

Essential Construction Law Update

9 November 2017

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The logo consists of a dark blue oval with the word "Building" written in white, bold, sans-serif font inside it. The oval is centered within a white square.

Building

Topics

- BIM
- Brexit
- Adjudication Update
- Questions

BIM: the need for contractual clarity, transparency and uniformity

A decorative graphic on the right side of the slide consists of numerous teal-colored lines of varying lengths and orientations, creating a sense of movement and depth. The lines are arranged in a way that suggests a stylized, abstract architectural or structural form, possibly representing a building's facade or a complex network of data.

What is BIM?

"The BIM system is building information modelling. It comprises a software system which is intended to assist the design, preparation and integration of differing designs and different disciplines for the purposes of adequate and efficient planning and management of the design and construction process."

Mrs Justice O'Farrell
Trant Engineering Ltd v Mott MacDonald Ltd

What is Common Data Environment (CDE) ?

CDE:

“a central repository where construction project information is housed. The contents of the CDE are not limited to assets created in a ‘BIM environment’ and it will therefore include documentation, graphical model and non-graphical assets...”

The NBS

The coordinator of the CDE provides codes or passwords to the platform, allowing access for those parties entitled to it.

Trant Engineering Ltd v Mott MacDonald Ltd

- Fee dispute;
- Mott MacDonald denied Trant access to the servers hosting the design data by revoking the passwords that had been issued to Trant;
- Trant argued that without restoring access to the relevant database on ProjectWise, the project could not be progressed. Trant would be forced to start the project over again, losing a year of progress; and
- The TCC considered that the balance of convenience lay firmly in granting an injunction compelling Mott MacDonald to make the design data available;

BUT

- The TCC also ordered Trant to make payment into court of £475,000, pending final resolution of the dispute. It was fair and reasonable that Trant should put up the money in respect of a sum that was invoiced and in respect of which it failed to issue a payment notice.

Securing access to data

- Careful consideration should be given to the identity of the CDE coordinator and the terms on which each participant has access to the data;
- Is taking the approach that the employer should safeguard the progress of the project and control the CDE, the most efficient way of working? Is it possible given the employer's resources and capabilities?
- In order to avoid bringing the project to a halt when disputes arise, parties should consider putting in place procedures for alternative access to back-up copies of the data needed for the project; and
- Can this be done in a BIM Protocol?

New Contracts in 2016/2017: JCT Design & Build 2016

- “BIM Protocol” to be agreed between the parties and shall be treated as a Contract Document. Not the CIC Protocol and not drafted by the JCT;
- The Design Submission Procedure for Contractor’s Design Documents should be as specified in the BIM Protocol;
- Employers should check whether the BIM Protocol obliges them to provide the Contractor with any information within a set timeframe as complying with such timeframes is now a contractual requirement (see clause 2.7.2);
- Contractors must ensure that any sub-contract provides for the sub-contractor to supply and grant all reasonably necessary information and licences required by the BIM Protocol (see clause 3.4.3); and
- No amendment made to clause 2.38 which deals with copyright and use of the Contractor’s design Documents. Therefore, unless dealt with in Protocol copyright licence of BIM data/information may not be covered.

The NEC3 Guide: *How to use BIM*

- Use the CIC BIM Protocol;
- Incorporate the technical requirements into the Works Information;
- Use the Z-clauses to deal with any rights and liabilities to be found in the protocol;
- Consider additional compensation events; and
- Use of X12 (Partnering).

NEC4:

- “Information modelling”;
- No Guide;
- No reference to CIC Protocol;
- Includes a new secondary option, X10 to provide: “*the additional contract clauses required to support the production of information for BIM*”; and
- Contractor required to provide an Information Execution Plan for incorporation in the contract either from the outset, or within a period defined by the Client.

New Contracts in 2016/2017: FIDIC

FIDIC: 2nd Edition of Rainbow Suite due out in December 2017:

- The second edition is silent on BIM;
- Under review by Contracts, Capacity Building and Business Practice committees;
- Particular attention must be paid to the Employer's Requirements; and
- Likely position: consider including a BIM Protocol together with a BIM Execution Plan.

Framework Alliance Contract:

- Intended to be compatible with any combination of standard form project contract conditions, including NEC, JCT and FIDIC;
- A multi-party BIM protocol?
- Encourages early employer, contractor and supplier involvement;
- Creates direct relationships between project team members in relation to BIM;
- BIM seeks to integrate the work of the various team members and the learning gained from other projects;
- Enables mutual reliance on agreed deadlines in respect of BIM contributions and approvals;
- Creates an agreed forum for resolution of clashes between BIM models;
- Direct mutual intellectual property rights; and
- Provides for joining agreements to bring in extra team members.

New Contracts in 2016/2017: issues to consider

- Different contracts use different terminology;
- Different contracts promote different Protocols or no Protocols at all;
- Does the Protocol have priority over other Contract documents?
- Clarity about the status of documents that enable BIM;
- Agreement of deadlines and interfaces in respect of submission and approval of design information and other data;
- Agreement of copyright and intellectual property rights;
- What are the responsibilities of the BIM Information Manager; and
- How can you achieve early contractor, sub-contractor and manufacturer involvement.

Need for consistency, clarity and collaboration

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The construction &
energy law specialists

Brexit

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Brexit

- What just happened?
- Implications from a construction law perspective;
- Implications on the UK construction industry; and
- Can I Brexit-proof my construction contract?

Brexit – a timeline

- 23 June 2016 – UK votes to leave the EU (51.9% / 48.1%);
- 24 June 2016 – David Cameron resigns as prime minister;
- 11 July 2016 – Theresa May becomes prime minister elect;
- 24 January 2017 – Supreme Court rules that parliamentary approval needed before Article 50 can be triggered;
- 29 March 2017 – UK formally triggers Article 50;
- 8 June 2017 – UK General Election results in a hung parliament;
- 22 September 2017 – Theresa May’s keynote speech in Florence puts forward a proposal to postpone a ‘full’ Brexit until 2021;
- 1 November 2017 – Government pressured into releasing secret Brexit studies assessing the impact on construction in the UK;
- 2 November 2017 – Bank of England raises interest rates from 0.25% to 0.5% - the first rate rise in over a decade; and
- European Council (Art. 50) guidelines for Brexit negotiations: “*nothing is agreed until everything is agreed*”.

Implications on UK law

- No immediate changes in UK law;
- European Union (Withdrawal) Bill shall repeal the 1972 European Communities Act;
- All existing EU legislation will be copied across into domestic UK law “*wherever practical*” to avoid a “*black hole in our statute book*”;
- Parliament shall then “*amend, repeal and improve*” the laws as necessary;
- House of Commons library - “*potentially one of the largest legislative projects ever undertaken in the UK*”; and
- The Government’s White Paper indicates that the corrections will require between 800 to 1000 statutory instruments.

Implications on UK construction law

Brexit is likely to have a limited impact on UK construction law:

- Housing Grants Construction and Regeneration Act 1996 as amended by the Local Democracy Economic Development and Construction Act 2009;
- Supply of Goods and Services Act 1982 / The Unfair Contract Terms Act 1977;
- Health and Safety at Work Act 1974 / Corporate Manslaughter and Corporate Homicide Act 2007;
- Construction (Design and Management) Regulations 2015;
- Public Contracts Regulations 2015; and
- Common law and equity shall remain intact!

Implications on UK construction law

However, Brexit will impact contractual negotiations and parties' appetite for taking on risk as market conditions change

IHS Markit/CIPS UK Construction Purchasing Managers' Index:

“Growth in the construction sector was largely confined to house building, which partly offset lower volumes of civil engineering and commercial activity. Yet, business confidence for the next 12 months fell to the lowest since December of 2012 mainly due to concerns about UK economic prospects and a lack of new projects in the pipeline.”



Implications on the construction industry **FENWICK ELLIOTT**

Workforce

- Free movement of labour a major asset to UK construction;
- 12% of construction workers from overseas; and
- RICS – a lack of an adequate workforce is the primary risk to a £500 billion pipeline of projects.

Currency fluctuations

- An unpredictable market;
- Weak pound has temporarily boosted FTSE 100;
- Impacts on profitability due to the increased cost of imports; and
- Creates cost uncertainty.

Goods and Materials

- 64% of construction materials used in UK imported from the EU;
- 63% of construction materials exported from the UK go to the EU; and
- Concerns over the accessibility and affordability of materials.

Implications on the construction industry

Funding

- UK has been one of the biggest net beneficiaries of EU funding (HS2/Crossrail);
- European Structural Investment Fund / European Regional Development Fund;
- An opportunity for foreign investment?
- Tightening of lending criteria?

Brexit uncertainty

- Leads to a lack of market confidence;
- Risk of projects becoming delayed / shelved;
- It is essential for UK construction to be seen as a sound investment; and
- What is on the Government's agenda in negotiations for construction?

Brexit-proofing my contract...

Neither JCT 2016, NEC4 or FIDIC 2nd Editions expressly mention 'Brexit'

Brexit clauses:

- Absent a suitable express reference to Brexit, the market view and case law suggest that *force majeure* clauses / frustration arguments are unlikely to assist;
- Allocation of Brexit related risk:
 - Changes in law;
 - Fluctuations in the cost of materials, taxes, shortage or unavailability of labour and/or import duties.
- Major difficulty is not risk allocation, but interpreting these risks, managing them and pricing against them; and
- What is a foreseeable change?

Brexit-proofing my contract ...

Further considerations:

- Is a right to 'walk away' / terminate required?
- Is this the end of fixed price lump sum contracts where the Contractor takes all risk?
- What is the duration of the project programme?
- Increased potential for disputes?

Adjudication Update



Payment notices & “smash and grab” adjudications

What constitutes a valid payment and pay less notice?

“If a contractor wishes to have the benefit of the interim payment regime such as that contained in the Contract, then its application for interim payment must be in substance, form and intent an interim application stating the sum considered by the contractor as due at the relevant due date and it must be free from ambiguity.”

Jawaby Property Investment Ltd v The Interiors Group Ltd

[2016] BLR 328

“There is a high threshold to be met by any contractor who seeks to take advantage of these provisions whereby a sum automatically becomes payable if a timely employer's notice is not served.”

Surrey and Sussex Healthcare NHS Trust v Logan Construction (South East) Ltd

[2017] EWHC 17 (TCC)

Payment notices & “smash and grab” adjudications

What constitutes a valid payment and pay less notice?

“Instead, on a broader level, the overall message and purpose conveyed ... was that, if he was wrong about the contractual position, the Contract Administrator was valuing the work on the same basis as had been set out in detail in the Final Certificate and accompanying breakdown and that this was the only sum to which the contractor was entitled whether by way of final account or by way of interim payment.”

Surrey and Sussex Healthcare NHS Trust v Logan Construction (South East) Ltd
[2017] EWHC 17 (TCC)

Payment notices & “smash and grab” adjudications

What constitutes a valid payment and pay less notice?

“From none of the information provided could the reasonable recipient work out the basis on which the zero sum figure was calculated. There is no calculation put forward which would allow the reasonable recipient to understand how that figure is arrived at. There is no specification which would allow the reasonable recipient to make any sense of the figure arrived at. The defender sets forth no figures and thus no basis substantiating the zero sum figure...upon which it relies.

...It amounted to no more than saying the sum retained is not a large one and given the number and nature of problems founded upon in the PLN the cost of remedying these would clearly amount to a figure well in excess of the retained sum and thus a basis for the zero sum figure was provided. That is not providing a basis for the figure.”

Muir Construction Ltd v Kapital Residential

[2017] CSOH 132

Oral contracts

“I regret very much the time and cost that has been wasted on this process, which I consider to be due to the amendments to the 1996 Act. As originally enacted, the 1996 Act would not have permitted this dispute to have been progressed in this way, because Section 107 ensured that it was only when the contract was in writing that adjudication provisions were incorporated. That provision was designed to promote certainty. Section 107 was, in my view, unthinkingly repealed, meaning that (as here) adjudicators have now to grapple with entirely oral contracts, with all the uncertainty and contention that such a situation can engender...in this case, the result of the repeal of section 107 has been a process lasting 16 months and the incurring of large sums by way of costs. That is the opposite of the quick, cheap dispute resolution service that adjudication was intended to provide.”

RCS Contractors Ltd v Conway
[2017] EWHC 715 (TCC)

Can a successful party recover the costs of an adjudication?

MAYBE:

- Recovery of adjudication costs as a debt under the Late Payment of Commercial Debts (Interest) Act 1998;
- *Lulu Construction Ltd v Mulalley & Co Ltd*, [2016] EWHC 1852 (TCC);
- In its adjudication rejoinder, Lulu included for the first time a claim of £48k for “*debt recovery costs*” claimed under the Late Payment Act;
- The adjudicator awarded Lulu its debt recovery costs;
- Mulalley said that the claim for debt recovery costs was not within the scope of the referral. The Judge disagreed, finding that the costs were clearly connected with and ancillary to the referred dispute and must properly be considered part of it;
- Therefore the adjudicator had jurisdiction to decide that element of the dispute; and
- The case is NOT authority for the idea that adjudication costs can be recovered under the Late Payments Act.

Can a successful party recover the costs of an adjudication?

NO:

“In “an ordinary case”, a party seeking to recover a sum awarded by an adjudicator is not entitled to (and cannot seek) the legal costs it incurred in the adjudication itself.”

WES Futures Ltd v Allen Wilson Construction Ltd [2016] EWHC 2863 (TCC)

Can a successful party recover the costs of an adjudication?

NO

- Section 5A of the Late Payment Act which implies a term into a contract that a successful party is entitled to its reasonable costs of recovering a debt; and
- Section 108A of the Construction Act which says that the costs of an adjudication can only be awarded where such a provision has been made in writing.

Whilst Enviroflow was entitled to seek its reasonable costs by the implied term under section 5A of the Late Payment Act, such an implied term was caught by section 108A of the Construction Act and was therefore ineffective unless agreed in writing.

Enviroflow Management Ltd v Redhill Works (Nottingham) Ltd

[2017] EWHC 2159 (TCC)

What about an adjudicator's costs? Do you have to pay?

“where reasonableness is in issue then...the court should adopt a robust approach ...allowing the adjudicator a considerable margin of appreciation, given the circumstances in which adjudicators have to work; namely working at speed and under pressure from the parties in circumstances trying very hard to get it right in often challenging circumstances in a way which is as fair to both parties as can reasonably be expected....the court should be careful against considering the reasonableness of the time taken by reference only to the bare bones of the decision rather than the process which led to that result or with the generous benefits of hindsight....

It seems to me that the detail and complexity of the adjudication entirely justified the amount of time which was taken and I see no basis for criticising that either.”

*The Vinden Partnership Ltd v Orca LGS Solutions Ltd & Anor [2017]
EWHC B24 (TCC)*

Government consultations on Construction Act and Retentions

- Launched by BEIS on 24 October 2017.
- Replies to be submitted by 19 January 2018;
- With the adjudication consultation, the focus is on:
 - Increasing transparency in the exchange of information relating to payments;
 - Encouraging the use of adjudication, where appropriate; and
 - Strengthening the right to suspend performance.

Most of questions relate to the costs and effectiveness of adjudication as well as the payment framework.

Government consultations on Construction Act and Retentions

Retentions: Pye Tait research;

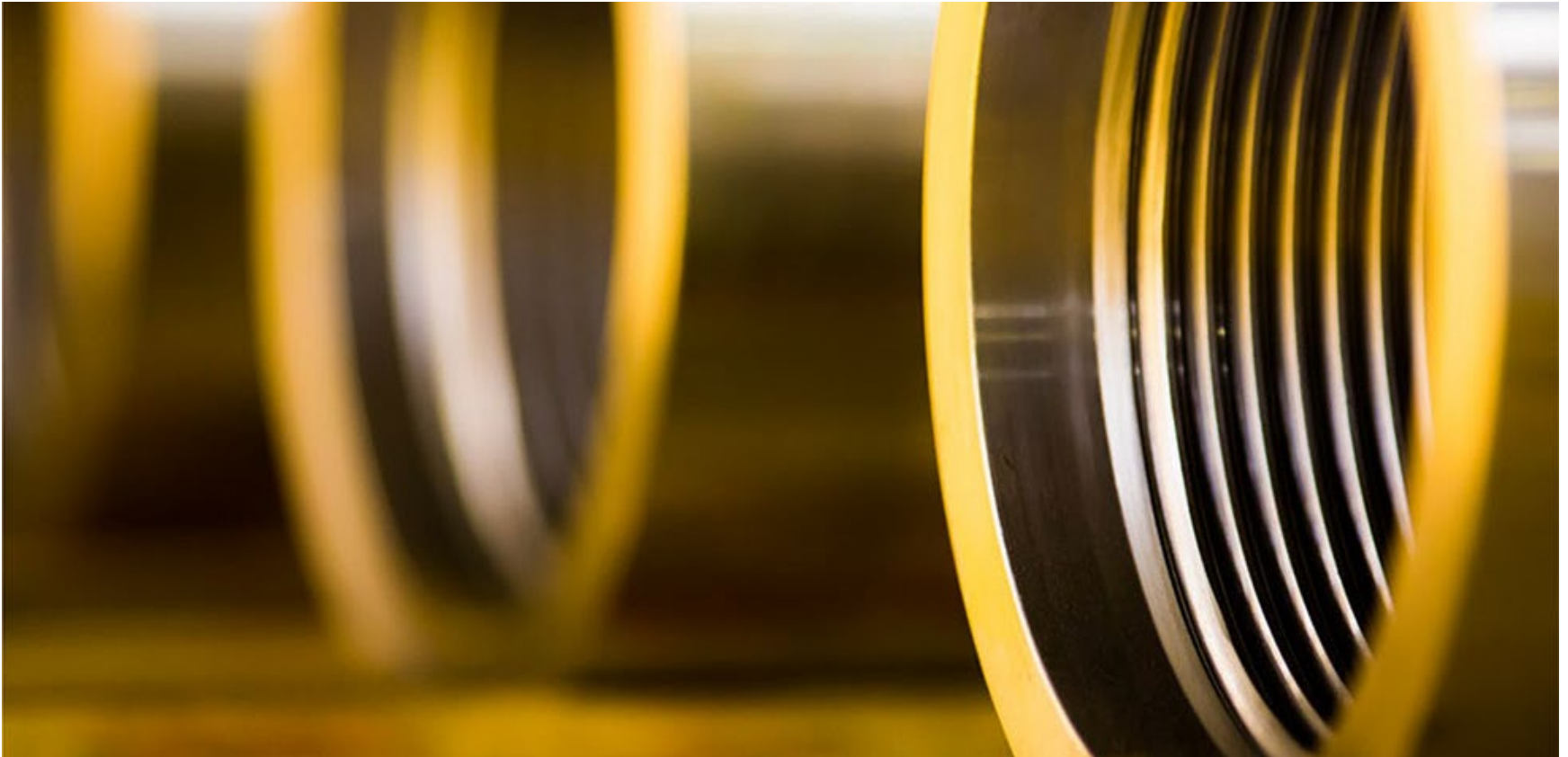
- Retention monies being lost due to contractor insolvency;
- Some contractors are still making payment of retentions conditional when "pay when paid" provisions are banned by the Construction Act;
- Unjustified late and non-payment of retentions was a significant issue for some contractors; and
- A retention deposit scheme or trust account would eliminate the risk of delayed or non-payment and still provide surety against defects.

Links:

- <https://www.gov.uk/government/consultations/retention-payments-in-the-construction-industry>
- <https://www.gov.uk/government/consultations/2011-changes-to-part-2-of-the-housing-grants-construction-and-regeneration-act-1996>

Questions?

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Thank you

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