

BEWARE THE SET-OFF

An adjudicator will generally be required to consider any defence to a claim whether or not it has been previously raised by the responding party. A difficulty arises when a responding party relies on a counterclaim and one of the following requirements is satisfied: (1) no withholding notice is necessary for the sums sought by the responding party by way of counterclaim or (2) a withholding notice is necessary and a valid notice has been issued in respect of the sums sought in the counterclaim. In the recent 2009 case of *Letchworth Roofing Company v Sterling Building Company*, it was decided that if an adjudicator concludes that no withholding notice was required, or that one was required and was validly issued, then he must take the cross-claim into account when coming to a decision. (This is slightly different from the situation where a court is asked to set off against each other two separate adjudicator's decisions.)

ONE IN THE NET

Restricting liability for personal actions and substantially lowering professional indemnity premiums are two reasons why consultants like to have a Net Contribution Clause in their appointments. The insertion of such a clause was recently challenged in the recent Scottish case of *Langstane Housing Association v Riverside Construction Limited* and others. Lord Glennie held that there was no exclusion or restriction of liability which would fall foul of the Unfair Contract Terms Act 1977. Even if he was wrong, Lord Glennie did not regard the clause as unusual or onerous and consequently he found it to be fair and reasonable. In his view, employer risk of possible insolvency of those who they choose to appoint was not unfair, especially since it was a risk that could be covered by insurance.

A LOOPHOLE IN THE LAW FOR TERMINATION?

Can an employer rely on the variation clause to terminate a contract, without being liable for breach of contract? It would appear from the case of *Abbey Developments v PP Brickwork*, that he cannot. The judge concluded that in a labour-only sub-contract the variation clause was to alter the scope of the work to meet the employer's requirements.

It was held that although no rule of law prevented an omission from being interpreted as termination, any contract would have to provide for such a situation, especially since the effect is to remove the rights of the contractor.

Going forward, contractors may wish to consider carefully the contents of all specific contract amendments that employers make.



SEND THE INVOICE, OR SUFFER THE LOSS

This is the message to be taken from a recent case concerning interest on late payment in construction contracts.

The Late Payment of Commercial Debts (Interest) Act 1998 provides that interest can start to accrue from the day on which a claim for payment is made if (1) the parties' underlying contract is silent on interest or (2) does not provide a "substantial remedy" for late payment. In the case of *Ruttle Plant Hire Limited v DEFRA*, Ruttle raised invoices which contained errors.

In the leading opinion of the Court of Appeal, the judge said that it was important to consider the provisions of Section 4(5)(b) of the Act which state that the 'relevant day' (ie on which interest starts to run) is the day on which the purchaser had notice of the amount of the debt "or the sum which the supplier claims is the amount of debt". Lord Justice Jacob held this anticipates that the supplier may issue an invoice with what it considers to be the amount due, which is then subject to revision.

This decision will prevent employers from taking advantage by relying on inaccuracies within invoices to delay payment while avoiding payment of the statutory interest.

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EDITORIAL

Hello, and welcome to this Autumn's Inside Construction.

While many of us will have had the opportunity to take a break and recharge over the summer period, the courts have been busy and a number of interesting cases have been litigated. This edition of Inside Construction includes a round-up of key outcomes.

Also in this issue we look ahead to the potential implications of the Equality Bill (scheduled for implementation next year), and European procurement issues which may be triggered by changing trends in the drafting of development agreements.

Finally, we shine a spotlight on possible contractual approaches to swine flu: with predictions that significant numbers of the population will be struck down by the second wave of the virus in the final months of the year, do your contracts provide sufficient flexibility to enable your projects to be delivered on time and within budget?



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DEVELOPMENT AGREEMENTS IN PUBLIC PROCUREMENT LAW

Agreements for the development/regeneration of land made with the public sector are increasingly subject to public procurement law. Last month the European Commission launched an investigation into a contract between the City of York Council and developers relating to the residential development of a piece of land known as "Ostbaldwick". The UK has accepted that the development agreement should have been tendered out in accordance with EU rules. It remains to be seen what will become of the Ostbaldwick agreement but the European Commission has made it clear that such a direct award of a development contract is not compliant with public procurement law.

Developers need to be aware that many traditional development agreements are now subject to the rules of public procurement.

Here are some warning signs that you need to look out for:

- the local authority has a level of involvement in the specification in the proposed development (depending on the degree and purpose of the involvement);
- the local authority is to contribute financially to the scheme or bear some risk in the development;
- the local authority is to have elements of the scheme transferred to it;
- the local authority is seeking occupational rights or nomination rights (e.g. in relation to housing schemes).

A development agreement that has not been publicly tendered may be cut short or a rival developer may seek damages from the public sector. The introduction of the new Remedies Directive later this year will mean costs of getting it wrong are even greater for the public sector and developers alike.



SWINE FLU – CAN WE CONTRACT OUT?

As swine flu sweeps the nation, Inside Construction wonders "is this something we should be thinking about in our contracts"? With swine flu being very much in the public eye, it is growing increasingly unlikely that the potential impact of swine flu (i.e. the inability to meet your contractual obligations) could be said to be an unforeseeable event. You may wish to consider whether your contract has contingency provisions such as alternative sources of labour or materials or perhaps amending the force majeure clause to include swine flu. And, of course, "catch it, bin it, kill it" in your workplace!

PUBLIC PROCUREMENT ASPECTS OF THE EQUALITY BILL (KATIE DOUGLAS)

On 11 June 2009 the Government Equalities Office opened a consultation on the public procurement aspects of the draft Equality Bill. One of the proposed duties on public bodies is to ensure that public procurement in Scotland, England and Wales fosters the Bill's equality objectives.

The Bill, which is scheduled to come into force in 2010, will require public authorities to evaluate and publish their equality objectives, policies and performance. Of concern for private sector businesses is the requirement that public authorities extend this to their procurement methods. In its simplest form, this would require public authorities to consider tenders in light of their equality objectives, which would likely result in closer examination of a contractor's equality criteria. Typically, this might require the contractor to demonstrate that they have in place processes such as equal opportunities training, flexible working arrangements and that they analyse actions taken in relation to equality monitoring etc.

If the Bill is implemented in its strictest form it will require standard terms in public sector contracts and require contractors to demonstrate their compliance with the public body's equality objectives and obligations. An example of how these obligations might impact on contractors is demonstrated as follows: in the construction of a school in an area where a large number of middle-aged people are unemployed due to the recent closure of a mine, the public body could require the contractor to implement a program undertaking to train local people over the age of 50 in plumbing, welding and other skills associated with the school's construction. This would clearly result in significant additional administrative and financial burdens on private sector companies dealing with public sector contracts.

In order to manage and prepare for these anticipated obligations, contractors should start by looking at their own equality criteria now, and watch out for public bodies' local area plans and equality statements. Even if the government changes, contracting arrangements with public bodies are still likely to change in the near future.

The Government Equalities Office is seeking representations on:

- which public authorities the Bill should apply to;
- which general and specific duties should be covered;
- what measures should be imposed on public authorities for publishing and achieving equality goals; and
- which public bodies will be required to use procurement to contribute to delivery of their equality objectives.

Responses to the consultation are due to the Government Equalities Office by 30 September 2009. The consultation and pro forma response are available from www.equalities.gov.uk.

PUBLIC AUTHORITIES TO EVALUATE AND PUBLISH THEIR EQUALITY OBJECTIVES, POLICIES AND PERFORMANCE

