Construction Law Update

Recent Developments in Construction Law
New case-law, and statutory change

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Latest Case-Law

- Surveyor's Duties when giving a Home-Buyer's report
- Costs risk for expert witnesses
- New Opportunities for Adjudication Experts
- Increasing Need for Mediation Skills
- Contract Administrators beware statutory change
- Drafting assignment clauses

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Surveyor's Duties when giving a Home-Buyer's report

- *Hart v Large* [2020] EWHC 985 TCC, BLM
- Surveyor's liability for a Home-Buyer's survey report in respect of a re-built property (with no NHBC Warranty) included a duty to advise on getting a PPC.

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Costs risk for expert witnesses

- *Thimmaya v Lancashire NHS Foundation Trust* [2020] 175 BMLR 226,
- Incompetent expert witness ordered to pay costs of wasted trial.

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New Opportunities for Adjudication Experts

- *Bresco v Lonsdale* [2020] UKSC 25, Supreme Court, BLM
- Can the Liquidators of an insolvent company use Adjudication to resolve the value or validity of claims, or to establish the insolvent company's rights?

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Increasing Need for Mediation Skills

- *DSN v Blackpool Football Club Limited* (2020) EWHC 670 QB. (BAIILI)
- Developing policy on pushing litigants to mediate, even where they believe they have a strong case, with costs punishment for refusal.

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Drafting assignment clauses

- ***Energy Works v MW High Tech*** **[2020] EWHC 2537 TCC, BLM**
- Subcontract assignment clause (in event of Contractor being sacked) allowed Employer to take an assignment of the subcontracts.
- This meant both future and past rights – the Contractor lost its accrued rights, worth millions.

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Insurance – cover for Business Interruption

- ***Hiscox Action Group v Arch Insurance (FCA intervening),*** **2021 UKSC 1**
- The FCA has stepped in to win a major test case favouring insureds' claims on business interruption insurance
- Concurrent causes of loss irrelevant
- Broad interpretation of "radius" clauses
- Broad interpretation of restrictions imposed by public authorities
- "Trends" clauses cannot take into account previous covid damage

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Contract Administrators beware statutory change

- **Section 233 B of the Insolvency Act 1986.**
- Inserted by Section 14 of the *Corporate Insolvency and Governance Act 2020*
- Statutory change – Contractual clauses giving the employer the right to terminate the Contractor's employment in the event of Contractor going into an insolvency process (e.g., liquidation) are no longer effective.

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In Conclusion.....

...any Questions?

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Construction Law Update – 2020 case-law, and statutory change

CASE NOTES, 2020

Hart v Large, [2021] EWCA Civ 24, [2021] All ER (D) 51 (Jan) Liabilities on Surveyor for Home Buyers' Survey

Facts: Mr and Mrs Hart bought a property in Devon which had been completely rebuilt by the Vendor. They relied upon a homebuyer's survey costing £600 from Mr Large and paid a purchase price of £1,200,000. In addition to the few defects Mr Large had detected, there proved to be so many more so that the entire property needed to be demolished and rebuilt. Mr and Mrs Hart sued Mr Large for diminution in value on the basis that (1) there were a number of other defects he should have reported on; (2); he should have recommended a building survey and (3) he should have recommended that a Professional Consultant's Certificate be sought and obtained They further maintained that if they had been properly advised, they would not have proceeded with the purchase.

Held:

(1) the allegation that Mr Large should have recommended a building survey report was rejected as he had given them a clear choice between paying for a homebuyer's report or for a building survey;
(2) Mr Large had missed other defects;
(3) but more importantly as this was a recently rebuilt structure (and there was no NHBC Warranty) he should have advised them to obtain a Professional Consultant's Certificate (PPC) which would have given them some protection in case the rebuilding works turned out to have been carried out negligently.
(4) As a matter of fact, Mr and Mrs Hart would not gone ahead with the purchase if he had given them this advice;
(5) Accordingly Mr Large was liable for damages assessed by reference to diminution in value.

Comment:

a) This case is a precedent for a rather strict approach to the normal Homebuyer's Survey report, imposing a broad view of the professional duty to advise the client not just about defects but on other circumstances, such as the implications of the structure being extensively rebuilt without a conventional Warranty for the rebuilding works.

b) Where property is acquired in reliance upon a defective survey, the normal measure of damages is not by reference to the cost of making good but rather a reference to the diminution in the value of the property between the purchase price and the realistic price if all defects had been known.

c) The court applied that approach, but the defence cleverly argued that the reduction should be based on identifying all the defects which Mr Large ought reasonably to have detected. This would have produced a much smaller figure than the amount calculated by reference to a need to demolish and rebuild. The judge rejected that approach.

d) Fortunately, Mr Mrs Hart had previously settled claims against their architect and solicitors which reduced the damages ordered against Mr Large to £374,000, plus damages for inconvenience and distress of £15,000 each.

e) Ironically, had Mr Large advised that a PPC be obtained, then either the matter would not have gone ahead, or he would have got fee for doing a PPC and avoided this court case.

Thimmaya v Lancashire NHS Foundation Trust [2020] 175 BMLR 226, Manchester CC
Incompetent expert witness ordered to pay costs of wasted trial.

Facts: Mrs Thimmaya sued Lancashire NHS for medical negligence (spinal surgery), and her lawyers appointed Mr Jamil as their expert medical witness although he himself had only carried out surgery of this sort twice. Just after his appointment he had ceased working because of psychiatric difficulties, but assured her solicitors he was still fit to do expert witness work.

In cross examination, he revealed that he was not familiar with the legal test of medical negligence (which meant that he was not competent to give an independent expert opinion on whether the defendants had acted with proper professional skill and care). The case was therefore dismissed. Subsequently Lancashire NHS applied to the court for an order that Mr Jamil pay their wasted defence costs of £88,000.

Held: Mr Jamil's health problems meant that he was unable to concentrate or to engage properly with cross examination. However he did not inform Mrs Thimmaya or her lawyers and should not have accepted instructions to act. His absence caused serious problems for his client and had caused a public body to incur significant necessary costs. Consequently he was ordered to pay the trust's costs.

Comment:

a) Although this was only decision in the County Court, the principles are very relevant to everyone who accepts expert witness work. Because Mrs Thimmaya's case was dismissed,she had lost her opportunity to obtain compensation (unless she sued Mr Jamil).

b) The Judge stressed that *"Experts should understand the importance of their duties and the potential consequences of failure to discharge them."* She further observed that Mrs Thimmaya had not had a strong case and a different expert witness and well not have supported her claim, which would never have got to trial.

c) Consequently the Trust had wasted all the legal costs of its defence from the point when Mr Jamil had fallen ill. He was therefore ordered to pay £88,000 under the court's power to order legal costs be paid by a third party.

d) Professionals should not be discouraged from doing expert witness work, but it is vital to do the home-work, e.g., thoroughly study CPR 35, do the CPD, etc..

Bresco v Lonsdale [2020] UKSC 25, Supreme Court, BLM Can an insolvent company go to Adjudication?

Facts: Bresco was carrying out electrical installation work under a subcontract with Lonsdale; each accused the other of wrongful termination. Bresco went into liquidation and its liquidator commenced an Adjudication for £220,000. Lonsdale applied to court for an injunction to prevent Bresco from proceeding with its adjudication. The High Court gave an injunction, on the basis that, following the Insolvency Rules, the two companies' claims should be set off against each other so there was no dispute and nothing to adjudicate.

The Court of Appeal confirmed that judgement, and the case went to the Supreme Court:-

Held: It is established law that this set-off Rule does not prevent any party from establishing its legal entitlement by using Litigation, or contractual Arbitration. There is no therefore no reason why a party should not instead use the quicker and cheaper route of an Adjudication decision. Section 108 of the *Housing Grants Construction Regeneration Act 1996* creates a statutory right to construction adjudication which is not struck down by the Insolvency Rules. The injunction was therefore cancelled, and the adjudication could go ahead.

Comment:

a) Adjudication of construction disputes is generally understood to be about cash-flow. Lonsdale convinced both the High Court and the Court of Appeal that as Bresco would probably not be granted summary enforcement of any adjudication Award, the process was futile and should be stopped.

b) Lord Briggs perceived that there is another, equally important function. Adjudication provided a simple and proportionate method for Bresco's liquidators to determine the quantum of liabilities. He also observed correctly that in reality most Awards are not challenged in the Courts, and therefore provide "a simple, proportionate method" of determining disputes.

c) The Supreme Court stated that adjudication should be seen as a form of ADR, speedy and cost-effective. Although adjudication decisions during the insolvency process may well not be enforced, nevertheless they are valuable for ascertaining liability or quantum, and Liquidators are likely to make increasing use of them in construction company liquidations.

d) Claims consultants and QS experts may well find new opportunities and clients, such as Licensed Insolvency Practitioners.

DSN v Blackpool Football Club Limited **(2020) EWHC 670 QB.** ***(BAIILI)*** Major guidance on costs punishment for those who won't mediate

Facts: When DSN was aged 13 he attended coaching sessions at Blackpool FC run by Frank Roper, who was a volunteer assisting Blackpool FC. Roper sexually assaulted DSN, and many years later DSN brought a claim against the Club. DSN made three claimant settlement offers, all of which were rejected by the club out of hand, which also refused to mediate on the basis that it had a good defence, even though the court had formally ordered the parties to consider ADR.

The Court ruled that **t**he Club was vicariously liable for Roper's actions, and it was ordered to pay £19,000 in compensation. DSN applied for indemnity costs which the club argued were unfair.

Held

1. The Club by its solicitors had been ordered to make a written statement of its reasons, should it refuse to enter into an ADL process. The reason given by the solicitors was simply that the defendants were confident in the strength of their Defence (which failed!). The Court ruled that the defendants had given inadequate reasons for their conduct. The Judge commented *"no defence, however strong, by itself justifies a failure to engage in any kind of alternative dispute resolution".*

2. Furthermore, even if their case had been strong, the defendant's inadequate statement of its reasons, and its responses to the claimant's settlement offers, would still have fallen short of an acceptable level of engagement with the possibility of settlement or ADR. This justified an award of "indemnity costs", (i.e. costs at a much higher level than usual). An interim award of £200,000 was ordered.

Comment: This case raises an urgent issue for litigation solicitors; how far should an adviser go in warning the client that a refusal to mediate or negotiate is very risky? Fortunately, the judgement sets out a really useful list of the positive reasons to engage with the other side:

- The Club had lost, and so was due to pay "standard level" costs anyway. Because of its behaviour, it had to pay "indemnity level" costs.

- Experience has shown that disputes may often be resolved in a way satisfactory to all parties, including parties who through a mediation process discover that they are able to resolve claims against them which they had considered not to be well founded.

- Settlement allows solutions which are potentially limitless in their ingenuity and flexibility, and which do not necessarily require any admission of liability, or even a payment of money.

- Even if they do involve payment of money, the amount may compare favourably (if the settlement is timely) with the irrecoverable costs, in money terms alone, of an action that has been successfully fought.

- What is more, the costs of an action will not always be limited to financial costs, however. A trial is likely to require a significant expenditure of time, including management time, and may take a heavy toll on witnesses even for successful parties which a settlement could spare them.

- As to admission of liability, a settlement can include admissions or statements which fall short of accepting legal liability, which may still be of value to the party bringing a claim. Blackpool FC had missed an opportunity to acknowledge and accept that the Claimant had been sexually abused by Roper. DSN was not primarily motivated by money, he just expected the club to want to engage and to understand what had happened.

Energy Works v MW High Tech [2020] EWHC 2537 TCC, BLM Serious consequences of a subcontract asignment clause.

Facts: Energy Works (EW) appointed MW High Tech as its EPC contractor for an energy from waste power station. MW appointed Outotec as subcontractor for certain key works. The EPC contract provided for EW to terminate MW's employment for default, and further entitled EW on termination to demand assignment of the Outotec subcontract from High Tech to EW.

The project was seriously delayed, so EW terminated MW High Tech and sued it for £133,000,000 for delays, rectification and completion costs. Hi Tech blamed Outotec and sued it as 3rd party. However, EW claimed in the proceedings that it was entitled to have assignment of all MW High Tech's subcontract rights including both accrued rights to sue for breaches and future rights to require further performance and completion of the subcontract work.

Held: (1) clause 44.3 (d) simply said *"… the contractor shall, if so required by the purchaser… assign any subcontract to the purchaser*." Although High Tech argued that all that was intended was an assignment of future rights, there was no such amendment or qualification in the clause.

(2) So the clause entitled the employer to have assignment of all the accrued and future rights which the main contractor had against the subcontractor. Therefore High Tech lost its rights to claim contractual recovery from Outotec both for EW's £133,000,000 claim under the EPC and for the losses it suffered from breaches of the subcontract duties.

(3) N.B., the Court also ruled that High Tech could pursue an equivalent claim for "contribution" under the Civil Liability Contribution Act, 1987 in respect of EW's claims against it.

Comment: it is normal for major projects to provide that where the main contractor has to be dismissed, and the employer needs to take over and complete the works, then the employer needs to be able to take over all the subcontracts and continue their employment. Generally a competently worded contract should make it clear that the assignment required is in respect of future rights to require performance. Because of the inadequate drafting here, the main contractor suffered a disaster.

Although the contractor had an opportunity to pass on delay liability as a contribution claim (providing he could prove that it was the subcontractor's fault) there was no mechanism for the contractor to claim in respect of his own losses unless he could make out a parallel tort claim for negligence.

***Hiscox Action Group v Arch Insurance (FCA intervening),* 2021 UKSC 1** The FCA has stepped in on behalf of insureds, to win a major test case, favouring insureds' claims on business interruption insurance

Facts: The FCA has agreed a scheme with the leading UK insurance companies to fast-track major issues of law **f**or early judicial guidance. In the present case, the FCA arranged proceedings to examine 21 separate business interruption policies as offered by wide range of insurers. The Supreme Court largely found in favour of a positive interpretation of these various policies to benefit insureds.

Particularly, **the Supreme Court held:**

- "Disease Clauses" (business interruption losses resulting from any occurrence of a notifiable disease within a specified distance of insured premises) will be interpreted broadly. So if there has been any Covid case within the relevant distance (or radius) then all disruption caused by Covid cases everywhere is recoverable, not just in respect of the local case.

- "Prevention of access clauses" were stated to apply to any instruction given by public authority, if it either carries the imminent threat of legal compulsion or is in mandatory and clear terms, indicating that compliance is required without recourse to legal powers.

- The Court rejected insurers' defence argument that if they could show a "concurrent cause" outwith the policy then the policy did not respond. The Court therefore expressly overruled the *Orient-Express* case in which in 2010 the Commercial Court had disallowed business interruption losses sustained by a hotel in New Orleans on the basis that the damage to the city itself had been so great that the hotel business would have suffered even if no direct loss to the hotel had occurred.

Comment:

a) The effect of this strong intervention by the Supreme Court is that losses generated, for example, by the Prime Minister's words on 23rd March asking the nation to stay at home may give rise to interruption claims even though the relevant Regulations (imposing a legal obligation) were not passed until several days later.

b) In consequence of this Decision, businesses should review previous refusals by their insurers to pay up on business interruption clauses. The FCA has made it clear that it will intervene robustly and take further steps in the courts if necessary.

c) We can also expect that in future business interruption cover will be less widely available, for much higher premiums, on very carefully worded policy terms.

STATUTORY CHANGE

Section 233 B of the Insolvency Act 1986. Statutory change – termination clauses in the event of insolvency are no longer effective.

Section 14 of the Corporate Insolvency and Governance Act 2020 has amended *the Insolvency Act 1986* by inserting a new section 233B. This provides that any term in a contract with a company for the supply of goods or services which provides for the termination of that contract in the event that the company goes into a "relevant insolvency procedure" shall cease to have effect if/when the company becomes subject to such a procedure. In other words, any contract clause which purports to confer a right to

terminate the contract for insolvency will not be effective. This covers both discretionary and automatic termination.

- "Relevant insolvency procedures" are widely defined and include administrative receivership, administration, liquidation and company voluntary arrangements etc.
- Care should be taken to remove these clauses from your standard forms to avoid inadvertently putting yourself in breach of contract by terminating when you are not entitled to.
- However termination on substantive grounds, for example cessation of performance or non-payment of invoices should not be adversely affected by this change.

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