

Autumn 2009

CONSTRUCTION LAW UPDATE

## OLYMPIC PARK

The Olympic Delivery Authority (ODA) has announced that construction is ahead of schedule. Having completed phase 1 (Planning and Design), phase 2 (Demolish, Dig, Design), the "Big Build" phase is well under way. David Brown of Gullands' Construction Department recently visited the Olympic site. The main Olympic stadium is in an advanced stage of construction, with pre-fabricated seating in place. The capacity will be 80,000, and as part of the legacy the stadium will remain but as a 25,000 seater arena suitable for non-premiership football or cricket for example. Close to the main stadium the Aquatics Centre is under construction. It has a spectacularly designed and engineered roof. The frame of the massive media centre is complete. Public access to the park from all points will be by bridges. The river Lea flows through the site. There will be park areas to the north and south of the site. One will be designed to provide a relaxing environment, the other will be more festive. The ODA is placing much emphasis on accessibility, legacy, sustainability, and health and safety. Of over 1,000 suppliers who have won work with the ODA, 98% are UK based and 68% are small and medium size. A "dating agency" has been established called "ComputeFour" enabling sme's to register to be matched to available opportunities.

## CONSTRUCTION BILL

The Local Democracy, Economic Development and Construction Bill (LDEDC Bill 2008) proposes amendments to Part II of the existing Construction Act 1996. If they become law, the changes may come into effect in 2010. The construction industry would then have an interim period when the original Construction Act 1996 applied to contracts entered into before a particular date, with the amended Act applying to new contracts going forward. This could cause complicated problems with payment where, for example, a main contractor has entered into agreements with some sub-contractors under the old rules and some under the new.

Here is a look at some of the proposed changes. Firstly there will no longer be a requirement for a "construction contract" to be in writing for the Act to apply. This will avoid legal argument as to whether there is sufficient documentary evidence for a written agreement. However, Adjudicators are likely to be faced with considering what verbal agreements were reached, a role more usually played by a Judge or Arbitrator.

The right of a party to suspend performance (which arises due to non-payment) will be changed. Instead of the "nuclear option" of all out suspension, a party may suspend only part of its obligations. So a contractor could opt to suspend only work on variations until they are paid up to date, and a contract administrator could suspend its obligation to carry out site visits. Helpfully for the party suspending, the new amendments provide for not only an extension of time for the period of a valid suspension but also any period of delay suffered as a consequence of, such as re-mobilisation time. Further, the payee who has validly suspended will be entitled to receive its reasonable costs and expenses for doing so from the paying party. All good news for the main contractors and sub-contractors who are not paid on time and the new changes, if they become law, will hopefully encourage the paying party to pay promptly.

There are a number of proposed changes to the payment rules. The "Withholding Notice" will go. The bill will require new "Payment Notices" which would specify the sum the payer or payee considers is due, or was due at the payment date, and the basis of its calculation. The payee may issue a "Default Payment Notice" and can only validly suspend if it has done so. An application for payment leading to an interim certificate counts as a payment notice and the payee does not have to issue two notices. The payer would need to identify a different sum it says is due and the basis on which it is calculated, a "Counter Notice" rather than a "Withholding Notice". The objective is to require the payment of the sum referred to in the Payment Notice unless the payer has given this new Counter Notice.

## JCT CONTRACT REVISIONS

A series of revisions to the 2005 editions of the contracts have been published by the Joint Contracts Tribunal. These are collectively known as the 2009 Revision 2. JCT announced that following a consultation on sustainability, Revision 2 incorporates a schedule that includes supplemental provisions covering aspects of sustainability. These provisions provide a framework to assist users in setting requirements and monitoring environmental and other performance. Other new provisions in the schedule respond to the Office of Government Commerce (OGC) in the Achieving Excellence in Construction (AEC) initiative. The aim of the AEC initiative is to increase efficiency, effectiveness and value for money in public procurement and JCT say that this criteria extends across the JCT suite. New provisions deal with matters such as cost savings and value improvements, early notification of problems that might otherwise lead to disputes, an amplification of health and safety and collaboration.

Amendments also made to payment provisions, notwithstanding the possible enactment of the LDEDC Bill 2008. JCT say that they felt it was right to start to address certain aspects of the payment provisions as it will be some time before the new legislation is operative and the changes are not intended to pre-empt the outcome of the legislation.

The changes to payment include the incorporation of further provisions with respect to the failure to certify; modification of the provisions relating to payment certificates after practical completion; incorporation in some contracts of provisions governing acceleration of the works programme, where the works are in delay; a revision to the mediation provision; a different approach to communications and notices, including the treatment of electronic communications; revisions to the Recitals and to the Contract Particulars; changes to the language which JCT say will make the contracts easier to understand without affecting the legal position.

Returning to the sustainability theme, JCT point to the iCon Building in Daventry which recently commenced construction under a JCT Design and Build Contract, incorporating new sustainability clauses. The building will contain sixty small offices that will be utilised by researchers and businesses at the cutting edge of the sustainable construction and green technologies. As an innovation centre, it will offer the support businesses need to get off the ground and give them a place to work in and share ideas. The building itself will be a leading example of energy-efficiency and sustainability in its own right.

## ADJUDICATION AND COURT UPDATE

We were pleased to be able to assist our client Windglass Windows Limited in a successful adjudication enforcement in the High Court this July. The case is reported as *Windglass Windows Limited v. Capital Skyline Construction Limited & Another* [2009] EWHC 2022 (TCC). Windglass had made two applications for interim payments totalling £166,000 plus VAT but their employer requested that valuations must be presented in a standard format and authorised by the appropriate site manager before the application could be processed. There was a dispute as to whether there had been a prior agreement to use a standard format. The Adjudicator decided that there was no agreed format for the applications for payment and further decided that Windglass' employer Capital Skyline Construction had not issued effective payment notices or withholding notices under the Scheme for Construction Contracts 1998 and so could not raise any cross claim for defects and delays. Further, the amounts to be withheld or valid grounds for withholding were not set out.

The TCC Mr Justice Coulson found in favour of Windglass. He found that the Adjudicator had jurisdiction to make the decision he did, namely that effective withholding notices were needed if the sums otherwise due by way of interim payment were to be reduced or not paid at all by reason of a cross claim for defects and delay, that there were no such withholding notices and that the cross claim for defects and delay could not be raised as a defence to the claim for interim payments in the absence of valid withholding notices. The Judge also found that the Construction Act does not permit a party to put in an ineffective withholding notice and then in the subsequent adjudication, seek to put together an entirely different justification withholding payment. Describing this approach as a "foot in the door" one, Mr Justice Coulson said that the Act emphasises the obligation on the paying party to give good reasons, there and then and in advance of the date for payment, if any part of the sum otherwise due is not going to be paid.

In the case of *Estor Limited v. Multifit (UK) Limited* [2009] EWHC 2108 (TCC), Mr Justice Akenhead decided in August 2009 that the winning party in an adjudication would not succeed in its application to enforce on summary judgment application. The Adjudicator had decided that there was a contract between Multifit and Estor and that Multifit were due to be paid £37,624. Estor did not pay out on the decision but issued its own proceedings seeking declarations that there was no contract in writing between Estor and Multifit. The Judge had two applications before him, the first being Estor's application for the declarations and the second being Multifit's application for summary judgment to enforce the Adjudicator's decision.

The Judge commented that the court is constrained to consider astutely complaints that an Adjudicator had no jurisdiction, but the position is different if the jurisdictional challenge is dependent upon fact and evidence. The Court Rules allow summary judgment to be given if the Judge considers that the Defendant "has no real prospect of successfully defending the claim or issue". The Judge had to decide whether on the evidence before him and since the issues were largely factual, he was satisfied that Estor had no or no realistic prospect of establishing that the contract was **not** between Estor and Multifit and that there were oral terms agreed which effectively prevented any contract between Estor and Multifit being a construction contract in writing. The Judge considered that he needed more evidence to decide this but that as Estor's defence was at the weak end of the scale, he should impose a condition of defending that Estor pay over half of the claim into court. By doing this the court is encouraging the parties to reach a settlement of the dispute rather than incurring further legal fees and running the risk of a full trial. This approach was evident in the case of *Allen Wilson Joinery Limited v. Privet Grange Construction Limited* [2008] EWHC 2802 which we reported upon in our Spring 2009 Edition.

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*This Update is for guidance only. Legal advice should be obtained for specific issues.*

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