Newsletter

Quaystone

BURGES SALMON

April 2015

Further information

For further details on the issues raised in this bulletin or generally on the services we offer please email **marcus.harling@burges-salmon.com**, **william.gard@burges-salmon.com**, **steven.james@burges-salmon.com** or **lloyd.james@burges-salmon.com** or your usual Construction and Engineering Team contact.

Welcome to the April 2015 edition of Quaystone, the newsletter from the Construction and Engineering Team at Burges Salmon. This month Norris Riley looks at priority clauses and Catherine Gilbert rounds up new rule changes and judgments that will impact on the cost and process of pursuing construction disputes. Finally, we cover the imminent changes to the CDM Regulations.

Priority clauses: Check all documents before you sign

It is very common for construction contracts to consist of more than one document. In simple projects these may include the contract conditions, a specification and perhaps a contract agreement tying everything together. In more complex projects there are likely to be considerably more documents including contract conditions, schedules of amendments and large numbers of appendices dealing with payment and technical matters.

In an ideal world each of these documents would be reviewed together before the contract is signed to make sure that they are consistent with each other. In practice two things often conspire to mean that this harmonisation process doesn't happen properly: firstly the documents are often drafted by different people (lawyers dealing with the contract conditions, engineers providing the technical schedules, the employer's commercial team providing the pricing information etc.) and secondly there is often strong pressure to keep costs down and get the contract signed as quickly as possible.

So what happens after signature when someone notices there are discrepancies between two or more of the contract documents? A common way to anticipate and provide a mechanism to deal with this problem is to include a so called priority or conflicts clause in the contract conditions. This is the type of clause that lists each of the contract documents and gives the order in which they should be read in the event of inconsistency. Many standard forms of contract include such clauses.

However, priority clauses are not the panacea to contractual ambiguity that many assume them to be. A recent case, *Alexander v West Bromwich Mortgage Co Ltd*, gave the courts an opportunity to examine this type of clause. The court's conclusion, based on previous similar cases, was that such clauses are only intended to deal with instances of *"clear and irreconcilable discrepancy"*. They are not there to allow one of the parties to choose the most favourable position in instances of mere ambiguity. If one document can be read to simply qualify or modify another then the priority clause is unlikely to be invoked and both documents will stand.

The court's message is that priority clauses should not be relied upon as a get out for sloppy drafting or hurried contract formation. All contract documents should be checked and amended before signature to ensure consistency and avoid unanticipated and possibly costly consequences.

Costs round up

Court fees increase

On 9 March 2015, court fees for starting a claim increased significantly. The fee for issuing a claim for between £10,001 and £200,000 is now 5% of the value of the claim. For claims in excess of £200,000 or unlimited claims, the fee is £10,000.

The government's aim is to reduce the costs of the courts to the taxpayer by looking to those who use the courts to contribute more, *"where they can afford to do so."* But there have been concerns about the increased court fees: the Law Society has already started judicial review proceedings in relation to the decision and the most senior judges in England and Wales also expressed significant fears about the effect on litigants of the increased fees.

Concerns focus on the potentially detrimental and disproportionate impact on SMEs, especially as the court fee has to be paid up-front, and the possibility of discouraging claimants with genuine claims going to court. We will monitor the progress of the Law Society's judicial review but for the time being, higher court fees for larger claims are here to stay.

Refusing to mediate

The court has, once again, imposed costs sanctions on a successful party in litigation who had unreasonably refused to mediate. In the February 2015 case of *Laporte and another v The Commissioner of Police of the Metropolis*, the court applied the principles set out in *Halsey v Milton Keynes General NHS Trust* back in 2004.

Halsey established the position that in order to justify a costs sanction, an unsuccessful party must show that the successful party acted unreasonably in refusing to mediate.

Here is a quick recap of the questions raised by *Halsey* which determine whether a refusal to mediate is reasonable:

- What is the nature of the dispute?
- What are the merits of the case?
- Are there any other settlement options?

- Are the costs of mediation disproportionately high?
- Would mediating delay the trial?
- What are the mediation's prospects of success?
- Has the court encouraged the use of ADR in the case?

The *Laporte* case reiterates how important it is not only for a party to have a solid argument on why any refusal to mediate is reasonable (taking into account the *Halsey* principles), but also to articulate its reasons clearly. In *Laporte*, the defendant simply said that it no longer considered ADR to be an appropriate use of resources. It gave no further reasons in writing. The defendant went on to be successful at trial, but its failure to adhere to the pre-action protocol and to justify its refusal to mediate, meant it only recovered two thirds of its costs.

Keeping costs proportionate

The January 2015 case of *Savoye and Savoye Ltd v Spicers Ltd* provides yet another reminder that costs in litigation must be proportionate. The issue in question had already been addressed in some detail in an adjudication, using the same solicitors and witnesses. The issues were not complex. The Judge decided that on this basis, the costs claimed of £200,000 were disproportionate and instead assessed costs at only £96,465.

CDM 2015

New CDM Regulations are coming into force on 6 April 2015. From that date a new CDM regime will apply to virtually everyone in the UK who procures or provides construction works and services of any significance. There is already plenty of information freely available online (including the HSE's own guidance) which explains the key changes – the demise of the CDM Coordinator, the new role of principal designer, domestic work now covered by CDM, the enhanced role of the client etc. etc.

So rather than repeat what is already available we thought it would be more useful to look at a number of thorny issues raised by the new regs. These are set out in our separate **CDM Bulletin.**

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