

CITY OF LONDON LAW SOCIETY

Construction Committee

Minutes of Meeting

Date: 7 October 2009

Held at: Ashurst LLP, Broadgate West, 9 Appold Street, London

Present

Marc Hanson, Ashurst (Chairman)

Lynne Freeman, Reed Smith Richards Butler

David Metzger, Clifford Chance

John Hughes-D'Aeth, BLP

Tom Pemberton, Shadbolts

Patrick Holmes, Macfarlanes

Martin Potter, Canary Wharf

Ian Roger, Arup

Alastair McGregor, Nabarro

Victoria Peckett, CMS Cameron McKenna

Gillian Thomas, Lovells

Elaine Doyle, Ashurst

1. LIMITATION REFORM PAPER

The Committee submitted its response to the Limitation Reform consultation on 18 September 2009. The Response contained sensible recommendations and comments and was not supportive of the proposed review of the law. It is not currently clear when or how the relevant bill will be progressed. The Chairman thanked all those who contributed to the response, particularly David Metzger and his team at Clifford Chance. The response is now on the Committee's web site.

2. FOUNDATION LEVEL TRAINING

The Committee discussed the option of repeating the Foundation Level Training sessions held in September 2008. It was agreed that the two training sessions be repeated in March 2010 at roughly the time that trainees move seats and a number will qualify. Patrick Holmes offered to host the first session at Macfarlanes and Lynne Freeman offered to host the second session at Reed Smith. It was agreed that the programme for the training sessions would be as those held in 2008. The Chairman would contact those who presented in 2008 and ask whether they would be willing to take part again. In the meantime, the Chairman reminded the Committee that the 2008 training sessions could be viewed in streaming video on the Committee web site.

3. **THIRD PARTY RIGHTS INITIATIVE**

The Chairman, Patrick Holmes and Martin Potter had attended a meeting of the Land Law Committee in the Spring to discuss a joint approach to promoting the use of third party rights in lieu of collateral warranties. The Chairman had subsequently received a request from the Chairman of the Land Law Committee asking the Construction Committee to produce a note on the advantages of third party rights. It was intended that the note would be used as a basis for a media and educational campaign by both committees to illustrate to property lawyers, banking lawyers and surveyors of the benefits of third party rights as opposed to collateral warranties. The Chairman undertook to produce a draft note for discussion.

4. **FUTURE WORK STREAMS**

4.1 Construction Act

The Committee noted that the bill reforming the Construction Act was due to have its third reading on 30 October 2009. As revisions to the Scheme were at least 18 months away it was agreed it would be premature to look at any specific guidance on the reform of the Act.

4.2 JCT

It was noted by the Committee that the JCT had recently published amendments to contracts and the contracts themselves dealing with issues such as two stage contracting, sustainability and project bank accounts – topics that might otherwise have been suitable for consideration by the Committee.

4.3 Insurance

The Committee discussed an increasingly common problem occurring in relation to fit-out works. It is far more cost effective for a tenant if the landlord of an existing building procures that his insurers waive their rights against any tenant fit-out contractor in relation to any damage that might be caused by the tenant fit-out contractors' activities. Increasingly, however, landlords are refusing to allow this and as such the tenant or its fit-out contractor is obliged to maintain high levels of public liability insurance to cover the risk. Where the value of the fit-out contract is low and the value of the building in which the works are being carried out is high, this can result in a disproportionate cost to the tenant. As the tenant will invariably seek to pass this on to the landlord it is not clear what commercial advantage a landlord gains by this arrangement. It has been noted, however, that in many instances the requirement for the tenant to take out public liability insurance is not disclosed until after the deal to take the lease has been done. This can put the tenant in a difficult position and is not an ideal way to start a hopefully long term commercial relationship. The Committee considered whether this was a topic suitable for guidance although it was appreciated that this might be something better dealt with by the Insurance Law Committee. The Chairman would raise the topic with the Insurance Law Committee.

4.4 Project Bank Accounts

The Committee discussed the current use of project bank accounts and recognised that their use was limited primarily to the public sector. The current proposals relating to project bank accounts put forward by the ACA, NEC and JCT all seemed to offer little benefit to sub-contractors and a likely cost to the employer. It was felt that the JCT version in particular was rushed out due to political considerations. Guidance on the subject was considered to be a possible topic for future work.

4.5 Adjudication Bonds

Thought had been given to producing a standard adjudication bond a number of years ago. This was not pursued on the basis that demand for a standard form was considered to be low. It was agreed that this was still probably the case.

4.6 Insolvency

The Committee discussed whether it was worth pursuing any initiatives in relation to insolvency. In particular the subject of direct payment to sub-contractors was considered. It was appreciated that there was a difficulty in producing something which would be understandable for lay people but at the same time contained enough detail to be useful.

5. **OTHER BUSINESS**

The Chairman mentioned that the Livery Dinner would be taking place at Drapers Hall on 23 November 2009. The Chairman and the past chairman (Alan Elias) would be attending. Others were encouraged to do so.