



SILVER SHEMMINGS SOLICITORS

Business Information Update

November 2009

Issue 4



Sarah Shemmings
Partner

Welcome....

Welcome to the autumn/winter edition Update of 2009.

Firstly it was great to see those of you that attended our breakfast seminar in September on 'Contract Determination'; we do hope you found it useful. Thank you for the positive feedback and for the future seminar topic suggestions – we had plenty to choose from! 2010 will see a further series of complimentary construction law and contracts seminars. The first two dates are now confirmed for 26 January 2009 & 23 March 2009 and details on topics and how to book will be circulated shortly. However to express provisional interest please contact us at office@shemmingsllp.co.uk

It has been a busy few months for Silver Shemmings with the opening of our Epping office on 1 October 2009. The office is headed by Richard Silver, Partner and assisted by Matthew Dillon, Consultant, both of whom are able to advise on an array of commercial and construction matters.

We are also pleased to advise that Silver Shemmings is one of the firms who have been invited to participate in the pilot project being run by the Technology & Construction Court, London, for electronic filing of claims and paperwork.

The TCC is pioneering, with the Commercial Court, a system that allows claims to be issued "on-line" which means a reduction in the amount of the time taken to issue a claim form. In fact claims can be issued 24 hours a day with this system. The system also allows judges to monitor and actively manage claims which is one of the CPR requirements. If the system is successful and all indications are that it is, then it will in use for these 2 courts (London only) next year.

We hope this Update is of interest to you and should you have any topics you would like to see reviewed please let us know and we will try to include these in later editions.

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Construction Law

Construction Act Update

By Sarah Shemmings, Partner

The changes to the Construction Act have now been debated by both Houses of Parliament. The outstanding issues have now been resolved and all that needs to be done is for the Bill to receive Royal Assent. This has now been given and all that remains is for the commencement date of the Act to be confirmed. It is anticipated that this will be later on in 2010.



The changes to the Construction Act will only affect construction contracts entered into after the commencement date of the Act.

Under the new Act, the adjudication provisions will apply to oral contracts and there are new provisions relating to interim payments.

Changes in the Technology & Construction Court

By Sarah Shemmings, Partner

There has been a change in Judges at the Technology & Construction Court ("TCC") in London. Antony Edwards-Stuart QC has been appointed as a High Court Judge sitting in the TCC as from this October. This brings the number of High Court Judges to four in the TCC which reflects the increase of workload in that Court.

However whilst the High Court side of the cases have increased, the work carried out by the Senior Circuit Judges has decreased and it has been decided that they only need two full-time Senior Circuit Judges and therefore His Honor Judge Thornton QC is moving to the Queen's Bench Division.

Article: Alternative Dispute Resolution - the preferred option in the UK construction industry

By Tony Philpott, Consultant

Tony Philpott, a Consultant who has recently joined the practice from Bovis



Lend Lease Ltd where he worked as in-house legal counsel, has had the above article published in the International In-House Counsel Journal. The article looks at dispute resolution from a contractors' perspective particularly as *"nowadays in the construction industry there is a greater recognition of*

the scale of unnecessary legal costs and time involved in the litigation process. The consequence of this is that there is a drive towards the avoidance of protracted disputes that often alienate parties from each other, increase legal costs and reduce the prospect of an amicable solution? Because of this desire, adjudication is seen as practical way of resolving disputes."

If you would like to read a full copy of this article and also an article by Tony Philpott on in-house lawyers, please visit the **Legal Updates** page on our website.

Why make an offer to settle?

By Matthew Dillon, Consultant

The recent case of *Costain Limited -v- Charles Haswell & Partners Limited* provides useful guidance on how the Court should allocate costs at the end of a trial when a Claimant recovers significantly less than that which it claimed.

The brief facts of this case are that the Claimant, Costain, was engaged by United Utilities Water Limited under a Design and Build Contract to carry out various works at a site in Bolton. Costain in turn engaged the Defendant, Haswell, who were Consultant Civil Engineers. Costain claimed that the foundations designed by Haswell were defective and had to be changed late in the day thus causing Costain additional cost and expense.

When Costain commenced proceedings they sought some £3.5m in

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damages although by the final day of the 14 day trial Costain had reduced its claim to £1.257, 377.00. Costain actually recovered £163,478.51 which was dwarfed by the joint legal costs of some £2.9m. A hollow victory indeed.

Haswell were obviously confident in their case because they made no payment into Court and no Part 36 Offer. Unfortunately because Costain did make a recovery they were able to claim victory and argue that costs should follow the event.

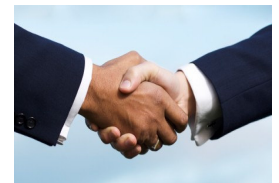
Notwithstanding the fact that Costain's claims had been largely defeated, the Judge stated that he was in no doubt that Costain was the successful party and had recovered a substantial sum of money. The Judge accepted that Costain's claims were inflated and indeed at the early stage were exaggerated, but he said they failed because Costain were unable to prove the facts upon which they relied and not because the quantum was excessive. The Judge did not think that Costain were unreasonable in pursuing their claims, nor did the Judge consider that Costain were unreasonable in pitching their offer to settle at no less than £1,150,000.00 plus costs. Perhaps surprisingly the Judge was very critical of Haswell for not protecting itself by making a payment into Court or Part 36 Offer and said, *"I do not consider that Haswell acted reasonably in rejecting Costain's offers of settlement out of hand without coming back with some form of substantive counteroffer"*.

The Judge went on to consider a number of authorities including the case of *McGlin -v- Waltham Contractors Limited and others* and concluded that the modern approach of the Courts was to assess the relative success or failure of the parties and deal with costs by way of costs order stating that:

"the time honoured rubric that "costs follow the event" is no longer applied automatically in this kind of situation even though a clear winner of the litigation has emerged. The Court nowadays is encouraged to enquire more closely into relatively success or failure of the parties and to adjust its cost order in favour of the winner of the litigation accordingly."

The Judge concluded that the issues upon which Costain succeeded consumed approximately 60% of the time taken at trial and Haswell succeeded on issues that consumed about 35% of the time at trial. The Judge concluded that Costain should therefore recover 65% of its total costs from Haswell and that Haswell should recover 35% of its total costs from Costain. The Judge then went on and made a deduction against each parties' recovery to reflect the conduct of the parties. The Judge assessed that the net effect was that Haswell had to pay Costain £620,000 in respect of Costain's costs, representing just under 39% of Costain's total cost expenditure of £1.6m. This appears to suggest that following the litigation Costain remained £800,000 out of pocket and Haswell nearly £2m.

This case provides useful guidance on how costs should be allocated when a party is not successful on all of its claims. It will be noted that a Claimant may suffer adverse cost orders even if it recovers over and above a Defendants offer to settle. The case also serves as a useful reminder that when defending litigation, no matter how spurious or over-egged a Defendant considers a claim to be, the Defendant should give serious consideration to either making a payment into Court or a Part 36 Offer. In this case had Haswell made a small payment into Court they may have potentially saved themselves nearly £2m in legal costs.



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Health & Safety - Construction Sites

By Sarah Shemmings, Partner

Two companies were recently fined for breaches of Health & Safety

Regulations following a fatal accident on the construction of the new Terminal 5 building at Heathrow. In 2005, a concrete slab collapsed causing the death of one workman and serious injury to another. The HSE prosecuted both companies involved for failing to have adequate systems in place to inspect the quality and condition of safety critical components which subsequently failed causing the collapse.



This case goes to show that it is essential that Health & Safety considerations on all construction sites must be at the forefront of managements mind especially now that prosecutions for corporate manslaughter for failure to ensure proper and adequate health & safety on site is law and is being used. The first prosecution is going through the Courts at the current time.

Employment Law

Discrimination in the workplace 2009

By Tony Philpott, Consultant

Tony Philpott, Consultant specialising in employment claims, has prepared an article looking at discrimination cases over the past year.

Employers are generally alive to the dangers of unfairly dismissing employees and of the resulting claims in the Employment Tribunal. Aside from these dangers, employers often fail to anticipate discrimination claims before it is too late.

Discrimination means treating some employees differently to others. New forms of discrimination include age and disability.

Under the Employment Equality (Age) Regulations 2006 an employer discriminates if it treats that employee less favourably than someone in similar circumstances on the grounds of age.

The Disability Discrimination Act 1995 outlaws disability discrimination in that it is unlawful to:

- treat an employee or job applicant unfairly on the grounds of their disability; or
- for a reason relating to their disability; and also
- where it fails to comply with its duty to make reasonable adjustments for an employee or job applicant.

A 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.

If you would like to read a full copy of this article please visit the **Legal Updates** page on our website.

And finally,

We have a number of articles on recent cases on our website by Ann Glacki of Bliss Books. Please take a moment to visit our website and take a look.

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

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