

Construction Law

IN THIS ISSUE: 1 Termination - the nuclear option. 2 Using the courts as a last resort. 3 Competition law compliance: how well prepared is your business? 4 Case study - negotiations with liquidator of specialist supplier. Construction & Engineering team news update.

Termination - the nuclear option

Clients are increasingly seeking advice on termination. This is often because contractors losing money have stopped work or employers are failing to pay. However termination is a drastic step with serious consequences if you get it wrong.

Three key issues are:

- 1) can I terminate?
- 2) how?
- 3) what if I get it wrong?

1. Check what your contract says

A standard form construction contract (e.g. a JCT form) will include specific termination rights to apply in the case of both the contractor's default (failure to meet the obligations of the contract), e.g. failing to progress the works, and the employer's failure (e.g. failure to pay).

If the type of default is specified in the termination provisions of your contract then you can terminate, as long as you follow the correct procedure.

Whether or not there are specific termination provisions within the contract, the aggrieved party can terminate the contract for 'repudiatory breach' by written notice. This can happen if either party shows it has no intention to continue to be bound by the contract (e.g. if the contractor just downs tools, or the employer throws the contractor off site, without contractual justification).

2. Follow the method specified in the contract exactly

The JCT Standard Building Contract 2005 for instance, requires two separate notices to be sent:

- I. the first sets out the ground(s) for termination and gives seven days to remedy the breach of contract;
- II. in default a second notice can then be issued terminating the other party's employment. Note any agreed methods of serving the notices, and particularly by whom they must be served.

↓ Continued on page 2.



From the Editor

Welcome to the November 2010 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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If you get it wrong, the financial consequences could be severe, so only terminate having considered the position carefully and taken proper advice.

➔ Continued from page 1.

In the case of a contractor's breach of the JCT Standard Contract, the first notice must be served by the architect/contract administrator. The second notice must be served by the employer.

Pay careful attention to any specified time limits and note what constitutes a day - in the JCT form public holidays do not count but weekends do.

3. If you do not follow a method specified in the contract, then any termination is likely to be wrongful and therefore invalid

You are also likely to be in repudiatory breach entitling the other party to terminate and claim damages. For a contractor, damages will be essentially his or her loss of profit on the work they cannot now finish. For an employer the

damages would be the extra cost over what it would have cost if the contractor had completed in accordance with the contract.

Summary

Read the contract and check for any bespoke amendments. Also read any notice clauses - make sure you know who must send which notice and to whom; and calculate time periods with great care. Be clear of your ground(s) for termination. If you get it wrong, the financial consequences could be severe, so only terminate having considered the position carefully and taken proper advice. ■

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Using the courts as a last resort

Amid controversial government plans to close 54 county courts in England and Wales, the effectiveness of the out of court routes is in sharp focus.

With careful thought to each situation, disputes can be handled more effectively and imaginatively than ever before.

The construction industry is relatively well catered for already, the Technology & Construction Court having led the way with innovative measures that are likely to be adopted in other areas.

The first key measure is the Pre-Action Protocol for Construction & Engineering Disputes. This is a process which parties must follow before issuing court proceedings (providing there are no limitation issues). It requires each side to set out fully its legal and factual position, so each party can understand their opponent's position. It goes significantly further than the general protocol by requiring the parties to meet on an off the record basis, to see if the points in dispute can be narrowed, or a global deal reached. The contents of that meeting remain off the record and cannot be brought to the Judge's attention, until he or she has made their decision (they might take them into account when dealing with legal costs).

Mediation

One form that these meetings can take, which is increasingly popular, is a mediation. Here, a neutral third party is appointed as a mediator, to facilitate off the record negotiations. He or she will not have any power to make a decision, but they can discuss matters with each side individually, to try and see if there are issues of common ground or compromise that can be used to bring the parties closer together, or do a deal.

Adjudication

Another very important option that is available for most construction disputes is adjudication. This is very much a rough and ready remedy, which was designed with the express objective of keeping cash flow moving in the industry. It is a radically slimmed down version of litigation, usually not even involving a hearing, and generally deals with much narrower issues. This enables the process to take place within as little as 28 days, so providing a much quicker and potentially more cost effective way of resolving disputes than would be available in the courts. Whilst not suitable for every occasion, its speed and relative simplicity mean it has been broadly, and warmly, welcomed by the industry.

Summary

The inevitable downside of all of these processes is that where they are not successful they can lead to more time and resources being expended than if the parties had gone straight to the courts. However, with careful thought to each situation, disputes can be handled more effectively and imaginatively than ever before. Future reforms should seek to ensure that the alternative options tie in as much as possible with the court proceedings, to remove the risk of duplication, and to ensure there is no disincentive to actively and fully pursuing the less formal routes.

Competition law compliance: how well prepared is your business?

With the risks of infringing competition law ever more serious for businesses and for individuals the OFT's latest guidance on compliance could not be more timely.

The latest OFT guidance offers an opportune moment for businesses to consider or review their own internal compliance procedures and training.

The construction sector in recent years has had its share of issues and difficulties in the competition law area. In late 2009 the Office of Fair Trading (OFT) concluded its long-running investigation into bid-rigging in the construction industry imposing fines totalling over £129 million on 103 construction firms. 86 of those firms received reductions in their fines because they admitted infringements. 25 firms have since lodged appeals. Around the same time the OFT also fined six recruitment agencies a total of over £39 million for price-fixing and collective boycott in the supply of candidates to the construction industry.

Whatever the ins and outs of a particular case, the fact is that the penalties for competition law infringements are damaging not just in financial terms (fines, the cost of legal proceedings and diverted management time) but also in reputational terms with the public and with customers. An infringement finding can also generate a long tail of damages claims from alleged victims.

Cartels are viewed as the most serious infringement of competition law and the OFT has waged a tireless campaign against them. Going hand in hand with the high level of fines on companies and the threat of criminal prosecution of individuals, the OFT's principal tool for uncovering unlawful cartels has been its leniency programme. The programme encourages 'whistle-blowing' by cartel members in exchange for immunity from fines and prosecution for themselves and their employees. However, away from its enforcement role, the OFT has also been championing education and compliance as a way for companies to protect themselves against the consequences of infringing competition law. It is currently consulting on new draft Guidance aimed both at companies (How Your Business Can Achieve Compliance) and at individual company directors (Company Directors and Competition Law).

Time for a review?

With competition law occupying a higher and

higher position among compliance priorities, the latest OFT guidance offers an opportune moment for businesses to consider or review their own internal compliance procedures and training. TSP's experienced competition law team is well placed to advise businesses in the construction sector on all questions relating to compliance with the law, introduction or review of compliance manuals and programmes, and all associated training.

Guidance for companies

The guidance for companies, derived from a survey to which numerous businesses contributed, sets out a recommended risk-based, four-step process for introducing a culture of compliance within a business, including endorsement for practical compliance measures that a company might undertake in terms of training and policy.

Guidance for directors

The guidance for company directors explains the level of understanding of competition law that directors are expected to have as well as steps that they should be taking to detect and prevent breaches of the law. The backdrop to this is the OFT's stated intent to make more use of Director Disqualification Orders to deter anti-competitive behaviour, not just against directors who actively participate in unlawful behaviour but also against those who ought to have known or against those who might be said to have turned a blind eye.

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Chris Kirby-Turner acted as lead lawyer for a specialist roofing contractor in relation to a very urgent matter caused by our client's supplier of York stone going into liquidation.

Case study - negotiations with liquidator of specialist supplier

The stone supplier went into liquidation having only supplied the first consignment of specially cut York stone that was to be used on the roof terraces of a major development in London.

The stone slabs were to a bespoke specification for the job, in order to comply with the particular technical performance requirements. Securing an alternative supply of stone would have basically required the manufacturer to go back to the drawing board, and could potentially have caused several months of delay to a major construction project.

We were instructed by our client immediately upon the stone supplier going into liquidation, and entered into negotiations and dialogue with the liquidator to seek to secure the supply of the stone. In the event, it became clear that the supplier had not, as it had always claimed, obtained or cut the remaining consignments of the stone.

However, we were able through enquiries of various other third parties (including the owner of the stone supplier's yard and the haulier) to obtain details of the quarry from which the stone had come. Our client was then able to contact them direct, and make arrangements for the remaining stone required to be produced as an urgent special order, therefore considerably reducing the potential delay and expense that would have arisen had our client had to go to an entirely new source.

Our client was left in an incredibly difficult position by events completely outside its control, but of course commonplace in the current difficult market. Whilst the legal answer was not palatable or capable of furthering our client's immediate need, we were able to assist them in finding the best available practical solution to the problem, to improve their position as far as possible.

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News update

The Construction & Engineering team continues to grow and receive national recognition for its achievements, having recently climbed to tier two in the recently published independent national legal directory, The Legal 500. In addition, Chris Whittington, Head of the Construction & Engineering team, has been recognised in the 2011 edition of Chambers legal directory as a leader in the field of construction law. He is praised for providing "practical, common-sense advice, which is an asset in trying to reconcile the wishes of various parties".

We are delighted to welcome Su Sharma to the team. Su joins us as a consultant, having worked for Skanska UK PLC from 1993 advising primarily on projects based in the Square Mile, and brings further invaluable expertise to our team. For Su's full profile, please visit www.ts-p.co.uk/our-people.

For a copy of our current Construction & Engineering team sheet, with contact details for the lead lawyers and a fuller description of our full range of contentious and non-contentious services, please email Chris Whittington on chris.whittington@ts-p.co.uk.



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.