

BRIEFINGS

31 March 2008

The Arch

Welcome to this latest edition of the new quarterly newsletter prepared by the **Construction and Engineering Team** at Harvey Ingram LLP.

In this edition we have two articles written by members of the team which offer guidance on issues which can arise in practice. Matthew Duckworth reports on a Hong Kong case which sheds some light on when practical completion of a building is achieved, whereas Mark Jones highlights a case which shows the dangers of not following the correct tender process.

The dangers of attending a Dutch auction

A recent court decision offers a timely reminder to architects of their duties to their client when that client wishes to negotiate with tenderers following a competitive tender process. The case, J & A Developments Ltd –v- Edina Manufacturing Ltd is a decision of the High Court in Northern Ireland, but its principles will apply equally in England and Wales.

The defendant, Edina, wished to erect a workshop and associated offices. They retained an architect, Mr Gallagher, to represent them. He prepared the tender documents which provided that the “tendering procedure will be in accordance with the principles of the code of practice for single stage tendering 1996” published by the National Joint Consultative Committee for Building (“Code of Practice”). The Code of Practice states that the contractor’s tender price should not be reduced without justification.

Following the return of tenders a series of meetings took place between Edina, the architect and the three lowest tenderers. Each tenderer was invited to reduce his price. One did so, but J & A, the lowest priced, refused. The contract was awarded to the tenderer who had cut his price. J & A were aggrieved and sued Edina to recover their costs of tendering and the profit they said they would have made on the job, a total of £161,247. Edina joined Mr Gallagher and his partners into the proceedings blaming them for not advising them not to conduct a Dutch auction with the three tenderers.

The court decided that there was an enforceable agreement that the tender process would be in accordance with the Code of Practice and whilst there was no obligation on Edina to accept the lowest tender, they were bound to either accept no tender at all or one at the price at which it was submitted. Edina were not entitled to play one contractor off against the other with a view to seeking a price reduction.

The court also went on to hold that an architect in these circumstances would be expected to warn his client that his proposed course of action would breach the Code of Practice. However, the court thought an architect would not be expected to advise that this might result in a legal action against the client as a consequence.

In the circumstances, the Court ordered Edina to pay J & A damages of £135,528, but declined to order that the architects indemnify Edina for this sum because the Judge was not satisfied that Edina’s owner would have listened to the advice even if it had been given.

When drawing up tender documents architects need to be careful if they incorporate the terms of other documents, such as the Code of Practice, as they will then have legal effect. Architects need to advise clients to stick to the terms of the tendering process. If the client is not satisfied by the tender prices, then it is acceptable to seek reductions from the lowest tenderer by a change in the scope of the work or the quality of the specification, but not by arbitrarily demanded a reduction in the tender sum as the price of being awarded the contract,. The case also emphasises that

where an architect is working for a “challenging” client he needs to be rigorous in documenting and recording his advice, particularly where he knows it may not be fully followed

A practical approach to completion

The importance of practical completion

The cause of many construction disputes is the question of whether the works have achieved practical completion. The certification of practical completion is a key aspect of all building projects as it generally signifies the date at which the contractor’s liability for liquidated damages ceases, the defects liability period commences, the employer takes possession of the works, the employer takes over the insurance responsibilities from the contractor and half the retention monies are released.

The importance of this issue makes it all the more surprising that the majority of standard form contracts fail to define the term “practical completion” but instead leave it to the discretion of the architect.

The Courts have tried to provide guidance as to the meaning of the term on a few occasions, although the judges’ differing opinions have resulted in ambiguity and a distinct lack of clear legal authority. However, a recent decision from the highest court in Hong Kong has established a clearer definition and whilst the jurisdiction of the judgment ensures that it does not amount to binding case law, it nevertheless provides persuasive guidance.

Mariner International Hotels Limited -v- Atlas Limited

The case related to an agreement for the sale and purchase of a hotel in Hong Kong. Completion under the agreement was conditional upon Atlas procuring practical completion of the hotel itself by 30th June 1998. On 30th June 1998, Mariner refused to complete the agreement alleging that Atlas had failed to satisfy the above condition. Both parties claimed that the other had repudiated the agreement.

After the Court of First Instance and the Court of Appeal had decided in favour of Atlas, the Court of Final Appeal reversed the decision and held that Atlas had repudiated the Agreement. The final judgment turned on the definition of ‘practical completion’ which was not expressly defined under the Agreement.

Atlas argued that practical completion was simply a state of affairs in which the hotel was capable of being opened for business irrespective of the fact that works were still ongoing. The Court of Final Appeal rejected this argument and took the view that the term “practical completion” is a legal term of art meaning a state of affairs in which the works have been completed free from patent defects other than ones to be ignored as trifling. In light of this conclusion, Atlas’s admission earlier in the case that the hotel was not free from non-trifling, patent defects proved fatal.

Analysis

The decision in the *Mariner International Hotels* case is a sensible one in that it refuses to interpret practical completion as being a standard so exacting that it is unreasonable to expect a contractor to achieve it. If practical completion was something which is only achieved once all defects, shrinkages and other minor faults are remedied, liquidated damages provisions would be rendered unworkable. However, it is not unreasonable to expect a contractor to deliver a building free of non-trifling, patent defects.

The fact that the three different Hong Kong courts each came to different conclusions as to the definition of practical completion demonstrates the uncertainty surrounding the term. Whilst the decision does not create binding case law, it nevertheless highlights the importance of setting out a clear definition of the term wherever it is used. In order to avoid disputes further down the line,

parties to a building contract should discuss and agree at the outset exactly what is required from the contractor in order to achieve this essential stage of the construction process.

However, in the event that the definition of practical completion under a building contract is left open to debate, architects should remember that the term does not mean there are absolutely no patent defects, although these should only be “trifling”. It is easy to be pressured into certifying practical completion despite the fact that certain work remains to be completed. This should be avoided at all costs because, unless there is a specific provision to the contrary, an architect or contract administrator will not have the jurisdiction or authority to revoke a certificate of practical completion.

Whilst it remains to be seen whether the *Mariner International Hotels* decision is followed by the English courts, in the meantime it does provide some clarification of the term; although one can well imagine that the question of whether patent defects are “trifling ” will prompt healthy debate between many employers, contractors and architects.

We hope that you have found this newsletter interesting and informative, and if you have any comments on it, or any suggestions for articles in future editions, please do not hesitate to contact any of the following members of the team:

- Martin Jones on 0116 257 4429 or e-mail: martin.jones@harveyingram.com
- Debra Mansfield on 0116 257 4421 or e-mail: debra.mansfield@harveyingram.com
- Mark Jones on 0116 257 6133 or e-mail: mark.jones@harveyingram.com
- Matthew Duckworth on 0116 257 6155 or e-mail: matthew.duckworth@harveyingram.com

You have consented to receive news updates and information via e-mail from Harvey Ingram. If you wish to unsubscribe, please click on the link below and put "Unsubscribe: The Arch" in the Subject box. Thank you. unsubscribe@harveyingram.com

Leicester Office

20 New Walk
Leicester
LE1 6TX
T: +44 (0)116 254 5454
F: +44 (0)116 255 4559

Birmingham Recovery

30 St Paul's Square
Birmingham
B3 1QZ
T: +44 (0)121 262 6550
F: +44 (0)121 236 9599

Birmingham Corporate

Edmund House, 12-22 Newhall St
Birmingham
B3 3EW
T: +44 (0)121 214 1200
F: +44 (0)121 214 1299

E : mail@harveyingram.com W : www.harveyingram.com

This briefing note is for guidance purposes only and should not be regarded as a substitute for taking legal advice.

ALWAYS PART OF THE SOLUTION  **Harvey Ingram LLP**
solicitors