Contract killers 1

When was the last time you prepared a standard form of contract for signature by the parties? Maybe not that long ago. So when was the last time you read the clauses in the contract before you sent it to the contractor and client for signature?

Paul Greenwood MCIAT suspects that in the majority of cases it is probably quite some time ago.

In reality, at best, the last time the clauses were read with any real conviction was probably when you last faced a claim from the contractor that you were not prepared to accept.

Alternatively, and possibly more likely in these hectic days where time is at a premium, you may have picked up the phone and spoke to your friendly QS to ask him what the clause actually means.

I suspect the majority of us only find out what the contract actually means when there is a problem. Why should that be? Is it complacency or is it that we just can't find time?

If we are totally honest with ourselves neither excuse is acceptable. It is probably because when we prepared the specification (which stipulates which clauses are in, which clauses are out and what insertions get added), we just didn't have the time to thoroughly read all the contract provisions and therefore we rely on the fact that what we did last time and the time before that worked OK.

Now here comes the crunch. Contract clauses are continually being amended, the CDM Regulations (1994) (re-amended 2007) and the Constructions Act (1996) both recently introduced far reaching changes, but more subtle changes are taking place all the time, such as changes to the insurance provisions, etc.

How much effort do we make to keep abreast of these changes and of the decisions of the Court, which decide what the clauses actually mean? Sometimes these decisions are completely at odds with what the whole industry thought (and often intended) them to mean.

Take for example the Mowlem case regarding the conclusiveness of the Final certificate, which imposed very onerous obligations on the Contract Administrator. The clause has since been amended to put things back, hopefully to what was previously intended, but we shall still have to wait and see whether the courts agree.

A great deal more care was being exercised by Contract Administrators before issuing the Final Certificate in the immediate aftermath of Mowlem and that caution should still perhaps be exercised even now (and probably ought to have always been exercised).

The point I am trying to make is that sometimes the implications of the contract clauses, amendments or court decisions are not fully appreciated, indeed some clauses are just not understood at all.

The need to keep abreast of what the contract clauses actually mean cannot be overstated since it is often too late when you pick up the phone to ring the QS after you have received a claim from a contractor.

CPD is a very good way of keeping up to date. CPD is not, however, intended to be a jolly to attend the latest manufacturer's seminar because they provide the requisite number of CPD hours, free food and free drink (as valuable as some of these events are)

CPD should also include expanding your awareness in a range of areas appropriate to your particular sphere of work and should include contractual matters if you are involved in contract administration.

I know it sounds pretty boring stuff but it can be interesting and certainly can help to avoid getting those cold sweats that often accompany those unwanted claims from contractors which are all too often quickly followed by very searching and embarrassing questions from the client.

So what are you looking for in the various contract clauses? I am afraid I don't have a definitive answer since I am only a humble Technologist and not a clairvoyant. I can, however suggest that the most likely areas to give rise to problems are perhaps worth concentrating on most.

That is easier said than done since problems arise for a variety of reasons and sometimes where they are least expected. Here is my suggested top 6, but I am sure you will be able to put together your own top 6 from your own experiences.

1. Definition of the scope of work (with this the likelihood of disputes arising under items 2, 3 and 4 are drastically reduced)
2. Claims for extra money (variations/loss and expense)
3. Claims for extra time (extension of time, loss and expense/minimise damages)
4. Wrongful withholding of payment (notice of withholding payment)
5. Practical completion (issuing of certificate of non-completion/minimise damages).
6. Adjudication – (adjudication/payment provisions, disputes in respect of 2-5 referred to adjudication for speedy resolution)

It is perhaps not surprising that most of the above involve money. I have put adjudication at number 6 but it could very easily be number 2 (or even number 1). Adjudication is now increasing in popularity since its introduction over 5 years ago and is a very quick way for a contractor to get a decision in his favour for some extra money. If the client gets drawn into adjudication he is likely to be looking to the Contract Administrator to advise him in the first instance of what adjudication is all about. You can tell him to consult a solicitor (or the QS) if you like but this is a lost opportunity. There is no mystery about adjudication; the provisions in the contract are very clear and easy to understand. So why duck the problem? You are certainly not likely to endear yourself to your client – he will begrudge having to engage yet another professional when he has already employed one who should really know the implications of the clauses he has incorporated into the contract (even if they are usually standard clauses)

Perhaps here is an opportunity to consider attending an introductory course on adjudication. These are not just aimed at adjudicators (even though prospective adjudicatiors attend them), they are aimed at increasing the awareness of the Construction Act, the Scheme and the provisions incorporated in some of the standard forms of contract. I can certainly recommend them to anybody who is involved in contract administration.

The same goes for items 2-5 in my list. If the client asks you what entitles the contractor to make his claim you should be able to refer to the relevant clause and comment upon whether that clause entitles him to make a claim and more importantly, if it does, whether he is justified in making the claim.

OK, so the contractor claims for an extension of time because it rained about 50% of the time between November and December when he was trying to lay the foundations – does this automatically entitle him to an extension of time of 4 weeks or does the contractor have to substantiate that the weather delayed the works because it was exceptionally adverse for that time of year, in that part of the country, during the normal working day?

Perhaps you would scrutinise his programme closely and ask for Met Office details showing what actually occurred during November and December and compare this with the average over the same period.

The contract may stipulate that the contractor shall supply all documentation reasonably required for the computation of the amount to be finally certified and that such information shall be provided within three months of Practical Completion (or some other date).

This is not to allow you to continually request for information such that you put off the computation of the Final Account indefinitely. Adjudication will be implemented by the contractor without hesitation, which will mean, that he can have his Final Account resolved within 28 days.

This is happening and it is happening to an increasing extent. If your client is on the receiving end of an Adjudicator's decision which entitles the contractor to more money than you consider appropriate your client will (not surprisingly) want to know how you allowed this to happen without warning him that this was a possibility.

If the Adjudicator decides some amounts are due to the contractor due to your failings then you had better dust off your PI policy documents.

Don't forget by the way that any adjudication against you or your practice must be notified to your insurers within a very limited period of time – check what it is!

If you have any doubts as to how scathing a Judge can be on the performance of a Contract Administrator try reading the Judgement in John Barker Construction Ltd –v- London Portman Hotel Ltd (1996) 83 BLR 31. An extract which perhaps gives an indication of what the Judge thought was '…the architect's assessment of the extension of time due….was fundamentally flawed because he did not carry out a logical analysis in a methodical way of the impact which relevant matters had…on the planned programme; he made impressionistic rather than calculated assessment of the extensions; he misapplied specific contractual provisions…the extension of time…was not a fair determination nor was it based on a proper appreciation of the provisions of the contract and it was accordingly invalid'.

Perhaps now when there is an article written in the trade press or a CPD event about contract clauses, disputes or adjudication you may take a greater interest in the subject.

From the many disputes referred to me as Adjudicator I must say that I am very surprised at the level of ignorance shown by some about pretty fundamental contractual matters.

I am also seeing an increase in the number of adjudications being brought by employers against their Contract Administrator. Adjudication has now allowed parties to refer disputes to an Adjudicator for speedy economical resolutions with the minimum of fuss.

Watch out that you don't finish up as one of the increasing number of statistics! Make sure that the contract is appropriate for the works and that you understand and implement all the contractual obligations. You may know what the obligations are today but you need to make an effort to keep abreast of any changes in the future.

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