Hewitsons Construction

LEGAL UPDATE

Absolute Client Focus

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In this Issue

STOP PRESS: The Architects Act 1997 (Amendments etc.) Order 2018

The Architects Act 1997 regulates the use of architect as a professional title, making it an offence to operate as and use the title of an architect unless registered with the Architects Registration Board (ARB). It also issues a code of conduct and deals with any complaints relating to an architect's professional competence.

On 31 March 2017 the Department for Communities and Local Government announced that it intended to carry out a two stage review to (a) evaluate the continuing need for the regulation of architects and (b) evaluate the nature of this regulation.

The review found the current arrangement of the Board was out of line with other regulators, such as the General Medical Council, who all operate with appointed Boards and reported improved functionality as a result. It found that the current arrangements, whereby the Board is comprised of 7 elected architect members and 8 appointed lay members, hinder Board cohesiveness as the elected members have two sets of obligations; to the Board and to their electorate.

As a result of the review, the Architects Act 1997 (Amendments etc.) Order 2018 was made on 28 August 2018 and will come into force on **7 January 2019**. The key changes will be in relation to the

structure of the Board, which will now be wholly appointed by the Privy Council and amends the constitution and quorum of the Professional Conduct Committee.

No quick fix for the NHBC - Hodgson v National House Building Council (NHBC) [2018] EWHC 2226 (TCC)

[Mohammed Husnain Ali](#)
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Background

This case considered an application for summary judgment and/or strike out of the whole or part of a claim by NHBC and looked into whether the property owner could recover the cost of remedial works.

The claimant's bungalow was constructed by a contractor with the benefit of NHBC Buildmark cover. When defects became apparent, the claimant gained a partial award via arbitration against the contractor which he failed to pay.

The claimant later began a second arbitration against the contractor which deemed to be rather problematic as the latter was in the process of liquidation. It became apparent that the NHBC policy would be the claimant's main source of compensation and as such the claimant and NHBC entered into a settlement agreement whereby the second arbitration was discontinued and NHBC agreed to consider any claims that had not been addressed in the first arbitration to the extent that they fell within the scope of the NHBC policy.

However, NHBC subsequently rejected all the claims arguing that these had been addressed in the first arbitration. The claimant began court proceedings for all of the sums she had claimed, whilst NHBC applied to strike out the claim.

Court Judgment

The court granted the application in part and considered:

- **Applicable tests -** Although a claimant had to have a case that was more than merely arguable, the bar on either summary judgment (i.e. early judgment) or strike out (of a claim) was not to be set too high and there should be no need for a mini-trial of the issues.
- **Recoverable loss -** Refused to accept NHBC's argument that the claimant had suffered no recoverable loss because he had sold the property without making any repairs. This question was unsuitable for resolution on a summary basis and the Court could not conclude at this stage that the claimant had no real prospect of succeeding.
- **Abuse of process -** Considered that, even if she was incorrect about the settlement agreement, the claimant's claims for items that had been subject to a previous arbitration against a different party could amount to an abuse of process. The public interest in not having the same issues repeatedly litigated was as valid as that in not vexing the same party twice.

Conclusion:

This case highlights the detailed investigation required to decide on applications for striking out claims and for summary judgment commenting that such applications are not always a "quick fix".

Whilst this judgment creates no new law, it provides a useful summary of the law regarding questions of recoverable loss and abuse of the Court process, highlighting that the courts continue to show reluctance to decide on issues which may have already been considered.

For more information on this update please contact Mohammed Husnain Ali on 01223 461155 or click here to email Mohammed.

Follow up on Be careful what you wish for January 2018 Construction Law Update

Lorna Carter
Legal Director

North Midland Building Ltd v Cyden Homes Ltd [2018] EWCA Civ 1744

Background

In our January HTML we reported on the decision in the Technology and Construction Court holding that a clause in a construction contract was unambiguous and therefore could not be said to be inoperable by the prevention principle.

The matter was heard on appeal in July of this year and the original decision of the TCC was upheld.

The Claimant, North Midland Building Ltd, was the main contractor for the Defendant, Cyden Homes. Their agreement was based on an amended JCT 2005 contract in which the extension of time clause at 2.25.1 was amended to state *'€¦ any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account.'* In other words, in the event there is concurrent delay which was caused by the contractor or for which the risk was allocated to him under the building contract, then the contractor would not be entitled to an extension of time.

In this case there was a delay with the project, part of which was attributable to concurrent delay which was the responsibility of the contractor. The contractor sought declarations from the Court that the provisions in the JCT contract which the parties had agreed in relation to concurrent delay was invalid and the employer could therefore not require the contractor to pay liquidated damages. The contractor particularly relied on the prevention principle to claim time was at large and that accordingly the employer was not entitled to liquidated damages as there was no longer a completion date but instead a requirement to complete within a reasonable period.

Appeal

The Court of Appeal agreed with the TCC that the parties were 'crystal clear' in how they wanted extensions of time to be dealt with. The Court of Appeal held that the prevention principle could not operate to rescue the contractor from a clause which he had freely agreed to and that there was no basis to imply a term to prevent the employer requiring payment of liquidated damages under the contract because the clause 2.25.1 was valid.

Conclusion

This decision is likely to result in parties finding it increasingly hard to deviate from contractually agreed positions, even when this results in harsh outcomes - the prevention principle will not save a contractor from the effects of a clause he has freely agreed to. This is reassuring to employers who rely on concurrent delay exclusions by confirming they are effective and will not risk setting time at large or

risking their right to claim liquidated damages. Since the first instance decision in 2017 the use of such clauses has increased and it is likely this confirmation will continue this trend.

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Unjustly enriched? - Office Depot International (UK) Ltd v UBC Asset Management (UK) Ltd and others [2018] EWHC 1494 (TCC)

Sardeep Gill
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Background

The landlord, UBS Assets, entered into an Agreement for Lease with Office Depot in relation to a warehouse in Manchester. AMEC were appointed as the contractor and engaged FK Facades as the roofing sub-contractor. AMEC provided collateral warranties to both the landlord UBS Assets and the tenant Office Depot.

Completion of the warehouse took place in 2005 and UBS Assets granted the lease to Office Depot as arranged. This lease included a tenant's repairing covenant.

Settlement with landlord

The roof leaked and eventually the landlord brought a claim against the contractor under its collateral warranty. This was settled and the contractor agreed to pay damages, passing some of these on to their subcontractor. As part of the settlement agreement the contractor also obtained an indemnity from the landlord as a precaution in case they later invoked a repairing covenant in Office Depot's lease triggering in turn a claim by Office Depot under their collateral warranty from the contractor.

The landlord did not use the settlement monies to repair the roof, instead waiting to see what their tenant would do. The landlord did not chase the tenant's repairing obligation as this would trigger the indemnity agreed in the settlement agreement.

Action by tenant

Office Depot, instead of claiming under the collateral warranty in their favour from the contractor, asked the TCC for a declaration as to what works were needed under their repairing covenant and that any such works would be the contractor and sub-contractor's responsibility. This declaration was refused by the Court as the tenant's obligation is to keep the premises in a specified standard of repair. The landlord does not have an obligation to specify the works that are needed, they are entitled simply to have the standard of their property maintained.

The contractor and sub-contractor argued that they were not liable to the tenant at this stage. The tenant had not yet incurred any remedial costs and their liability is dependent on whether works are indeed required. Further, the sub-contractor is liable only to the contractor under the roofing sub-contract and does not guarantee the tenant's repairing obligations. The court concluded that the tenant should be given a further opportunity to plead a proper case and the contractor then indicated it may bring both the landlord and the successor landlord into the proceedings by way of contribution claim.

Unjust enrichment

This case provides an interesting discussion in terms of looking at the approach the tenant perhaps should have taken; instead of seeking a declaration for works due they could have brought a claim directly under the contractor collateral warranty in their favour. If they were able to prove the contractor and sub-contractor's breach caused loss for which the tenant was liable under their repairing covenant, it is not obvious how the parties would avoid liability. However, it must not be forgotten that the landlord has already received damages towards the repair of the roof under the settlement agreement. Surely it must be right that they must use the damages they received towards the repair? This point was addressed in the judgment:

"it doesn't feel right that AMEC and FK should have to pay twice to repair the same defect. Equally, it isn't immediately obvious how to unravel the double liability problem [perhaps] the answer lies again in the unjust enrichment point."

Next steps

The tenant has been given another opportunity to plead its case so it remains to be seen how this issue will be dealt with. Perhaps the point of unjust enrichment will be addressed, but until this is resolved it would be prudent to ensure the terms of any settlement place an obligation to use the proceeds for their intended use.

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The perils of milestone payment - CIMC MBS Ltd v Bennett (Construction) Ltd [unreported] 18 July 2018

Campbell Wilson
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Background

One of the key terms of the Housing Grants Construction and Regeneration Act 1996 (as amended) is section 110(1)(a): "*Every construction contract shall provide an adequate mechanism for determining what payments become due under the contract, and when*". Whilst the parties to a contract are able to determine what their payment provisions will be it is important to keep in mind this provision of the Construction Act.

Declaration

In this case the claimant sub-contractor sought a declaration from the Court that the payment terms in their sub-contract were not an adequate mechanism for determining what payments were due and so were unenforceable. They had agreed to design, supply and install pre-fabricated bedroom units for a hotel in London which were to be made in China, shipped to Southampton and then transported and installed in London. The payment terms were not monthly under the JCT contract but instead due at specified milestones:

- 20% on execution of contract;
- 30% on sign off of prototype in China;
- 30% on sign off of snagging items in China;
- 10% on sign off in Southampton;
- 10% on completion of installation/snagging.

The subcontract works were suspended due to non-payment by the employer and the claimant referred a dispute over its entitlement to payment to adjudication. The adjudicator decided the milestone payment provisions complied with the Construction Act and were therefore valid and enforceable.

Court action

The claimant brought enforcement action in Court contending s110(1)(a) was not complied with in relation to milestones 2, 3 and 4 because there was no criteria for determining whether sign-off had occurred and no time was prescribed for the process.

The court held in favour of the claimant. The provisions of the sub-contract for payment by reference to certain milestones did not comply with the Construction Act requirements as it was not clear what the criteria or relevant date were for "sign-off" under the milestones. They noted that "sign-off" appeared elsewhere in the contract, not just within the payment provisions. It was used to signify approval by the underlying client and therefore the court could not fashion a particular meaning to it for the payment provisions. It was not clear what sign-off involved and it was impossible to say what the due date for sign-off was for milestones 2 and 3. It could not be completion of that stage, as completion was expressly used for milestone 5.

However, the court did hold that milestone 4 was compliant as it could be construed as delivery of the units from the ship at Southampton.

Conclusion

The key message is that it is important to make sure any payment provisions that displace the monthly JCT payment provisions are still complaint with s110(1)(a) of the Construction Act by clearly providing an adequate mechanism for identifying when payments become due. The payment provisions need to be read in conjunction with the rest of the contract to ensure there can be no confusion as to their meaning.

For more information on this update please contact Campbell Wilson on 01908 247014 or click here to email Campbell.

The importance of being earnest about collateral warranties

Charlotte Glasse
Trainee Solicitor

BDW TRADING LTD v INTEGRAL GEOTECHNIQUE (WALES) LTD (2018)

Background

A local authority intended to sell land, which had previously been used as a residential education centre for development into housing. They commissioned the Defendant to provide a geotechnical report which was then used for marketing the site. The Defendant was going to provide collateral warranties in relation to this to the ultimate purchasers, but had not agreed to assign the benefit of the report to the purchaser of the site.

The Claimant was a national housebuilder who purchased the site. During clearing of the site it was discovered to include materials containing asbestos. The report had shown that there was a lesser risk of asbestos on the site then there actually was and thus the cost of remediating was higher than estimated. The Claimant wanted to recover these additional costs from the

Defendant although there was no contractual link between them; the Defendant was not the seller, he merely produced a report for the seller. The Claimant housebuilder therefore brought a case claiming the Defendant owed it a duty of care in relation to the report which had been negligently prepared. Had they known about the asbestos they would have negotiated a lower purchase price.

Court action

The court dismissed a professional negligence claim holding that the Defendant did not owe the Claimant a duty of care in circumstances where the consultant's appointment included an exclusion of third party rights and provided for the eventual purchaser of the property (as opposed to the builder/developer) to be afforded legal recourse by way of a formal assignment of the report or appointment.

Conclusion

This case highlights the importance of letters of reliance and collateral warranties and being certain as to who can rely on reports and take legal action when these reports are found to be defective. It will be relevant to those acquiring or selling land for development and illustrates what could happen when such collateral warranties, letters of reliance or an assignment of rights are not in place providing the legal basis for a claim to be made. Put simply if a third party wishes to rely on a report by a consultant they did not instruct they must ensure appropriate contractual arrangements are made to permit this.

For more information on this update please contact Charlotte Glasse on 01223 461155 or click here to email Charlotte.

An own goal - Swansea Stadium Management Co Ltd v (1) Swansea City & County Council (2) Interserve Construction Ltd (2018)

Tim Richards
Partner

Background

This case concerned a contractor that had been engaged to design and construct a football stadium. On 1 April 2005 (April Fool's day!) the employer wrote stating that the works had reached practical completion the previous day. It then granted a 50 year lease to the claimant which contained tenant repair covenants.

In April 2017 the claimant issued proceedings seeking damages from the employer and contractor for alleged defects in the stadium. There were two pleaded claims:

- That the design and construction of the flooring and steelworks were defective; and
- That the contractor had failed to rectify those defects in breach of its obligations under the design and build contract and collateral warranty provided to the tenant claimant which had been entered into after practical completion but not dated.

The contractor submitted the claims were time barred because any right to make a claim under the collateral warranties accrued on the date of practical completion, being 31 March 2005. However the claimant argued that the collateral warranty did not have retrospective effect and practical completion was not achieved by 31 March 2005 because the works were incomplete and defective at that date.

Court judgment

The court held that whether or not the collateral warranty could have retrospective effect depended on the express or implied intentions of the parties. In this case there was no express commencement or expiry date, no express date on which any right to take legal action was deemed to have occurred or an express limitation period. It contained a promise to hold PI insurance for 12 years from practical completion and express reference to the warrantor's liability for the same period, but neither of these was determinative.

It was decided that the language and matrix was indicative of the parties' intention for it to have retrospective effect. Its purpose was to give the claimant a direct right of action against the contractor in respect of their obligations under the building contract and indicated it intended to cover the full scope of the works. Additionally, the equivalent rights clause in the collateral warranty limited the contractor's liability to that which it would have had if the claimant had been named as joint employer under the building contract. This indicated that the parties intended the contractor's liability to the claimant to be coterminous with its liability to the employer under the contract.

Furthermore the letter from employer's agent stating practical completion was reached was unchallenged. Whilst it is not conclusive evidence that practical completion had been reached, clause 16 of the contract provided that a statement from the employer that practical completion has been reached was deemed to for the purposes of the contract to mean it had been, even if there were outstanding or defective works. This meant practical completion was reached on 31 March 2005 and the claim was time barred. There was no other reason why it should go to trial and therefore summary judgement was granted.

Conclusion

This case acts as a warning that a warranty may act retrospectively to cover pre-existing breaches if there is no express term in the warranty to state when liability under the warranty starts or ends. It also reinforces the fact that liability under a building contract continues until PC:

"A cause of action for breach of a construction contract accrued when the contractor was in breach of its express or implied obligations thereunder. Where the contractor was obliged to carry out and complete the works, the cause of action for a failure to complete in accordance with the contract accrued at the date of practical completion".

This decision suggests that if parties want to try and extend the limitation period they must do so expressly and clearly. It is rare though that a warrantor would accept this.

For more information on this update please contact Tim Richards on 01908 247011 or click here to email Tim.

Brexit update: New Deal or No Deal?

Colin Jones
Partner

A brief look into the possible effects of Brexit on the realms of construction:

Following the government's recent 'no deal' analysis of Brexit, the implications of what might accompany it still remain unclear. Even more inconspicuous are the effects it will have on construction, an industry which currently contributes 7 per cent to GDP and employs several million individuals.

Analysis:

The analysis papers did however contain an oddment or two of relevance to those related to this industry, namely that a no-deal Brexit would mean that the free circulation of goods between the UK and EU would cease.

The government's analysis notes 10 separate steps to take before materials are brought into the UK from the EU including customs declarations, safety and security declarations as well as further inspections and the potential of having to pay a duty fee.

Possible effects:

Whilst approximately two-thirds of construction materials are imported directly from the EU, such deal could result in an issue which is two-fold: a weaker pound may lead to the rising costs of imported materials and the UK also risks losing its tariff-free access to the single market as well as facing the imposition of duties and limits on quantities as well as price.

There is also the possibility of a shortage of workers which could lead to higher project costs where demand outstrips supply and UK construction workers insist on higher wages. The government have connoted that replacement schemes might be put in place by the government including a new visa system which may take time and involve complex procedures.

Conclusion:

To conclude, whilst the analysis still does not provide enough information on what the government proposes regarding Brexit generally as well as specifically in relation to construction, the government will need to undertake significant due diligence bearing in mind the construction industry is prodigious for economic growth and ensure the two are seen to be mutually supportive and not diametrically opposed.

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