Contract Law In Construction Projects

Introduction

Modern day construction projects are increasingly seeing the collaboration of a large number of different professions in order to improve the speed and quality in which they are completed. Clients now tend to engage with many participants, and if there is a poor relationship between any two parties or a lack of communication, this can often mean that problems tend to arise. This is very important to note when considering the amount of risk involved in construction projects. To resolve these difficulties, certain mechanisms and techniques are added to contractual documents, e.g. “these contracts may seek to transfer the risk by making one party financially liable, should the eventuality take place” (Will Hughes, et al, 2015). These Contractual documents are “traditionally designed and administered” (Adriaanse, J, 2010) by the architect, and modern contracts also offer the opportunity for project managers to be appointed in order to “coordinate and administer the contract,” (Adriaanse, J, 2016) once again showing an increase in the number of participants. This essay will provide an insight into why problems arise in the first place, and how contractual documents have adapted in order to diffuse them.

Background and context

When a client is considering which roles and responsibilities should be allocated to different participants in order to bring together a project team, it is important that this is carefully and thoughtfully done. When going through the procurement phase of a project, there is a huge variation of professions with various specialist traits contributing to the work at dissimilar times. These different groups tend to work for different companies and places, which often leads to a poor level of understanding about the project and the clients aims.

Within these projects there is an array of common problems that usually insinuate these conflicts and poor levels of understanding. The first of these problems is the concept of professional pride. With many different companies of many different sizes, it is a recurring issue that the larger companies often tend to believe that other companies are sub-standard. On the other hand, smaller companies tend to believe that others are often “greedy and self-righteous” (Will Hughes et al, 2015). However, as Will Hughes et al, states “the intelligence or skill of one’s colleagues in construction should never be under-estimated.” (2015). This mindset can often become very toxic in projects, as professions can often look away from the necessities of the project and more towards their own desires.

Another common problem often associated with different participants in construction projects is the overlapping between different stages. When a construction project takes place, there is a procedure that the professions are supposed to follow. This is briefing, designing and constructing. However, these three stages are often overlapped. Especially the design and construction phases. If contractors start the work without receiving the final designs from the Architect and something goes wrong due to a lack of communication, then we often see disputes occurring. This could be due to “new processes, equipment or materials” (Will Hughes, et al, 2015) emerging or alternatively, “economic situation may change and wipe out

the financial viability of a project" (Will Hughes, et al. 2015). Hence, it is vital to make sure there are processes that are pre-meditated, and that will accommodate for later changes to what the design team initially stated. Furthermore, even more of an argument for contractors not to overlap stages.

Do all participants in a construction project all share the same perception of risks? It is very unlikely that this is the case. With bigger companies being more financially equipped to take risks and vice versa, there is always going to be a mismatch in the objectives of different professions. Risk is a huge concept in the construction industry and conditions of a contract are "essential so that the allocation of risk is clear" (Geoff Powell, 2016).

Two standard forms of contracts utilised widely in construction are the NEC3 ECC and the JCT SCB. Within these are mechanisms and enablers suited to push projects of many variations from start to finish. "Mechanisms are the processes or systems by which the construction asset is realised. Enablers are 'the oils in the wheels' of mechanisms." (Geoff Powell, 2016). Government reports such as the Egan Report (1998) and the Latham Report (1994) were the first to recognise these enablers. An example of these can be found in the NEC3 ECC (10.1), a standard form of contract used by many. It goes on to say, "The employer, the contractor, the project manager and the supervisor shall act as stated in this contract, and in a spirit of mutual trust and co-operation." This is the first example of how a contractual document can be utilised to ensure that the several participants in a project maintain healthy relationships.

In a contractual document there is also the Law of Obligations, these inform each party what is legally required of them. If this agreement is breached, then one party can undergo legal action towards another. Good faith is also included as previously mentioned and can be found also in clause 6.1 of JCT 11. This enforces an obligation too, ensuring all parties work together in a "co-operative and collaborative manner" (JCT 11, Clause 6.1). However, Will Hughes, et al, (2015) makes an important point, "should the law of obligations be underpinned by an overriding principle of good faith?"

Discussion

When looking at good faith it is important to discuss whether it should be accepted as a valid argument. On the whole, it has not been accepted in English Law. Many see it as having insignificant amounts of useful application. However, Government Reports that are regarded very highly by many such as the Latham Report (1994), suggest that all contracts within the industry should include "a duty to trade fairly." But, does it actually contribute in any way to our legal system?

An example of where the doctrine of good faith has been overlooked is in the case of St Paul Fire and Marine Insurance Ltd. Vs McConnel Dowell Construction Ltd (1994). In this particular case, the insurance company were given a lack of information from the contractor. McConnel failed to explain to them that different types of foundations were being used, as the ones initially decided on. This is an example of a 'failure to disclose'. McConnel discovered they failed to get adequate insurance after the foundations gave way. In this situation "the insurers were able to avoid the policy because of the misinformation from the contractors. Once again raising the question of the validity of the policy of good faith.

The contractual documents JCT SBC and NEC3 ECC, both highlight the importance of high spirits and collaboration between parties, and this is supported by Sir John Egan and Sir Michael Latham. However, Brownsword R (2000), contrasts their viewpoints highlighting five different ways in which they could be discarded. One of these arguments that they have a “restriction on self-interest”. This may be the case, but on the other hand, is this an example of professional pride that was previously mentioned in this essay? The self-interest of one company may not be beneficial to other participants in the party, and this is important to note.

The interpretation of the clauses within these contractual documents were debated in the case of Costain Ltd vs Bechtel and anor (2005). Here the term ‘good faith’ was classed as ambiguous. Enablers, as previously mentioned are things “such as respect, trust, good communication” (Geoff Powell, 2016). However, is it possible to quantify these enablers? Once again, the whole problem of ambiguity is present.

In defence of the contractual documents, we can see examples of beneficial mechanisms within these construction projects. The recent inclusion of project managers in construction projects have allowed for mechanisms like critical path networks, resource scheduling and project plans to be utilised. This allows all participants to gain an understanding of the project’s objectives and a temporal scale that all parties can work with. However, as previously mentioned there are recurring problems in the industry such as professional pride and overlapping of stages, not to mention the many more such as “Extended project participation” and “Conflict in project teams” (Will Hughes, et al. 2015). The question is, will these common problems override these mechanisms of the contractual documents and still cause issues to arise? Well, its clearly a start down the right path, however in contract law, the idea of good faith is progressively needing to be reconsidered.

Conclusion

In conclusion the statement which expresses the idea that clients are currently engaging with more participants in construction projects is very true. The issues arising from the diversity of these participants is clear to see, Will Hughes et al, (2015), provides further evidence of this with problems such as professional pride and overlapping of stages. The introduction of mechanisms and their subsequent enablers into contractual documents such as JCT 11 and NEC3 ECC, are providing a rule of thumb for clients to utilise to prevent these issues from arising. However, in contract law it is important to note that every project is different, and every subsequent dispute is also different. Therefore, there is a huge discussion as to whether some of these techniques, such as good faith are actually important to English Law. Even though some believe that modern contractual documents have been ‘Lathamised,’ I believe that good faith and collaborative working should always be encouraged, as it’s an example of good practice.