

## Construction Law

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### “Let it snow, let it snow, let it snow...”

The seemingly endless appalling weather during December will have brought major disruption to many projects. It will have stopped work being carried out, even if the workforce was able to get to the site.

Contractors and sub-contractors will be looking to claim extensions of time as a result, and possibly extra money. Whether they are entitled and to what extent will depend on what their contract says. Who bears the cost of bad weather is, ultimately, an allocation of commercial risk. If it rests on the contractor they will, in an ideal world, have tried to factor it into their price. With margins as tight as they are at the moment, few can afford that luxury.

#### What does the contract say?

If the contract simply doesn't say anything about adverse weather, then in most cases adverse weather is a matter of contractor's risk. The contractor will have an uphill struggle to persuade the employer they should be entitled to loss and expense or, if there is a fixed completion date, an extension of time. However, if there is no fixed time, adverse weather should clearly be taken into account when considering if the works were undertaken in a 'reasonable' time.

#### JCT or NEC contracts

If they have contracted on the JCT or NEC forms then adverse weather is catered for, albeit in different ways. The following summarises the 'default' position if the contract has not been subject to amendment to reallocate (or share out) the risk.

Under JCT a contractor is entitled to an extension of time for "exceptionally adverse weather conditions", but not to loss and expense. Whether conditions are "exceptionally adverse" is a matter of subjective judgment, although using meteorological data for previous years in that area at that time of year will assist.

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#### From the Editor

Welcome to the February 2011 edition of Construction Law, Thomson Snell & Passmore's newsletter highlighting some key issues relating to those involved in the construction industry.

If you would like further advice on any of the issues covered please contact Chris Kirby-Turner.

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NEC provides specific criteria for weather conditions to apply. Such conditions must not have occurred more frequently on average than once every ten years. Given the most recent problems have occurred at least three times in the last two years, at some stage similar weather may not bring the entitlement to an extension of time.

### Summary

Check the terms of your contract carefully, particularly any amendments to the standard forms - some employers may have deleted adverse weather as a "relevant event".

It is also very important to check provisions for notifying a claim to ensure that it does not become time-barred. In the NEC, if notification is not given within eight weeks of the contractor actually becoming aware or when they could reasonably have become aware, the entitlement to claim is lost. ■

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## Honesty is the best policy

The Court will rectify a unilateral mistake in a contract where the behaviour of the party benefiting from it is dishonest or unconscionable.

Parties will put at risk a commercial relationship if they fail to act honestly and reasonably to establish whether there has been a mistake.

In 2008 HW Construction ('HWC'), in preparing a tender for a business centre, invited Traditional Structures ('TS') to tender for the supply and installation of structural steel work and roof cladding. On page 3 of TS's tender under the heading "prices", TS submitted separate prices for steel works (c£38K) and cladding (c£32K).

Unfortunately the version sent to HWC omitted the last line containing the cladding price. HWC were awarded the contract and two months later TS sent revised prices for the two elements totalling c£77K. HWC protested stating that the original tender price was c£38K.

TS referred the matter to Court claiming mistake and seeking payment on two grounds:

1. there was a concluded contract and under s15 of the Supply of Goods and Services Act a reasonable price would be paid for the cladding; and
2. TS sought rectification for a unilateral mistake. HWC said it had received the tender containing one price which it had accepted for the whole of the work.

The Court found for TS on both grounds.

The Judge applied the test for rectification established in **Thomas Bates -v- Windhams**

and found that HWC's behaviour showed actual knowledge of the mistake as they would have known or appreciated a mistake had been made.

The Judge stated that if HWC's managing director had been an "honest and reasonable man" he would have immediately spotted the error - his behaviour was unconscionable and went "beyond the boundaries of fair dealing, even having regard to the fact that the parties here were involved in an arms length commercial transaction".

### The moral

If one contracting party turns a blind eye when an obvious mistake has been made by the other, they cannot rely on the excuse of dealing at arm's length.

Parties will put at risk a commercial relationship (and in this case it had been a long standing one) if they fail to act honestly and reasonably to establish whether there has been a mistake.

In this particular case £34,754.17 was agreed by both sides as a reasonable price for the cladding - the costs of this case would have far exceeded that figure.

## Thomson Snell & Passmore advises Gravesham Borough Council

We have recently advised Gravesham Borough Council on the development of the first new Council houses in Gravesend for 16 years.

“I have no doubt that this type of regeneration will bring benefits to the local community.”

Councillor Anthony Pritchard

Lead Member Housing for Gravesham Borough Council

“To obtain funding in the current economic climate was particularly rewarding.”

The project will see five new Council homes constructed and previously vacant land put to good use. The new homes will be allocated to applicants on the Council’s waiting list who are in need. The Council’s Housing Strategy and Development Department worked hard to access Central Government funding earmarked to enable small sites to be put to residential use. To obtain funding in the current economic climate was particularly rewarding. The necessary funding is being provided by the Homes and Communities Agency under a grant agreement. Construction commenced in November 2010 and will complete in October 2011.

Russet Homes, a local housing association which is part of the Circle Anglia Group is providing development services to project manage and deliver the scheme for the Council.

In conjunction with the Council’s Housing Strategy and Development and in-house legal departments, we were involved in the development agency and grant agreements as well as the various construction agreements. The Thomson Snell & Passmore lawyers were Richard Ellard, a partner in the Commercial Property and Development team and Chris Whittington, a partner and Head of the Construction & Engineering team. The Council team included Sarah McEwan, Principal Legal Assistant, and Sharon Donald, Housing Strategy and Development Manager.

Richard Ellard said: “We are delighted to work with Gravesham Borough Council and to have been able to assist the Council in bringing to fruition this important project, which will lead to the regeneration of a disused site in Northfleet into much needed social housing.”

Councillor Anthony Pritchard, Lead Member Housing for the Council said: “I am pleased that the Council has been able to secure funding for this important project given the very challenging economic climate, and particularly the substantial cut just announced in government funding.

I have no doubt that this type of regeneration will bring benefits to the local community and I am delighted to have Thomson Snell & Passmore advising the Council on the negotiations and drafting the complex documentation. It was reassuring to have Richard and Chris supporting us on this important project. Thomson Snell & Passmore provided a high level of service and we thank them for their contribution.”



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A recent Court of Appeal judgment has provided some relief to companies contracting with public bodies on disclosure of commercially sensitive information.

## Freedom reined in

Under the Freedom of Information Act ('FoIA'), government bodies such as local authorities must disclose all contract details if requested, except when it is genuinely confidential. If contractors are tendering on a competitive basis, this can give a significant edge to rivals next time round.

The Environmental Information Regulations ('EIR') operate similarly with regard to waste-processing and other environmental matters.

The public interest in having contract details disclosed has often outweighed commercial confidentiality in decisions on FoIA or EIR applications. However in **Veolia vs Nottinghamshire Council**, the Court of Appeal dealt with an application under the Audit Commission Act ('ACA') by a local protestor regarding the construction of a waste-to-energy plant. It upheld the reasoning of the information commissioner who had dealt with an application under the EIR made by the same individual in relation to the same facility.

On this occasion the information commissioner had felt that public interest in the disclosure of commercially sensitive information (such as profit and cost recovery from selling by-products) was outweighed by the need to keep such matters confidential in appropriate circumstances, which these were deemed to be. The Court, confirming the commissioner's position, stated that there was a "strong public interest in the maintenance of valuable commercial confidential information" loss of which would be "potentially anti-competitive". The court further held that there was no disclosure of confidential information required under the Public Procurement Regulations.

These principles are likely to apply to future applications under the FoIA and the EIR as they have to the ACA, which will no doubt come as good news to companies contracting with public authorities.

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## News update

We are pleased to announce the launch of our new fixed price legal services, which we hope you will find a valuable addition to our [existing offerings](#). They are part of our commitment to being proactive players in, and not mere advisers to, your project team.

These services include:

- fixed price '[health checks](#)' of commercial construction contracts
- fixed price in-house '[contract clinics](#)' to discuss issues of concern or key importance affecting current projects
- fixed price '[problem project reviews](#)' to advise you of your position, options available and our recommendations for moving forward.

For further information, please contact [Chris Whittington](mailto:chris.whittington@ts-p.co.uk) (chris.whittington@ts-p.co.uk; 01322 623706) or [Chris Kirby-Turner](mailto:chris.kirby-turner@ts-p.co.uk) (chris.kirby-turner@ts-p.co.uk; 01322 623705).



Although this newsletter highlights some key issues relating to construction law, it should not be considered comprehensive and is not a substitute for seeking professional advice on a specific issue.