

WORKING TIME CASES & THE CONSTRUCTION INDUSTRY

The Working Time Regulations continue to cause problems in the construction industry.



In the last year the construction industry has featured in a number of cases that have concerned the annual leave rights under the Working Time Regulations. More than any other sector construction has traditionally relied upon the services of 'self employed' contractors. The self-employed status means that they are outside of the scope of employment laws, or does it? The Working Time Regulations uses the wider term of 'worker' rather than 'employee'.

In **Cavil v Barratt Homes Ltd** this led to a finding that a joiner who worked as a labour only subcontractor at various Barratt sites was obliged to render personal services and, therefore, was a worker for the purposes of the Regulations.

Similarly in **JNJ Bricklaying Ltd v Stacey** it was found that six bricklayers, who worked in gangs were workers for the purposes of the Regulations. Although a representative of the gang would quote the company a price for a job, the company made payment directly to each individual gang member.

In both these cases, despite the existence of contracts that excluded rights to holidays and other such employment style benefits, the "workers" were awarded backdated holiday pay in accordance with the Regulations.

Couldn't a sum just be added onto the contract price to cover holiday pay? The answer to that question depends on whether your business is north or south of the border. In the Scottish case of **MPB Structures v Munro** it was decided that the payment of an allowance does not amount to payment of holiday pay, even if so described in the contract, leaving the possibility of claims from workers for "double compensation" for holiday rights.

However in England and Wales the decision in **Marshall's Clay Products Ltd v Caulfield** takes precedence. It was in this case that payment of an allowance in respect of holiday pay was lawful under the Regulations if it was agreed between the parties.

Claims for outstanding holiday pay were held in **List Design Group Ltd v Douglas** to be recoverable as unlawful deductions from wages. As such, a continuing failure to pay meant the claim could be backdated to when the work began or October 1998 when the Regulations were introduced. This decision appeared to conflict with another Employment Appeals Tribunal case, **Brown v Kigass Aero Components**, in which it had been held that before entitlement to holiday pay arose a worker would have to request or take annual leave. Last month in **Gray and another v Canada Life Ltd** the EAT considered these cases and decided to follow the List case. This leaves the risk that in any existing self-employment arrangement a claim could be building for substantial holiday in the future.

IMPLICATIONS

- The Working Time Regulations give enhanced rights to 'workers' including the right to holiday pay. Workers is a wider definition than employees.
- The label given to employment status even if agreed by both sides and the inland revenue, in particular 'self employment', will not necessarily determine the way the law looks at workers.
- The key point is that where there is an obligation to render services personally, whatever the label attached, the enhanced rights will apply.

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HOW DO FLUCTUATIONS IN PROPERTY PRICES AFFECT CLAIMS AGAINST CONSTRUCTION PROFESSIONALS?

Can the effect of rampantly rising property prices be a factor to be considered when deciding on the level of damages to be awarded in a breach of contract claim, or would this be considered too remote from the alleged breach?

The recent case of **Earls Terrace Properties Limited v Nilsson Design Limited and Charter Construction plc** provides some up to date guidance on this issue. In this case the Court was concerned with whether the Defendant architect (Nilsson) was entitled to offset a reduction in Earls Terrace Properties Limited's (ETPL) loss occasioned by a rise in property values against the sum of damages awarded to the Claimant.

ETPL engaged Nilsson in 1994 in connection with a refurbishment project involving a group of properties. Discovery of defects in the works carried out by the contractor and the design of necessitated remedial works which caused a delay to ETPL's project.

ETPL made a claim against Nilsson alleging that Nilsson was aware of the workmanship defects from May/June 1998 onwards but failed to require their rectification resulting in damage. ETPL claimed for damages for breach of contract and duty of care. There were three categories of loss claimed:

1. Direct build and remedial costs.
2. Compensation in respect of the storage of various kitchen units and compensation to be paid to tenants.
3. The final category of loss was the funding costs. The claim stated amongst other things that as a result of the 15 month delay to the project ETPL's funds were held in the project for 15 months longer than they would otherwise have been. The delay to the completion of the project resulted in the loss of the use of those funds.

Nilsson defended and, at the same time joined the contractor Charter Construction plc ("Charter") as a Part 20 Defendant. The basis of its claim against Charter was that if ETPL's claims succeeded against Nilsson then, at the same time, Charter would be in breach of its contractual and common law duties to ETPL. Nilsson claimed under the Contribution Act 1979, an indemnity for, or a contribution towards, its liability to ETPL since Charter's liability to ETPL would have been for the same damage as Nilsson would be held liable for.

The issues which the Court had to address were:-

- (i) whether ETPL was entitled to be compensated by applying the interest rate of LIBOR plus 2% on the funds that it had invested for the project for such period of delay or by applying an interest rate to reflect the actual cost to ETPL of borrowing the funds that it had invested in the project for such period of delay.

- (ii) Whether ETPL was obliged to give credit against any sum claimed by them for the sums identified in Nilsson's defence. i.e. the increase in the value of houses during that period of delay. Nilsson had contended that the housing market had slumped and was stagnant in 1997/1998 so that ETPL would not have attempted to sell. The market then recovered very quickly so that ETPL was able to sell houses in and after 1999 and for significantly increased levels to those available in 1998. Therefore, Nilsson claimed, the sales would have been delayed in any event until the time they occurred and any delay caused by Nilsson's assumed negligence has been to ETPL's advantage since he was able in consequence to sell the houses at significantly enhanced prices compared to those obtained 15 months earlier.

His Honour Judge Thornton QC stated that the law seeks to define the boundary between recoverable and irrecoverable loss by loosely drawn principles of recovery. The loss must be foreseeable and within the scope of the Defendant's duty and it must have been caused by the breach in question. In addition it must not be too remote, and it must not, where negligent acts or omissions are in question, amount to pure economic loss. Finally, it must be fair and reasonable to impose a duty to avoid that loss.

The Court decided that ETPL may recover damages for the loss incurred by Vastint Holdings (who were the funding the project) arising out the late unlocking of funds it had advanced for the development on the grounds that this loss fell within the contemplation of the parties to the contract with Nilsson and within the scope of Nilsson's duty.

The court held that there was commercial loss because the loan was for a longer period than it should have been or because either ETPL or Vastint Holdings was unable to make commercial use of the money. It also stated that the uncertainties of the housing market showed that movements in property values are not directly linked to the development of property or to the delay in the completion of the sale of the properties being developed resulting from an architect's breach of contract. A rise or fall was held by the court to be unconnected with the negligent act and too remote for it to have been within Nilsson's scope of duty.

A further reason why the sale of the houses was unconnected with the original breach was that the sale occurred long after the breach had occurred.

Ordinarily, in a defects case, damages for negligence and breach of contract are assessed by reference to the date on which the breach of contract or duty occurred since that is when the damage was caused. This would mean that the rise in any sale price need not be taken into account when assessing ETPL's recoverable damages should any rise in price be reflected in a reduced award of damages. This was because the sales and any increase in profit was unconnected

with the original breaches and did not form part of the same transaction as those breaches and was not caused by them. The Court held therefore, Nilsson was not entitled to offset a reduction in ETPL's loss occasioned by a rise in property values against the damages awarded as the movements of the property market were too remote from the Defendant's alleged breach of duty to be considered as consequential loss or gain.

IMPLICATIONS

This case is interesting in as much that the court will not take into account any property market fluctuations, however substantial they are. The court is simply restating firmly the rule that nothing will be considered a factor to an alleged breach of duty unless it was reasonably connected.

For further information on this article please contact Louise Douglas on 0161 831 2646

PERFORMANCE GUARANTEE

Where there was to be a trial to determine the validity of a first demand under a performance guarantee, was the judge correct in striking out a claim based on a further second demand that relied upon the same alleged breaches of contract?

The Court of Appeal was asked to consider this in the recent case of **Manx Electricity Authority –v- JP Morgan Chase Bank**.

The background to the case was as follows. Manx Electricity Authority ("the Employer") employed The Contractor Europe Limited ("the Contractor") to design and construct a generating station called the Pulrose Station at Pulrose, Douglas in the Isle of Man. JP Morgan ("the Guarantor") was asked to provide a Performance Guarantee in favour of the Employer to secure the obligations of the Contractor. In fact, although the document issued by JP Morgan is described as a Performance Guarantee in the Judgment, it was in fact an on demand instrument as can be seen from the following extract from the document:-

"At the request of the Principal, we the Chase Manhattan Bank London Branch, hereinafter called the Surety, hereby irrevocably undertake to pay you forthwith, the Beneficiary, any sum or sums not exceeding in total the aggregate amount of £11,990,644, the guaranteed amount, upon receipt by us of your demand in writing stating (a) that the Principal is in breach of his obligations under the Contract and (b) the respect in which the Principal is in breach together with a certified copy of written notice given by the Beneficiary to the Contractor under the Contract specifying the breach and the Beneficiary's intention to make demands under this Guarantee.

"Our obligations shall remain in full force and effect and shall not be affected or discharged by any alterations of the terms of the Contract or any related contract, warranty or agreement between the Beneficiary and the Principal or in the extent or nature of any works to be carried out thereunder and our obligations hereunder shall not be affected or discharged by any time being given to the Principal or by any other indulgence or concession to the Principal or by any

forebearance, forgiveness or anything done or omitted or neglected to be done under the Contract or any related contract, warranty or agreement."

The Performance Guarantee was expressed to expire 36 months after the Takeover of the Works as stated in the Taking Over Certificate or 30 September 2006, whichever should first occur. The Performance Guarantee incorporated the Uniform Rules for Demand Guarantees published by the ICC (number 458).

The Contractor was a subsidiary of the Enron Group of Companies and in late 2001 following the collapse of Enron, the Contractor repudiated its contract with the Employer by removing its equipment and demobilising from the Pulrose site.

As a result, the Employer made a formal demand on the Performance Guarantee by letter dated 14 December 2001. JP Morgan pleaded that the first demand was defective and invalid, however, those matters were to be considered at trial later in the year and the Court of Appeal was not asked to consider these aspects.

On 2 and 11 October 2002, in consequence of the litigation arising out of the first demand, the Employer served two further demands on JP Morgan. The purpose of them was to cure, if necessary, the alleged defects of the first demand. The second demand stated (so as to reflect the language of the Performance Guarantee), that the Contractor was in breach of its obligations under the Contract.

Between the repudiation in December 2001 and the second demand in October 2002, the Employer and the Administrators of the Contractor entered into a new agreement whereby the Employer agreed to release and discharge the Contractor from

any claims but without prejudice to the Employer's rights under the Performance Guarantee. JP Morgan contended that, as a result of the settlement agreement, the Contractor could no longer be considered to be in breach of its obligations under the Contract when the second demand was served and, therefore, there was as at October 2002 no actionable breach.

The Judge at first instance accepted JP Morgan's submissions and struck out the Employer's claim to the extent that they relied on the second demand. The Judge's principal reason for acceding to JP Morgan's application was that the Contractor's breach in December 2001 had been of an anticipatory nature and that, with the making of the settlement agreement, that breach could no longer be said to exist since no further performance was required.

In the appeal, JP Morgan submitted that the Performance Guarantee required that any demand included a statement that the Contractor "is in breach" and that as a result of the settlement agreement the Employer was not in a position to make that statement. The second submission was that, since the settlement agreement had been completed, JP Morgan could have no liability under a Performance Guarantee in respect of a contract that was no longer in existence.

The Employer submitted that the breaches complained of in October 2002 in the second demand were exactly the same breaches as those complained of in December 2001. It was submitted that they were accrued breaches and that unless they had been discharged by the settlement agreement they were unaffected by the disappearance of the contract. Therefore, there were current breaches which the Employer could complain of in October 2002. The Court of Appeal indicated that the matter was not suitable for summary dismissal and that it appeared that the Contractor was in actual repudiatory breach of its contract.

In relation to the second aspect, as to whether the contract ceased to exist, the Court said that this was irrelevant. "It would be extraordinary if a Performance Guarantee was intended to cease to operate in exactly the situation in which its beneficiary most needs it - when the contract has failed because the Principal has repudiated it". In the circumstances, the Court of Appeal allowed the appeal. The case will now proceed and the Court will have to decide upon the validity of the first and/or second demand at trial.

IMPLICATIONS

Even though this case concerned a guarantee which was payable on demand, the Court of Appeal considered that the issues arising could only be properly dealt with at a full trial.

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FORTHCOMING SEMINARS

Innovation Breakfast Seminar - Technology Licensing For further information please contact Suzanne Cain Tel 0161 831 2633	Date: 6 July 2004 Venue: Halliwell Landau, Manchester Time: 7.30am - 11.00am
Commonhold Seminar Property seminar For further information please contact Claire Wakefield Tel 0161 831 2616	Date: TBC - August / Sept Venue: Manchester & London Time: To be Confirmed
Enterprise Act - One Year On Corporate Recovery seminar For further information please contact Claire Wakefield Tel 0161 831 2616	Date: 15 September Venue: Bridgewater Hall, Manchester Time: 10.00am – 6.00pm Cost: £95 + VAT

For further information about Construction and Engineering generally, please contact either Karen Spencer - 0161 831 2796 or Paul Rose - 0161 831 2653

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