act. Thus the Construction Act provisions only applied to that part of the construction works which fell within the Act's jurisdiction.

The dispute referred to adjudication and which is one to which the Scheme for Construction Contracts applied, requested the Adjudicator to

award a fixed sum or "such other sum as the Adjudicator considers is outstanding". The Judge held that one dispute had been referred part of which arose under a Construction Contract. However, because the dispute referred to construction and non-construction operations, the Adjudicator did not have jurisdiction to deal with the whole of the dispute but only those items which fell within the definition of construction operations.

The Judge then looked at whether it was possible to sever the decision and thus enforce those parts to which the Construction Act related. However, the Adjudicator awarded a sum in relation to both construction and non-construction items and as such it was not possible to sever the decision.



On severability the Judge considered "whether, if it were permissible for the Court to open up the decision to make an enforceable one, it would be possible to sever the decision in this case". However, because the evidence was challenged, the Judge found that "unless there is an agreed or unchallenged division, I do not consider that it would be appropriate on this type of application to determine a contested issue of the division between the sums within the Adjudicator's jurisdiction and sums outside that jurisdiction". On that basis the Court was unable to sever the decision to award a sum for the relevant part which related to Construction Operations. On that basis, the Judge held that the decision was not enforceable and that the application for Summary Judgment should be dismissed.

This decision related to Adjudications to which the Scheme applied. If there had been an Adjudication clause in the contract, then this situation may not have arisen. This shows the advisability of having a proper Adjudication clause inserted into the Contract or, if the Scheme applies then only to make a claim for those parts which can clearly be shown to fall within the Scheme.

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

Realistic prospect of defending a claim for payment - I don't think so

By Scott Milner, Trainee Solicitor

CPR 16.5 contains the rules on how a defence should be pleaded. CPR 3.4(2) enables the Court to strike out a statement of case if it discloses no reasonable grounds for bringing or defending the claim, or if the statement of case is an abuse of the process, or if there has been a failure to comply with a rule, practice direction or Court Order. Clients often say to me "CPR seems fine on paper but do the courts actually follow it". Well the recent case of *Clancy Consulting Ltd. v Derwent Holdings Ltd., Anglo International Holdings Ltd.* [2010] EWHC 762 (TCC) serves as proof that the courts do.

Clancy undertook extensive engineering work for the Claimant under a series of written contracts. Approximately 22 in total. Clancy's instructions were given by the Defendant's agent, Kingsley Fereday Management Limited ("KFM"). Clancy argued that the contracts stated that they would be paid on the basis of an hourly rate, unless and until an additional lump sum was agreed. A lump sum was agreed on some of the contracts, but not all. The Court was called upon to determine the basis of payment under these contracts.

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The Parties also agreed on a monthly "certification" process. Clancy provided KFM with a spreadsheet itemising the fees they were claiming. KFM then issued certificates for the sums which they considered to be due; often this was less than that claimed. This system applied to all the Parties' contracts irrespective of whether a lump sum had been agreed or not.

Clancy claimed sums which had been certified but not paid, sums which had not been certified at all, plus the cost of management time incurred in chasing payment. The sums at issue were nearly £500,000. Clancy alleged that the agreement that they would be paid hourly had been recorded in a number of letters, and that the Parties' previous course of dealing applied to all the projects included in the present claim.

The Defendant's denied Clancy's claim. They said that the Parties' agreement had been no more than an agreement that Clancy would be paid on a time basis pending the negotiation of a final fee agreement. They also alleged that there was no binding certification process. As there was no agreed fixed fee, then Clancy was only entitled to a "reasonable" sum for its work. However, the Defendants failed to explain what such a "reasonable sum" might be, nor why the sum Clancy was now claiming was not "reasonable".

Clancy had sought clarification of this, and the Defendants were ordered to serve an amended defence by 24 February, but this they failed to do.

The Judge was satisfied beyond argument that Clancy were entitled to be paid the sums which KFM had certified. The Defendants had no real prospect of defending that claim, and they had been right to concede it. The only sensible meaning of the repeated references to "time charge basis" was Clancy's hourly rates which were in force at the time. Indeed the evidence showed that that was the basis upon which KFM had certified the interim sums due. Given that and the Defendants' inadequate defence and the fact that they had not challenged the number of hours claimed by Clancy, there could be no dispute whether KFM had certified them or not. The Defendants had no realistic prospect of defending Clancy's claim, and their attack on Clancy's pleadings had been wrong and unfair.

For more information on this article, please contact Scott Milner, Trainee Solicitor at sm@shemmingsllp.co.uk

Liability for liquidated damages following termination

By Matthew Dillon

It has long been thought that a party's liability for liquidated damages ended upon the termination of his contract. Indeed as stated in Keating on Building Contracts:

"If the contract is brought to an end by determination or otherwise, then prima facie all future obligations cease and no claim can be made for liquidated damages accruing after determination".

Such a position would not normally cause any undue concern for an employer who could pursue any losses as a claim for general damages. Indeed it is generally thought that under both the JCT and NEC3 forms of contract the right to liquidated damages ceases upon termination and it is the actual losses to the Employer that are recoverable. In other forms of contract the wording may be a little less clear although the author when negotiating bespoke forms of contract has always sought an express provision stating that liquidated damages cease upon termination.

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The case of *Hall & Shivers v Van Der Heiden 2010* which was decided by Coulson J now casts some doubt over the previously thought position.

The case concerned extensive refurbishment works to a London flat where the contractor failed to achieve practical completion notwithstanding having received a sum of money well in excess of the Contract Sum. Following the owners taking possession of the flat the contractor refused to rectify defects or complete the works and eventually the works were completed by a replacement contractor.

The owners were awarded damages equivalent to the cost of rectifying the defects, something which is uncontroversial. However, Coulson J then went on to award the owners liquidated damages up until the time that the works were completed by a replacement contractor. The fact that the owners had taken possession of the flat was considered by Coulson J to be irrelevant to the issue of completion and indeed the ability to apply liquidated damages. It will be noted that the contract was a JCT Minor Works which does not contain any provision reducing liquidated damages following early possession, unlike the JCT Design and Build Contract.

Coulson J, contrary to the previous authorities, decided that there was nothing in principle to prevent liquidated damages being applied post termination of the contract. In a case such as this where the owners were not suffering any ongoing loss (as they continued to reside in the flat) the liquidated damages were something of a windfall.

The lessons to be learnt from this case are quite clear. Contractors should consider seeking a provision stating that liquidated damages end upon the termination of a contract. Contractors should also ensure that the contract provides for the level of liquidated damages reducing when early possession occurs.

Statutory Interest revisited

By Matthew Dillon

I have previously written on the issue of what a "substantial remedy" is under the Late Payment of Commercial Debts (Interest) Act 1998. This is important because unless a contract provides for a substantial remedy in the event of late payment then the Act imposes a rate of 8% above base rate.

Until recently there were no cases dealing with this issue and therefore some debate as to what rate of interest would constitute a substantial remedy. The case of *Yuanda (UK) Co Ltd v WW Gear Construction Limited 2010* provides some useful guidance on this point.

Mr Justice Edwards-Stuart was of the opinion that the rate stated in the JCT Trade Contract (being 5% over base rate) should be regarded as a substantial remedy notwithstanding that it fell below the 8% stipulated within the Act. He went on to say that a rate of 3 or 4 % may also be substantial if specifically negotiated by the parties, although as he was not required to decide such a point he would not do so. However, in the present case a rate of 0.5% above base rate had been enforced upon Yuanda without any negotiation and it was beyond doubt that such a rate did not provide a substantial remedy.

The message from this case is quite clear. If a party seeks to obtain an advantage by amending the standard forms of contract so to provide a lower rate of interest then he runs the risk of falling foul of the Act and a higher rate being imposed upon the late payer. Where a party is making a claim for late payment and a rate of interest lower than that provided for in the standard forms is used then it would be well worth arguing that the rate falls foul of the Act and therefore a rate of 8% above base rate

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should apply.

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

Employment Law

Bonus Payments

By Sarah Shemmings, Partner



In a recent case (*Rutherford v Seymour Pierce Ltd* [2010] EWHC 375(QB)), the Court had to look at the question of whether a discretionary bonus should be paid to an employee who had been unfairly dismissed some months earlier. The Court concluded that unless there were express terms to the contrary in either the contract of employment or the Compromise Agreement then an employee should be eligible to be considered for payment of a bonus. The employer tried to argue that there should be an implied term into the contract of employment that if an employee was not in employment at the date of distribution that he could not be considered eligible.

The Court refused to imply such a term. Otherwise as the Judge said (echoing an earlier decision) "*unscrupulous employers could sack an employee the day before the bonus was due to be distributed and then say that, as a matter of principle, the employee was not entitled to be considered for a bonus.*"

This case clearly demonstrates that employers have to be very clear in their contract terms as to the benefits offered to their employees. Perhaps now would be a good time to review employment contracts.

For more information on this article, please contact Sarah Shemmings at sas@shemmingsllp.co.uk

The responsibility of employers for employees suffering ill health caused by work, stress & treatment at work

By Anthony Philpott, Consultant

In the case of *McAdie v Royal Bank of Scotland* [2007] IRLR 895 the Court of Appeal decided that the fact that an employer has caused the incapacity in question cannot preclude him from forever fairly dismissing that employee. If it were otherwise employers would be obliged to retain on their books indefinitely employees who were incapable of any useful work. The Court of Appeal warned Employment Tribunals to resist the temptation of being led by sympathy for the employee into granting what is in truth an award of compensation from personal injury.

The fairness of the dismissal should be judged by whether given the employee's medical condition the dismissal was fair having regard to the medical condition and the enquiries and procedures the employer made and used before dismissal

The EAT criticised the Employment Tribunal for falling into the trap of considering not what a reasonable employer would have done but

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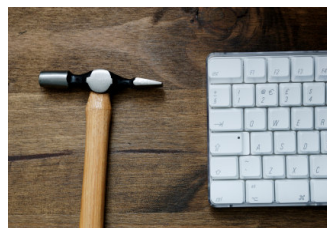
whether it should have gotten into that situation in the first place. Therefore a balance must be struck and while the EAT had sympathy with the employee they said this does not mean that it should be treated as a claim for personal injury.

In this case the employee returned to work from maternity leave and complained that because of an earlier grievance she had been wrongly displaced from her job and unfairly transferred to another branch. Following this and her complaint of a managers' conduct towards her, she went on longer term sick leave. Following this she had made it clear that no matter what anyone said or did she was not going back to work. The Court of Appeal recognised that it may be necessary to go the extra mile in finding alternative employment or to put up with a longer period of sickness absence where the employer has caused the absence but this does not mean that there can never be a case that the dismissal will be fair for indefinite absence where the employee has said that he or she will not return. In this case the dismissal was held to be fair.

If the conditions are such that the employee suffers ill health the employee may fail in his or her claim if they were employed to do the job and they unreasonably refuse an offer of alternative employment. In *Glitz v Watford Electric Co Ltd* [1979] IRLR 89 the employee was allergic to a vapour given off by a fluid that gave her headaches. She was offered an alternative role but she refused it. The EAT decided that she was fairly dismissed because she had agreed to carry out this role and she had refused an offer of alternative employment.

Stress has been described by the Court of Appeal as "an excess of demands upon an individual in excess of their ability to cope" (*Hatton v Sutherland* [2002] EWCA Civ 76). While stress is not a psychiatric injury it can lead to depression or exacerbate other conditions such as dyslexia or epilepsy. Employers should be aware that employees may become disabled under the DDA.

One of the guidelines in *Hatton* that an employer who offers a confidential advice service with referral to appropriate counselling or treatment services is unlikely to be found in breach of duty has been doubted in subsequent cases. In the case of *Intel Corporation (UK) Ltd v Daw* [2007] IRLR 355 it was stated that "the reference to counselling services in *Hatton* does not make such services a panacea by which employers can discharge their duty of care in all cases".



In *Dickins v O²* [2008] an "unusually conscientious" employee notified the employer that she was "cracking up" and requested a six months sabbatical. She was advised to take advantage of O2's confidential counselling helpline. She repeated her concerns and was referred to the occupational health department. There was a delay and before the appointment

was fixed she suffered a breakdown and did not return to work. The Court of Appeal found that her psychiatric illness was foreseeable from when she asked for a sabbatical. The court found that the employer had breached its duty of care by not sending the claimant home and in not making an immediate referral to the occupational health department.

Communication is key; regular six monthly appraisals can be an effective means of opening lines of communication between employers and employees.

Occupational assessments should be used proactively to manage the risks of psychiatric injury. They will assist in determining whether the employer has breached a duty of care.

There are some jobs that are intrinsically physically dangerous. However,

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there are no occupations which should be regarded as intrinsically dangerous to mental health. Some people thrive on pressure and they rarely if ever experience stress even in jobs which many would find extremely stressful. Others experience harmful levels of stress in jobs that many would not find stressful at all.

Management should be encouraged to recognise the existence and causes of occupational stress and to take steps to minimise it.

The test adopted by the courts is whether a harmful reaction to the pressures of the workplace is reasonably foreseeable in the individual employee concerned. This test has two components;

- (1) an injury to health; and which
- (2) is attributable to stress at work.

The answer to the foreseeability question will depend upon the inter-relationship between the particular characteristics of the employee concerned and the particular demands which the employer casts upon him. In the case of psychiatric injury the question is not whether it is reasonably foreseeable in a person of "ordinary fortitude". The employer's duty is owed to each individual employee, not to some as yet unidentified outsider. Psychiatric disorder may be more difficult to foresee than physical injury but it may be easier to foresee in a known individual than it is in the population at large. Therefore foreseeability depends upon what the employer knows (or ought reasonably to know) about the individual employee.

Employers should look out for signs of impending harm to health. They should ask whether an employee has a particular problem or vulnerability and whether he has already suffered from illness attributable to stress at work. Employers should look out for prolonged absences from work. In the case of *Barber v Somerset County Council* [2002] EWCA Civ 76 the Court of Appeal rejected the argument that the expiry of a GP's certificate implicitly suggested that the employee is not fit to return to work and even that he is no longer at risk of suffering the same sort of problem again. A GP's certificate is limited in time but many disorders may linger for a considerable time. An employee anxious to return to work may not go back to his GP for a further certificate when the current one runs out. "Even if the employee is currently fit for work, the earlier time-limited certificate carries no implication that the same or similar condition will not recur...." A trigger to a duty to take steps is when it is plain to the reasonable employer that they should know when they should do something about it, that is when it should have been known that an employee would "go over the edge" from workplace pressures and stress.



When considering breach of duty it is necessary to consider what the employer could and should have done; e.g. giving the employee a sabbatical, transferring him to other work, redistributing the work, giving him some extra help for a while, arranging treatment or counselling, providing buddying or mentoring schemes to encourage confidence. The employer can only be expected to take steps which are likely to do some good. This may require medical evidence.

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

And finally,

2010 Seminar Series

We have received excellent feedback following our breakfast seminars presented by Richard Silver earlier this year and look forward to seeing you at the next London seminar in September. Cardiff seminars dates have now been confirmed and a full listing is below.

If you would like to book a place please visit the Training & Events page on our website at www.silver-shemmings.co.uk

Date	Topic	Venue
20/07/2010	Extension of Time and Loss & Expense	Copthorne Hotel, Cardiff
15/09/2010	Defending Claims from Contractors & Subcontractors	Chartered Institute of Arbitrators, London
21/09/2010	Effective Project Management NEC3	Copthorne Hotel, Cardiff
25/10/2010	Adjudication: Claiming & Defending	Copthorne Hotel, Cardiff
17/11/2010	Termination	Chartered Institute of Arbitrators, London
23/11/2010	NEC3 Claiming Compensation Events	Copthorne Hotel, Cardiff

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For more information on any of the issues raised in this business information update please visit our website or email at

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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.