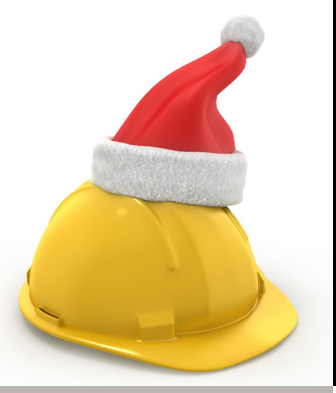


Newsletter

Quaystone

BURGES SALMON

December 2013

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** or **steven.james@burges-salmon.com** or your usual Construction and Engineering Group contact.

To round off the year, this edition of Quaystone is a whistle-stop tour through some of the key events, cases and themes of 2013. If there are any particular topics that you would like to see us tackle in 2014, why not let us know – contact catherine.gilbert@burges-salmon.com or norris.riley@burges-salmon.com or tweet us @BurgesSalmon

Experts on trial

Severe criticism is the polite way of describing what some experts have endured in TCC judgments this year. The Liverpool Museum case has been one of the clearest examples of why both solicitors and experts must get it right when giving expert evidence to the court. In *Liverpool Museum*, the Judge said that the expert was *"almost wholly unimpressive"*, *"wholly unconvincing"* and *"he accepted that he was 'seeking to defend the indefensible'"*.

Clearly, this expert was not the right person for the job: he failed to understand (or have explained to him) the very basic duties of an expert such as:

- An expert's overriding duty is to the court, not his client. Expert evidence must be truthful, impartial and, crucially, independent.
- An expert must have the right skills and experience to give evidence on points in dispute. This includes experience of giving evidence persuasively and appropriately in court.

- An expert must be truly independent. Solicitors, clients and experts must be careful to ensure that any connections between them are disclosed.

Judicial criticism and strict rules on expert costs will mean that instructing experts efficiently and appropriately will remain under scrutiny throughout 2014 and beyond.

Adjudicators: damned if they do...?

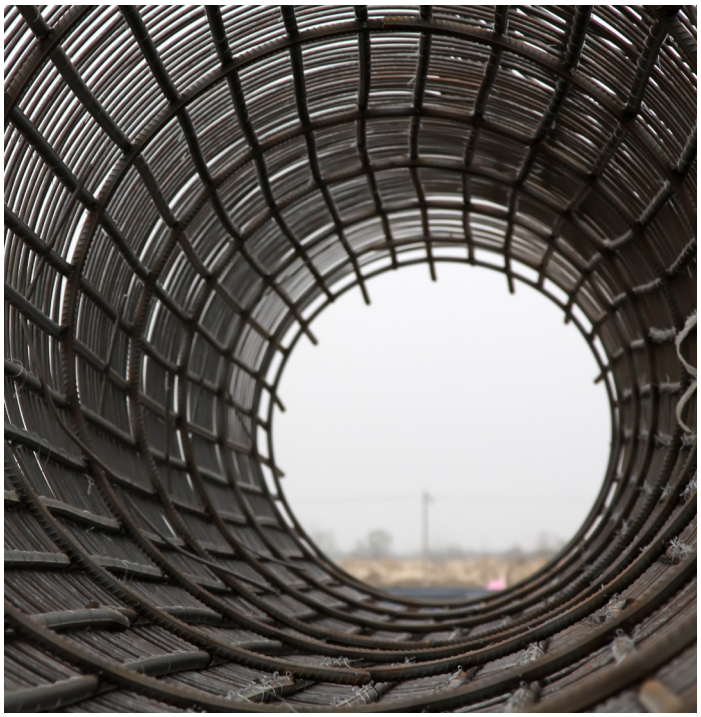
It's been a mixed year for adjudicators in terms of enforcement and natural justice. In *ABB v BAM Nuttall*, it was held that the adjudicator **had** breached the rules of natural justice when he relied on a clause of the sub-contract that neither party had referred to or relied upon. In *CG Group v Breyer Group*, the decision went the other way. The adjudicator **had not** breached natural justice and the court confirmed that it would not carry out a minute examination of the parties' arguments when determining whether the particular point selected by the adjudicator was highlighted by a party.

On the positive side for adjudicators, the general consensus among them at the end of 2013 seems to be that last year's decision in *PC Harrington v Systech* has had limited practical effect. This was the case where the court suggested that an adjudicator would not be able to recover his or her fees if the decision was found to be unenforceable.

Collateral warranties – are they construction contracts?

Most people's answer to this a year ago would have been a pretty straight forward "no". But HHJ Akenhead's decision in *Parkwood Leisure v Laing O'Rourke Wales and West* this year means that the answer now is more likely to be "it could be". In *Parkwood*, the Judge focussed on a couple of issues specific to the collateral warranty in question. He considered that a very strong pointer towards a collateral warranty being a construction contract would be whether the contractor was **undertaking to carry out** construction operations. A pointer against would be if all the works had been completed and that the contractor was simply **warranting** a past state of affairs.

The implications of the *Parkwood* case are that contractors and clients alike may start to consider whether an express right to adjudication should be inserted into collateral warranties. It remains to be seen whether the other parts of the Construction Act (such as those relating to payment provisions) would also be implied into such collateral warranties as the court didn't look at this in *Parkwood*. The bottom line is that there is no blanket rule that collateral warranties are now construction contracts, but parties might find themselves reading their warranties a little more carefully in 2014.



The court gets tough on costs

April of this year saw the biggest changes to the civil litigation landscape for some time, known broadly as the Jackson reforms. Among other changes, mandatory cost management and budgeting came into force for cases in the TCC worth less than £2million. For larger cases, the scheme is not mandatory, but it is likely that the exemption will be removed at a later date.

What this means in practice is that parties are expected to prepare, exchange and agree if possible their cost budgets for the whole case. The very broad aim of this is to make costs more predictable and more proportionate. The dangers of failing to adhere to the new rules are however severe, as Andrew Mitchell of the "Plebgate" case has discovered.

Mitchell is currently suing The Sun for defamation. In accordance with the new rules, Mitchell's solicitors should have filed a cost budget 7 days before the first case management conference ("CMC"). They did not do so; one was however filed the day before. At the CMC, the costs of the whole action were limited to court fees only: so as things stand if Mitchell is successful in his claim, he will only be able to recover his court fees and not his legal fees.

Needless to say, Mitchell (and no doubt his solicitors) were not happy with this and promptly applied for relief from sanctions which, after a fully argued and evidenced hearing, was denied at the beginning of August 2013. The Judge made the following comments:

- *"even before the advent of the new rules the failure of solicitors was generally not treated as in itself a good excuse and I am afraid that however much I sympathise with Mitchell's solicitors, such explanations* [they were short staffed] *carry even less weight in the post Jackson environment." and*
- *"what we now mean by 'dealing with cases justly' has changed, or if it has not changed then at the very least there is a significant shift of emphasis towards treating the wider effectiveness of court management and resources as a part of justice itself."*

The cost Judge's decision was examined by the Court of Appeal and in a much-awaited decision, it upheld the decision. Lord Dyson stated:

"Although it seems harsh in the individual case of Mr Mitchell's claim, if we were to overturn the decision to refuse relief, it is inevitable that the attempt to achieve a change in culture would receive a major setback.

In the result we hope that our decision will send out a clear message."

It certainly does – this signals a new and tough regime for litigants and their solicitors. Will this go to the Supreme Court in 2014? We will keep you posted.

All change to CDM – but not yet

Over the past few years, the CDM Regulations have come in for some criticism. Their perceived complexity for small or occasional clients coupled with the lengthy Approved Code of Practice have led to questions as to whether the CDM Regulations are really fit for purpose.

Revisions to the CDM Regulations have been on the drawing board throughout the year, and in May 2013 a revised package was presented to the HSE Board. This includes changes such as imposing new duties for domestic clients, replacing the ACoP with a series of guidance notes and replacing the design-phase duties of the current CDM Co-ordinator with a Project Preparation Manager.

The new regulations now have to clear a public consultation before a revision comes into force. This doesn't now look likely until the middle of 2015 and with the general election set to take place in May 2015, the CDM Regs (2015?) may well find themselves being pushed back to October 2015 at the earliest. Maybe one for the 2015 Quaystone round-up!

BIM: increased uptake

February this year saw the CIC publish its BIM Protocol. At only five pages, some will have breathed a sigh of relief, but the Protocol is a contractual document and in fact is intended to take precedence over other contractual documents. All central government departments will use level 2 BIM as a minimum by 2016 and the aim is simple: that BIM will lead to improvements in cost, value and carbon performance. Noises from industry are mostly positive.

But the question remains whether knowledge about what BIM really means and entails is as high as it could be. As we flagged in our April 2013 Quaystone, Level 3 BIM (which anticipates a collaborative and fully integrated process) has the potential to raise very different liability issues, which may have repercussions in the insurance market so BIM education over the next year or so will be vital.

PF2 and funding

PF2 is PFI's much trumpeted successor but its use remains limited. By contrast, the UK Guarantees scheme announced in October that energy, road and rail projects worth £33 billion had passed the first hurdle in getting a government infrastructure guarantee, with 40 such projects being at the so-called "pre-qualification" stage. These projects include many high profile energy projects such as the Helius 100MW biomass energy generation facility at Avonmouth and the Hinkley C nuclear power plant.

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