HEWITSONS

Absolute Client Focus

Hewitsons' Construction LEGAL UPDATE

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CIC BIM Protocol (Second Edition)

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Partner

The Construction Industry Council has, for the first time since February 2013, updated its BIM Protocol following consultation with the Joint Contracts Tribunal (JCT), New Engineering Contract (NEC) and the construction industry. The second edition addresses many of the concerns felt by Employers that arose out of the first edition protocol and is now relevant for use in current projects. The intention is that the Protocol will be incorporated into the Construction Contract as a contract document or, in NEC contracts, as part of the Works information. The Protocol does provide some guidance on this, but additional amendments will be required to the contracts themselves. Whilst the Protocol does not give guidance in relation to incorporation into a Professional Services agreement, this could be expected to be similar.

Further changes to the Protocol include alignment with PAS 1192. This includes amendments to terminology so that the Protocol refers to obligations in relation to all information comprising a common data environment and not just reference to models. The second edition addresses a concern raised in the first edition, relating to the integrity of information provided including incompatibilities between the

software used to produce and access information.

The second edition has also changed the approach under the original Protocol which allowed the Protocol to take precedence over the contract if there was an inconsistency. The second edition removes this uncertainty as parties must now agree a solution, encouraging a collaborative approach rather than the contradiction of the contract; the Protocol will now only take precedence in relation to conflicts concerning Employer or Team Member's obligations. This will, however, require amendments to the relevant consultancy agreements and building contracts.

Whilst it is now in the hands of construction professionals to use it, the 2018 Protocol seems to have addressed the concerns of its predecessor and has received positive feedback so far due to its flexibility and close alignment to the industry approach to BIM.

20 Years of the Construction Act

Lorna Carter
Legal Director

It is now over 20 years since the Housing Grants, Construction and Regeneration Act (the 'Construction Act') came into force in May 1998, bringing with it the introduction of statutory adjudication and payment rules.

Since the judgment on enforcing an adjudicator's decision was first passed in **Macob v Morrison [1999]**, a number of significant judgments in relation to adjudications have been passed, shaping the way adjudications are conducted. These include that:

- The adjudicator must be impartial and comply with the rules of natural justice.
- The dispute must be said to have crystallised before an adjudication can commence.
- Only in rare circumstances will the courts interfere with the decision reached by an adjudicator.
- Most recently, adjudications must concern one dispute, rather than disputes unless that parties otherwise agree.
- A party is free to start a second adjudication disputing the value of works (for more information see our **April Legal Update**) even if it has failed to provide a Pay Less Notice.

Whilst adjudication is of course not perfect it has provided a relatively cheap and certainly faster method of resolving disputes in an industry which unfortunately does continue to remain prone to them. It has become the industry's first choice dispute resolution mechanism and has on the whole been a notable success.

Retentions Bill

Campbell Wilson
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As reported in our **January HTML**, the government was consulting on retention payments in the construction industry. This consultation related to one of the recommendations of Sir Michael Latham that was not included in the Construction Act of 1996 discussed in Lorna's article – that of cash retentions. While retentions might be considered standard, they are perceived as having a negative impact on cash flow and new investments. Contractors are, every year, losing thousands of pounds of retention for each contract because of those higher up the chain going insolvent. A movement towards finding better ways to deal with this is therefore both encouraged and welcomed.

This consultation is now running in parallel with the introduction of the Construction (Retention Deposit Scheme) Bill, although it is unclear if or how one will influence the other.

On 9th January 2018 the Construction (Retention Deposit Scheme) Bill was introduced into the House of Commons by Peter Aldous, based on strong support across the industry for protection of retentions. The bill was due to receive its second reading on 15 June 2018, having been initially postponed from 27 April 2018, but this has now been postponed until 26 October 2018. The second reading is the first time the Bill will be debated and whilst few Private Member's Bills do become law, this Bill is supported across the parties and recent months have shown the risks inherent in the current practices.

Retentions have the potential to impact both the viability and productivity of smaller firms in the construction supply chain, although Carillion proves that it is not only the small contractors that can fail. There is no guarantee that sub-contractors will be paid their retention monies, placing a huge burden on small firms in the industry that then increase their costs to factor the risk of non-payment into their quotes. The proposed Bill will be similar to that in the Housing Act 2004 under which tenancy deposits are placed in a Government-approved scheme to protect the monies in the event of any issues and allow it to be released once work is complete. This in turn aids the cash flow in the construction industry and the increased protection may also increase the likelihood of banks being willing to lend.

There is strong industry support for the introduction of a retention deposits scheme and the reading in October may well be the start of a change to industry practice.

No heady success for scaffolders

Sardeep Gill
Solicitor

Breyer Group PLC v Adam Michael Scaffolding Services Ltd [2018] unreported

The Claimant worked as a roofing contractor and had engaged the Defendant to provide scaffolding services. The scaffolding contract sum was £685,000 plus VAT and the contract period was initially for one year, although this was extended and the value of the contract was increased.

A dispute arose as to the value of the Defendant's final account, which the Defendant had valued at £5.6 million. This was referred to adjudication and the adjudicator found the value of the works to instead be £2.5 million. By this point, the Claimant had already paid £4.5 million to the Defendant and the adjudicator therefore found that the Defendant owed £2 million to the Claimant.

The Claimant brought proceedings to enforce the adjudicator's decision after the Defendant did not pay. The Defendant argued that the adjudicator had acted outside his jurisdiction in making an award in favour of the Claimant, on the basis that it was not a decision which the adjudicator could reasonably have made. The Defendant also stated that if the adjudicator's decision was enforced it would become insolvent.

The application to enforce the adjudicator's decision was granted in the Claimant's favour. It was held that the Notice of Adjudication was wide enough to include the assessment of value of the final account which included the refund of the overpayment. A stay on enforcement of the Court Judgment upholding the adjudicator's decision was not granted to the Defendant in this case as there was no evidence that the Defendant was insolvent and it continued to act as a trading entity.

What we can take from this decision is two-fold: first, it is essential that proper consideration is given to the drafting of the Notice of Adjudication (sometimes referred to as the Notice of Intention to Refer to Adjudication) in order to reduce the likelihood that any favourable decision is squashed on a technical point. Although in our experience both adjudicators and the Court seem fairly robust on that point, that cannot be guaranteed and so caution is key. Secondly, if you are a party on the receiving end of an adjudicator's award and cash flow is an issue, attempt to agree payment arrangements with the other party, failing which ensure that evidence such as management accounts and other supporting financial documents are collated to enable the Court or the other party to properly assess the need for time to pay. In this case evidence is key.

Promises, promises

Charlotte Glasse
Trainee Solicitor

Ertan Sami v Taskin Hamit [2018] EWHC 1400 (Ch)

This matter was an appeal by the Defendant against a first instance decision not to strike out the Claimant's claim. The Claimant had brought a claim for either money or property owed to him by his brother-in-law, based on oral promises and assurances over a number of years that he would be paid for building work when the Defendant could afford to pay him. The Claimant did building work for the Defendant and his wife between 1992 and 2005, helping to renovate properties they had purchased.

The initial agreement between the parties was that the Claimant would be paid for his work when the Defendant could afford to do so. It is alleged that in 1999 this agreement was varied so that the Claimant was promised either the amount he was owed or an interest in a property in the Defendant's portfolio of an equivalent value. The assurances of payment were repeated by the Defendant on several occasions.

The Claimant relied on these assurances and did not bring enforcement proceedings until 2015 when the Defendant denied, for the first time, that he was under an obligation to pay the Claimant.

The Claimant sought to bring proceedings on three grounds:

- for breach of contract;
- on the basis of the doctrine of unjust enrichment – where one party has been unjustly enriched at the expense of another; and
- on the grounds of proprietary estoppel – where one party has relied on the conduct/statement of another to his detriment.

The Defendant applied to have the claim struck out by the Court on all three grounds contending that that there was no case for him to answer. The Recorder hearing the case at first instance rejected the application to strike out the claim. On appeal the Court held that:

The claim in contract – this would be easier to resolve by establishing exactly what the parties had discussed and agreed. The agreement was not based on a written contract, but on discussions between two brothers-in-law. The term referring to payment only when the Defendant could afford to do so ran the risk of being too uncertain to have contractual effect. However, the Claimant had a real prospect of establishing contractual liability within the 6 year limitation period provided for under the Limitation Act 1980 and the application to strike out on this ground was therefore dismissed.

Unjust enrichment – the Defendant also applied to strike out the claim for unjust enrichment on the ground that it was statute-barred – in other words it was too late to bring the claim. The Court held that the basis for the claim was the promise by the Defendant of payment and this failed only once the Defendant said he would not pay – it was at that date the cause of action (entitlement to bring Court action) arose and from when the time for the claim started to tick (this was 2015). The claim

for unjust enrichment therefore fell within the six year limitation period permitted for Court action and was allowed to continue.

Proprietary estoppel – the Claimant's final ground was based on the variation to the promise in 1999 whereby the Defendant promised either payment to the Claimant or to transfer an interest in property. The Defendant argued that there could not be proprietary estoppel over "property" on the basis that that is too uncertain. However the Court cited Lord Neuberger in **Thorner v Major [2009]** who said that in the same way a floating charge can be held over property owned from time to time, so too could an estopppel. Whilst the Judge identified that the proprietary estoppel claim faced difficulties, he did consider it has a real prospect of success.

The dismissal of the application to strike out was therefore the correct approach as the Claimant had a real prospect of success in all three of the claims put forward.

Conclusion – this case serves as a salutary reminder that oral promises and assurances between family members providing services to one another could amount to binding agreements and obligations to pay. It remains to be seen what the final outcome of this case will be. It is however prudent to see that agreements are written down to try to minimise the scope for argument.

A hot topic - insurance cover for fire

Colin Jones
Partner

Haberdashers' Aske's Federation Trust Limited and Others v Lakehouse Contracts Limited and Others [2018] EWHC 558 (TCC)

Background

The Main Contractor was extending a school and entered into a sub-contract for the roofing works. The sub-contractor had agreed it would get its own insurance cover. The sub-contractor was carrying out hot works on the roof of the school when a fire broke out causing significant damage.

At the time of the fire insurance cover of £5 million was in place for the sub-contractor as agreed in the roofing sub-contract and there was also project wide insurance. The project wide insurance covered the contractor and the contractor's sub-contractors, in relation to which category the roofing sub-contractor was of course included.

Court action

The Claimant, being the owner and operator of the school, sought to recover damages in excess of £11 million from the Main Contractor and sub-contractor. The Main Contractor then issued a claim against the sub-contractor for an indemnity or contribution in respect of their liability to the Claimant. The sub-contractor claimed that it was entitled to the benefit of the project wide insurance as a defence against the Main Contractor's claim and joined the insurers into the Court action.

The project wide insurers paid a settlement sum of £8.75 million to the Claimants. They claimed that the sub-contractor was not entitled to the benefit of the project wide insurance and that they

could bring a claim against the sub-contractor to recover the settlement sum which in turn would be addressed by the sub-contractor's own separate insurance policy.

The Judgment

The Court held that the existence of the express term in the roofing sub-contract requiring the sub-contractor to obtain its own insurance cover precluded the sub-contractor, to the extent that it had its own insurance cover, from being entitled to the benefit of the project wide insurance.

The Court therefore ruled in favour of the project insurers and Main Contractor allowing them to recover the sum of £5 million from the sub-contractor, being was the level of the insurance cover held.

Conclusion

This decision reminds us of the importance to consider the insurance provisions of a project as a whole and the potential implications of these, in particular where they overlap. The express terms agreed by the parties in their own contracts are of the greatest importance. It is possible that we may see sub-contractors seeking to exclude insurance provisions from their sub-contracts to the extent that they overlap with the cover in place under any project insurance policy.