

Regulation

When waiting for adjudication to be completed, it pays to seek a negative declaration as soon as possible or you risk running out of time; initiative to include regulation information in BIM objects; and why you must keep vehicle operator licences up to date

Timely reminder to act fast in a ruling dispute



TIME BARRING
 SCOTT MCMASTER

The important issue of when to commence court proceedings to reclaim sums paid under an adjudicator's decision was raised in the recent case of *Aspect Contracts (Asbestos) Ltd v Higgins Construction plc*.

In this case, Higgins engaged Aspect in March 2004 to carry out an asbestos survey. During development, asbestos was discovered that was not noted in the survey report, which caused significant delay, disruption and additional costs.

Higgins launched proceedings against Aspect. In August 2009, around five years after the alleged breach, an award was made against Aspect for failing to undertake a proper and appropriate survey and failing to identify the presence of asbestos.

Aspect was ordered to pay Higgins £658,000 in damages, which it paid within a few weeks of the decision.

In February 2012, two and a half years after the adjudicator's award and nine years after the original breach, Aspect commenced legal proceedings arguing that the survey had been carried out using reasonable skill and care and that it therefore was not liable to pay damages to Higgins

in the amount stated in the adjudicator's award.

Aspect sought to be reimbursed for the monies it had paid out. It sought "a final and binding resolution of the dispute which had been referred to adjudication".

Higgins argued in defence, among other things, that Aspect's claim was time-barred - ie that six years had passed since the breach/cause of action.

The court found against Aspect, holding that its claim was time-barred. The date of payment ordered by the adjudicator was not a "new cause of action".

The six-year rule

The court stated that to argue otherwise would effectively extend the period in which an underlying dispute can be litigated or arbitrated for an additional period of six years (but only by the party required to pay), without the risk of a limitation defence being raised.

The court held that Aspect could have made a claim for a negative declaration (asked the court to decide that it was not in breach) at any time - it did not have to wait for an adjudicator's decision and the dispute had not changed.

This case is a timely reminder that a dissatisfied losing party must act quickly in challenging an adjudication decision to avoid their claim being time-barred.

Parties are well-advised to carefully consider their options at an early stage and in particular consider the use of negative

"A dissatisfied losing party must act quickly in challenging an adjudication decision"



declarations in establishing potential liability.

Such a declaration can be sought at any time after an alleged breach of contract or tortious duty.

Scott McMaster is a solicitor at Dundas & Wilson

One step closer to seamless 3D modelling



PLANNING
 SIMON LEWIS

The government has commissioned a working group to integrate regulations into models generated through the building information modelling process.

The aim is to simplify

regulatory compliance and enable building regulations and planning applications to be made using 3D computer models.

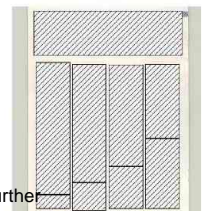
The new group, BIM4Regs, is the latest in a number of initiatives resulting from the establishment of the government's BIM task group and the significant increase in interest in the use of BIM in construction.

There are now a number of specifically targeted BIM groups dealing with facilities management, private sector clients, retail, SMEs, supply-side delivery, infrastructure and water.

BIM4Regs addresses, for the first time, not a sector-specific interest group but how information is integrated into BIM objects. These are already capable of incorporating programming information, time and cost, so there is no reason why they cannot also include regulatory information.

The current working group investigating this area is aiming to embed regulatory information within BIM software so that architects and engineers can immediately see if designs comply with the rules.

Consequently, in the same way that the spatial relationships established by a 3D BIM model allow clash detection, a BIM object which contravenes building or planning regulations will immediately become apparent.



Have we taken another step towards the seamless virtual assembly of a building that is fully designed, clash-free and in conformity with all existing regulations?

It is apparent that judgement-based or subjective responses to regulations, such as selecting the best measures needed to meet energy targets, will be more difficult to incorporate.

Also, where a matter is to be guided by policy the model is not yet adapted to meet this.

The same issue arises on planning gain. For example, matters relating to the percentage of affordable housing to be provided on a residential scheme may be up for negotiation.

The design and size of these can vary relative to market housing and therefore, until the negotiation with the planning authority has taken place, progressing the development of BIM with planning could be limited.

I would suggest that it may be impossible, at least in the foreseeable future, to incorporate subjective decisions. At best a range of options might be capable of being proposed for consideration by the human participant in this process.

The chair of BIM4Regs has indicated that he thinks about 30 per cent of regulations could be easily incorporated into BIM software and this would obviously be helpful.

It is of course the case that the government wants BIM to be scalable and applicable to any job; this may ultimately occur when the available technology becomes cheap enough and BIM has been incorporated into the process.

We should bear in mind, however, that not every project uses CAD now, so I suspect we will have some time to wait.

At the end of the day BIM, particularly at Level 2, is about the proper and effective use of information.

Level 3 takes us towards the

goal of real-time simultaneous involvement in a single BIM model in which as much information as possible should be incorporated to assist in a cost-efficient construction project. No-one could disagree with this aim.

Equally, no-one could disagree that subjectivity and judgment play a part in the process of designing and constructing buildings and this is always likely to be the case.

What is perhaps more important is that the construction sector at all levels gets used to the idea of using BIM as a way not only of streamlining the construction process and saving costs, but also as a tool for encouraging collaborative activity.

Simon Lewis is a partner in the construction and engineering team at Bond Dickinson

Your Restricted Operators' Licence duties



COMPLIANCE
 RICHARD WADKIN

There are lots of elements within a business that seem vital on the surface, but in reality there aren't many losses that could genuinely cause the whole business to flounder.

If you lose a key member of staff you can recruit. If you lose a customer you can have a sales push.

But if you lost your transportation, what would you do? You may not be able to get materials to jobs, and you may not be able to afford or be allowed to outsource. The ramifications can be huge.

Given the impact that losing this licence could have, businesses with a Restricted Goods Vehicle

Operators' Licence for company



"You still need the licence even if you're renting the vehicle, regardless of how long you're using it"

HGVs don't always give the responsibilities linked to it the care and attention they should.

Restricted licences are required for businesses that rely on one or more vehicles above 3.5 tonnes to carry their own goods and materials. It is not appropriate for businesses that carry goods for other people.

According to the Office of the Traffic Commissioner, 43,420 restricted licences were in circulation in 2011/12, accounting for more than half of the 84,702 total number of goods vehicle operators' licences in circulation.

All 93,424 vehicles in the UK that are currently covered under Restricted Operators' Licences need to be up to date in terms of their licence compliance requirements, from both a safety and legal perspective.

Failure to maintain full compliance can lead to a public inquiry before the traffic commissioner with potentially catastrophic consequences for the business.

Licences can be revoked or suspended, the number of vehicles authorised to be used under a licence can be reduced or conditions can be imposed. If a business doesn't have a licence,

the vehicles can even be impounded by VOSA.

A Restricted Operators' Licence specifies various things. If circumstances change, the necessary amendments to the licence must be applied for.

Details and requirements of the licence include:

- The number of vehicles covered;
- Where the vehicles will be parked (which needs to be off-road, suitably large, secure and easily accessible);
- Stipulated maintenance requirements – you must agree how you will maintain the vehicles, either in-house or providing evidence of a maintenance agreement;
- Conditions relating to drivers, including that you have arrangements in place to accurately monitor drivers' hours and to ensure vehicles aren't overloaded;
- Whether directors are "fit" to hold a licence;
- What systems are in place to manage the vehicle or fleet; and
- A level of financial solvency within the company, to ensure it is able to support the vehicles' maintenance and upkeep.

You still need the licence even if you're renting the vehicle, regardless of the length of time you're using it for.

It is important that directors keep on top of this and make sure they are updating their licence details when necessary. Issues with a licence can hit a business hard, but it can also have a knock-on effect for an individual.

In 2011/12, 37 goods licence holders were disqualified, and if a director is disqualified from holding a licence it can prevent them from taking a future management role within any business that requires one.

Richard Wadkin is a partner at **Shulmans** commercial solicitors