



SILVER SHEMMINGS SOLICITORS

Business Information Update

October 2011

Issue 9



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Welcome....

Welcome to our Autumn Newsletter.

It has been all change as from 1 October 2011 as far as the new Construction Act is concerned. We have produced a bulletin on the new Construction Act and the implication the amendments have on construction contracts.

The bulletin has been circulated to those on our mailing list however if you have not received a copy, this can also be downloaded from our website at www.silver-shemmings.co.uk

1st October 2011 is the favourite time to bring in new legislation and changes to employment rights also came into force. Details of these changes are set out in the article by Tony Philpott contained within this newsletter.

We hope the articles included in this issue are of interest to you and as always, if you have any topics you would like to see covered in future editions then please contact us at office@shemmingsllp.co.uk

Robert Shawyer
Partner

Construction Law

Payment Terms - The Series - Article 1

By Robert Shawyer, Partner

This is the first Article in a series of Articles by Robert Shawyer discussing the payment procedures of Standard Forms, commencing with the **Joint Contracts Tribunal Design and Build Contract 2005 Revision 2 2009**.

Payments are split into Interim and Final payment procedures.

Interim - When?

The procedure is either by way of Stage Payment (Alternative A of the Contract Particulars) or Periodic Payment (Alternative B of the Contract Particulars).

Where Alternative A applies the trigger for payment is the stage as described being next.

Where Alternative B applies the trigger is the 'first date' as included by the Parties within the Contract Particulars and thereafter the same date in each month or the nearest Business Day in that month.

Of note here the reference to Business Day is a defined term which is not a Saturday, a Sunday or a Public Holiday. Furthermore the 'first date' should not be more than one month after the Date of Possession. Moreover, whilst the Contract Particulars refer to the 'same date in each month' if Applications for Interim Payment are to be made on the last day of each month the Contract Particulars require entry/amendment to read 'the last day of (insert month) and thereafter the last day in each month or the nearest Business Day in that month'.

Interim Payments – Until When?



Alternative A Payments are made on completion of each stage. However once the last stage has been completed payment is to be made at intervals of 2 months. Moreover payment is to be made at the latter of the expiry of the Rectification Period or the issue of the Notice of Completion of Making Good.

In circumstances where Sectional Completion applies the later of the Rectification Period or Notice of Completion of Making Good for each section applies, whichever is the later.

Alternative B Payments are made at the intervals explained above. These continue up until Practical Completion has been certified or within one month thereafter. Following this interval the payments are made at intervals of 2 months. As with Alternative A payment is then to be made either at the expiry of the Rectification Period or the issue of the Notice of Completion of Making Good, whichever is the later and the same applies per section if Sectional Completion applies.

Interim Payments – Who Applies Who Values?

The Contractor is required to make an application in accordance with the Employers Requirements at the times set above. Since the Contractor applies it is the Contractor that must value the Works. However since the Employer must notify the Contractor how much they are to pay and the basis of that valuation clearly the Employer or someone on behalf of the Employer is required to value the Contractor's Works in any event, albeit absent an application from the Contractor the Employer's valuation triggers no payment.

Interim Payments – Due Date

The Housing, Grants Construction and Regeneration Act 1996, hereinafter referred to as 'HGCRA 1996' requires that every construction contract provides a mechanism for determining when sums become 'Due'. Accordingly the JCT 2005 Design & Build facilitates this by reference to its Alternative A and Alternative B payment procedures. Both of these procedures make the Application for Payment the 'Due Date'.

Nothing turns on the 'Due Date' save that it is a line in the sand from which matters such as the final date for payment of the amount Due is to be paid by.

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Interim Payments – s110 of the HGCRA 1996 – Sums Due

S110 of the HGCRA 1996 requires that every construction contract shall, not least:

"(a) *provide an adequate mechanism for determining what payments become due under the contract, and when, and*"

"(2) *Every construction contract shall provide for the giving of notice by a party not later than five days after the date on which a payment becomes due from him under the contract, or would have become due if –*

(a) the other party had carried out his obligations under the contract, and

(b) no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts.

Specifying the amount (if any) of the payment to be made, and the basis on which the amount was calculated."

The JCT 2005 Design and Build Contract complies with the HGCRA 1996 in so far that clause 4.10.3 provides the Employer opportunity to specify the amount of payment proposed to be made, to what the amount relates and the basis on which the amount has been calculated. This has to be notified by the Employer to the Contractor within 5 days of the Due Date. Moreover the amount notified is to be in respect of the Contractor's application. The 5 days is a reference to calendar days and thus it is different to the meaning defined under the words 'Business Days' as referred to above.

Interim Payments – s110 of the HGCRA 1996 – Final Date

S110 of the HGCRA 1996 requires that every construction contract shall, not least:

"(b) *provide for a final date for payment in relation to any sum which becomes due."*

The JCT 2005 Design and Build Contract complies with the HGCRA 1996 in so far that clause 4.10.1 provides that the final date is 14 days, these are calendar days not Business Days, from the Due Date, i.e. the date of receipt by the Employer of an Application for Interim Payment.

Interim Payments – s111 of the HGCRA 1996 – Withholding

S111 of the HGCRA 1996 provides that a party to a construction contract may not withhold payment after the final date for payment of a sum due, unless an effective notice to withhold has been given. Moreover the notice must specify the amount to be withheld and the ground or the amount per ground if more than one ground exists.

The JCT 2005 Design and Build Contract complies with the HGCRA 1996 in so far that clause 4.10.4 requires the Employer notify the Contractor specifying any amount they propose to withhold or deduct from the amount due with the ground or grounds for withholding or deduction and the amount in respect of each ground. The Employer has not less than 5 days before the final date for payment i.e. 9 days from the Due Date to communicate this notice to the Contractor. Failure by the Employer to notify the Contractor in time and/or in accordance with the requirements of the notice deny the Employer the

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right to withhold or deduct amounts from the Due amount in respect of that Application only.

Article 2 in this series will consider Final Payment under this standard form of contract.

For more information please contact Robert Shawyer of our Cardiff office at rjs@shemmingsllp.co.uk or 02920 474 570.

Interest Rates

By Sarah Shemmings, Partner

Interest is an item that is often forgotten when making a claim for an outstanding debt. The Courts have the power or discretion to award interest on outstanding debts before the date of Judgment. If the debt is contractual then the amount is calculated on the rates specified in the contract and this rate continues after Judgment until payment.



However once Judgment has been given the statutory rate is 8% (unless interest is calculated on the contractual rate as above) and accrues until payment. As interest rates are very low at present having 8% interest added to a Judgment debt may come as a surprise or possibly an unpleasant shock, to many people.

The Courts still have discretion to reduce the interest rate and, this has been looked at in a recent Scottish case when it was argued that the 8% rate could be considered to be unreasonable. However the Scottish Judgment applied only to pre-Judgment interest. The Scottish Court decided that they did not wish to change the rate applied to Judgments because in their view they thought the high rate would encourage prompt payment!

Interest is also claimable under the Late Payment of Commercial Debts (Interest) Act 1998. Under this Act, companies are entitled to add interest at the rate of 8% above base rate to outstanding invoices and also to claim compensation.

When pursuing outstanding debts, interest is often a weapon that is forgotten but can prove to be very effective when seeking payment or indeed negotiating a settlement with a debtor. The threat of adding interest to the debt especially in Court proceedings often has the effect of effecting very prompt payment.

For more information please contact Sarah Shemmings of our London office at sas@shemmingsllp.co.uk or 0845 345 1244.

Contributory Negligence - Duty to warn

By Guest Author, Ann Glacki (Knowledge Manager of Alway Associates)

Carillion JM Ltd. v PHI Group Ltd., and Robert West Consulting Ltd.; 15 June 2011 [2011] EWHC 1379 (TCC)

The claimant, Carillion was the main contractor for the construction of a train servicing depot near the new Wembley Football Stadium. To make room for the depot, substantial excavations had to be made into the clay ground. This left 70° to 80° slopes which both during and in

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spite of the works became unstable.



Carillion commenced proceedings against the specialist design and build contractor for the soil nailing work, PHI, and its consulting engineers and lead consultants for the works, Robert West Consulting, ("RWC"). The claim between Carillion and PHI was settled, but there were still unresolved Part 20 proceedings between PHI and RWC in relation to contribution. In the second claim, Carillion sought to recover the balance of its claim from RWC. Since the majority of the remedial works had not been started, quantum issues included not only programming and planning issues but also the extent to which Chiltern Railways ("Chiltern") which operates trains on the main line and service its trains in the depot would be disrupted by the remedial works when commenced

RWC denied liability, and pleaded extensive grounds of contributory negligence against Carillion. It also alleged that Schedule 1 was not an adequate description of the future remedial works. RWC did admit, however, that Carillion had incurred remedial costs to date of £600,000. Carillion later amended Schedule 1 so that its quantum claims became, £599,904.80 for the historic remedial costs, the costs associated with the permanent remedial works scheme which would address the deep-seated instability were said to be £4,261,179.36, and Chiltern's costs of £3,778,511.14 which were re claimed on the basis of the likely future costs to Chiltern occasioned by the future remedial work, including disruption costs.

RWC argued that its breaches of duty had not caused the historic remedial works or would cause the future costs, including the costs to Chiltern. It said it was not involved in the slip of January 2005 and had not even been aware of it. The slip should have alerted PHI and Carillion to the potentially serious problem. Its limited involvement in the aftermath of the slips of October 2005 had broken the chain of causation as had Carillion's reliance on PHI and others. RWC maintained that after the slips had occurred, PHI should have amended its design. The judge concluded that RWC's analysis ignored some key facts. It had been PHI's failure to design for the deep-seated instability in the site, and this failure had not been picked up by PHI, RWC or anyone else. RWC had been aware of the January 2005 slips in January or early February, but did nothing about advising Carillion or investigating the problem. It had been made expressly aware of the October 2005 slips and had been warned that it might be liable. Between November 2005 and January 2006, it had been asked to become involved but had opted not to do so. RWC had failed to act with the required care and skill at the various stages. If it had done so, the deep-seated instability would have been picked up and positively addressed in the permanent works that would have been provided. On the facts, there had been no break in the chain of causation because others might or even should have picked up or realised the existence of the problem of deep-seated instability. Why should RWC escape liability for its own breaches of duty simply because others might or even should have picked up on the problem which RWC's own breaches of duty also failed to pick up? The answer must obviously be that it should not escape liability.

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The allegations that Carillion should have itself noticed the errors in PHI's design were not sustainable. There was no evidence that anyone within Carillion had been charged with checking up on RWC or the substance of PHI's design or calculations. In any event, Carillion had employed PHI as specialist soil nailing contractors to carry out the detailed design and the installation of the soil nailing work. It had employed RWC as its overall consulting engineer designer, its Lead

Consultant and as its reviewer or checker of PHI's designs and calculations. There was no suggestion that RWC and Carillion operated on some convention or understanding that Carillion's personnel, even if they were chartered civil engineers, would vet the design, calculations or review process carried out by PHI and RWC respectively. The fact that a client of a professional consultant or contractor has some expertise which overlaps with that of its consultant or contractor does not mean, without more, that the client can or will be contributory negligent if the client fails to notice at the time that its consultant or contractor has been negligent. This applied not only during the preconstruction stages in this case but also in the aftermath of the January and October 2005 slips.

Commentary by Robert Shawyer, Partner

The interesting aspect of this case is that it reinforces principles regarding duty to warn and the fact that your client is knowledgeable may not mean they are held liable for contributory negligence. In this case RWC were found to have acted with the required care and skill. Furthermore and importantly the knowledge of others of the deep-seated instability, even though it maybe should have been noticed by others did not let RWC escape liability for its own breaches of duty.

This supports case law that there is no general duty imposed by the law upon a party to a contract who is in breach of it to inform the other party of his breach. However, such a duty can arise in particular circumstances. In Stag Line Limited v Tyne Ship repair Group Limited and Another (1984), a ship repairer had used the wrong material in relining a tube in the other contracting party's ship. It was held that in the circumstances of this case the court would imply into the contract a term imposing a duty on the party who was in breach to inform the other party of the breach. The factors that were said to give rise to the duty in this case were that the tube was unlikely to be examined for four years, the rules of the applicable classification society had been infringed and there was a possible danger to life and to very valuable property. This duty was said to be contractual duty.

The issue also arose in Equitable Debenture Assets Corporation Limited v William Moss Group Limited and Others (1984) where the judge held that Moss, who were large and experienced builders, having formed the view that part of the architect's design would not work, had a duty to immediately pass their concern to the architect and that there was, therefore, an implied term in the building contract to warn of design defects. The Official Referee in this case found that this duty was both an implied term in contract and a duty in tort. This duty arose, notwithstanding the fact that Moss had no design obligation in their building contract.

Contractors were found to have been under a duty to warn the house owner of bad house design where the designer was not retained to supervise construction. Brunswick Construction v Nowlan and Others (1974), Canada.

The whole area of duty to warn has been considered in a number of cases. For example, in Victoria University of Manchester v Hugh Wilson and Lewis Womersley and Pochin (Contractors) Limited (1984) it was decided that the contractors owed a duty to warn the architects, as agents of the University, of defects in the design of the architect. However as we have seen from this case the duty to warn of others is at best a contributory defence and moreover a contributory defence not to be relied upon. If a party wishes to protect itself reliance on the default of others is no safe bastion.

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Employment Law

Changes to employment rights with the fall of Autumn leaves



By Anthony Philpott, Consultant

With the fall of Autumn leaves came the announcement of changes to employment rights. One of the most notable was that of George Osborne at the Conservative Party conference that the Government will increase the qualifying length of employment an employee must have worked before he or she can bring a claim in the Employment Tribunal for Unfair Dismissal from one to two years. In addition employees will have to pay a fee before lodging an employment tribunal claim.

These changes are to be brought in April 2012.

From 1 October 2011 the Agency Worker Regulations 2010 came into force to give agency workers the right to be informed of job vacancies from day one of their engagement and to be given access to facilities such as child care and use of the canteen. After 12 weeks of engagement they are entitled to equal treatment with employees in basic employment rights such as pay, annual leave and rest breaks, and to be given the same rights to this entitlement as employees enjoy. After completing this 12 week period pregnant agency workers will be entitled to time off for ante natal appointments.



Away from the changes in the legislative climate came a new decision of the Court of Appeal shedding light on the murky question of the employer's obligation to give departing employees references. The general rule is that employers are not under any duty to give a character reference for an employee or ex-employee. In **Jackson -v- Liverpool City Council** Mr Jackson left the Council after 12 years with a satisfactory reference. However a year later the Council were asked to give a second reference in which they raised concerns about his performance but they said that these concerns had not led to an investigation into allegations made against him. The Council made it clear that they were not able to answer specific questions about whether they would employ him. They had said that if an investigation had taken place then this would merely have resulted in a performance improvement plan being put in place. The Court of Appeal decided that the reference was fair true and accurate.

For more information on employment issues please contact Tony Philpott of our London office at ap@shemmingsllp.co.uk or on 0845 345 1244.

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And finally,

We held our final breakfast seminar for 2011 on 19 October which covered Letters of Intent, Contract Formation and Limitation Periods.

This event was well attended and positive feedback received. For those of you that were unable to attend, a copy of the seminar

handout can be downloaded from our website at: <http://www.silver-shemmings.co.uk/articles/SSLLP%20Seminar%20Handout%20-%202019-10-11.pdf>

The breakfast seminar dates for 2012 are being agreed and will be circulated in due course.



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



In addition, Silver Shemmings LLP speakers will also be presenting the following courses which are run through the **Construction Study Centre**:

Date	Topic	Venue
01/11/2011	Sharpen Up – Commercial Awareness	London
03/11/2011	Managing and assessing NEC Compensation Events	London
08/11/2011	Working with JCT Minor + IFC contracts	London
17/11/2011	Successfully managing construction disputes – adjudication and dispute resolution	London
24/11/2011	Dealing with everyone's construction contract nightmares	London
28/11/2011	Getting to Grips with NEC	London
29/11/2011	The 'must know guide' to construction contract principles	London
01/12/2011	Which Contract? For refurb & maintenance contracts	London
28/02/2012	Getting to Grips with NEC	London
29/03/2012	Managing and assessing NEC Compensation Events	London

For information on the any of the above course please contact **Construction Study Centre** on **0845 313 3414** or visit their website at www.constructionstudycentre.co.uk

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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

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