SQUIRE PATTON BOGGS

Construction & Engineering Update

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Know Your Site – Newts, Bats, Knotweed and Unexpected Site Conditions

In May 2016, the Housing and Planning Act 2016 (the Act) received royal assent. The Act is intended to promote the supply of starter homes in England. With the increasing demand for housing and limited space on which to build, we have seen an increase in the remediation and development of brownfield sites. In turn, this could be the reason why we have seen an increase in publicity surrounding the great crested newt, bats and Japanese Knotweed. These are severe issues for a project should these plants or wildlife be discovered on a construction site. This is why developers and contractors need to carefully consider how their construction contracts deal with the risk allocation of unexpected site conditions.

Introduction

We summarise below some of the specific issues which may be encountered when faced with the discovery of great crested newts, bats and Japanese Knotweed. These are serious problems for projects in terms of the impact upon the works. We will explore the types of damage which they can cause and the penalties associated with their treatment or mistreatment. Against this backdrop, we will conclude with a brief review of how the principal construction contracts published by JCT, NEC and FIDIC approach and allocate the risk of unexpected site conditions.

Great Crested Newts

(i) How are they protected?

The great crested newt is native to the UK and its population has been declining since the 1940s due to loss of habitat. The great crested newt has had protected species status since the Wildlife and Countryside Act 1981 and additional European protected status under the Conservation (Natural Habitats, etc.) Regulations 1994 (as amended by the 2007 amendment regulations) (1994 Regulations).

(ii) What type of damage can be caused?

Whilst great crested newts do not cause physical harm to a construction site, their presence on site can cause a project to be delayed or shelved indefinitely. Delays can be caused either while the relevant surveys for protected species are being undertaken on site or, if great crested newts are discovered after the development has commenced, the government's advice is that all works on site which are likely to affect the great crested newt must cease immediately.

(iii) How is the treatment of great crested newts regulated?

Under the 1994 Regulations, it is an offence to:

- Deliberately capture, kill, disturb or injure the great crested newt
- Damage or destroy a breeding or resting place
- Obstruct access to a resting or sheltering place (whether deliberately or recklessly)
- Possess, control or transport live or dead newts or any part of them
- Take great crested newt eggs

Anyone found guilty of any of the above offences may be subject to an unlimited fine and up to six months' imprisonment for each offence.

Bats

(i) How are they protected?

All bat species and their breeding grounds are protected by European law, namely the Conservation of Habitats and Species Regulations (2010). Bats have been granted protected status as they are vulnerable and endangered due, in part, to the fragmentation of their habitat.

(ii) What type of damage can be caused?

As with the great crested newt, bats do not cause physical damage to projects, but they can cause long and costly delays due to their protected status. The following activities which may be undertaken when remediating brownfield sites, for example, are likely to cause harm to bats: renovating, converting or demolishing a building or removing hedgerows, watercourses or woodland. If bats are found once a development has started, then the project will be delayed, as guidance from the government is that work which is likely to be breaking the law must stop immediately and expert help should be obtained.

(iii) How is the treatment of bats regulated?

It is an offence to do any of the following to any species of bat:

- Deliberately capture
- Injure or kill
- Damage or destroy a breeding or resting place
- Obstruct access to resting or sheltering places
- Possess, sell, control or transport live or dead bats, or parts of them
- Intentionally or recklessly disturb a bat while in a structure or place of shelter or protection

The above offences are punishable, as with the great crested newt, either by an unlimited fine and/or up to six months' imprisonment.

Japanese Knotweed

(i) What is it?

Japanese Knotweed was originally introduced to the UK as an ornamental plant in the 19th century, but it is now the most invasive plant in the UK. It is classified as an invasive non-native species (INNS) which spreads rapidly, at a rate of up to 10 cm a day in certain months of the year.

(ii) What type of damage can it cause?

If Japanese Knotweed is found to be growing close to any building, then there is a danger that underground roots or rhizomes can cause damage to the structure of the building. The rhizomes will exploit any crack, joint or other structural weakness and the pressure which is exerted by the expanding roots/rhizomes is very likely to result in damage to the structural integrity of the building. The roots will seek access through cracks, weak joints, etc., in their search for water and, as such, can interfere with water pipes, drains and other underground pipes, which could lead to blockages or a need to replace pipes, if the invasion is severe. Additionally, as was seen recently in the *Network Rail* case (discussed below), the growth of Japanese Knotweed can cause diminution in the value of a property. Japanese Knotweed may also be problematic for some mortgage providers.

In *Robin Waistell v Network Rail Infrastructure Limited*, a homeowner sued Network Rail and was compensated for the encroachment onto his property of Japanese Knotweed which originated from Network Rail's land.

(iii) How is Japanese Knotweed regulated?

Japanese Knotweed is an INNS, or invasive alien species, which is regulated by the European Union Regulation (EU) No1143/2014. The INNS Framework Strategy for Great Britain was developed in 2008 and then, in 2015, the government published the 2015 Great Britain INNS Strategy. A person found guilty of planting or otherwise causing to grow any INNS can be punished by imprisonment or a statutory maximum fine.

Unexpected Site Conditions – Contractual Risk Allocation

These wildlife and plant risks, if found on site, are likely to cause delay or (in the case of Japanese Knotweed) damage. Given the potential costs of delay and/or damage, it is imperative that parties consider the risk allocation of unforeseen site conditions such as these when tendering or entering into a contract.

How Do Standard Form Contracts Allocate Unexpected Site Conditions Risks?

JCT Design and Build 2016

Perhaps surprisingly, the JCT Design and Build 2016 (like its predecessors) does not provide for unforeseen site or physical conditions. Because the contract is silent, it is presumed to be the contractor's risk. For this reason, parties will usually, and it is recommended, introduce amendments to explain which party bears the risk of unforeseen site conditions and what happens if they are discovered, for example, in terms of entitlements to extension of time (hence, relief from liquidated damages) and/or loss and expense. Also, if the contract is silent, it could be argued that any remediation strategy which might be required (for example, if Japanese Knotweed was discovered), then the contractor may argue that this work is outside of scope and, hence, an entitlement to a variation arises.

However, it should be borne in mind that there is also an obligation on the contractor to comply with all statutory requirements.

This potential uncertainty simply illustrates why it is a good idea, in our view, to regulate the risk allocation in respect of such matters.

FIDIC

The FIDIC Red and Yellow books require the employer to bear the risk of physical conditions which would not have been reasonably foreseeable by an experienced contractor at the date of tender. However, there is a requirement pre-tender for the contractor to interpret all the data that the employer provides to it and it is also deemed to have examined the site, access to the site, etc. It, therefore follows that, despite "Unforeseeable" site conditions being an employer risk, due to the wealth of information that the contractor is deemed to have analysed, any such "Unforeseeable" site conditions could, in fact, be limited.

It remains to be seen what, if any, changes to the risk allocation of site conditions might be made in the 2017 versions of the FIDIC contracts.

NEC3

The risk of unforeseen site conditions lies with the contractor unless the contractor encounters any "Physical Conditions" and they "... have such a small chance of occurring that it would have been unreasonable for him to have allowed for them." The contractor is assumed to have taken into account any information provided which relates to the site and any publicly held information together with a visual inspection and such other experience or information as an experienced contractor would have, or be expected to have, obtained. It therefore, follows that the risk of unforeseen conditions generally lies with the contractor as those excluded "Physical Conditions" are limited.

As with FIDIC, it remains to be seen what, if any, changes to the risk allocation of site conditions will be brought into the NEC4 later this year.

Conclusions

In our experience, what usually drives the allocation of risk for site conditions in a construction contract is generally the state of knowledge of both parties at the time of tender. The more information which is available, the better the risks may be understood and, therefore, the contractor or employer may be comfortable to agree a specific risk share. This comes down to, in our view, a need in the first instance to "know your site" and then agree a suitable approach towards unexpected site conditions in the construction contract which is clear for both parties.

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