



## Legal developments in construction law

### Current issues

#### 1. Dishonesty in application for adjudicator can bring down appointment

The RICS form for requesting nomination of a construction adjudicator asks for names of adjudicators who would have a conflict of interest. In the response to this question a subcontractor's representative listed a number of adjudicators that he did not want appointed, but none had a conflict of interest. Did this false statement invalidate the RICS's appointment of an adjudicator and render the eventual adjudicator's decision unenforceable?

In refusing an application for summary judgment to enforce the decision, the court decided that there was a sufficiently strong case that it did. Where a material fraudulent misrepresentation is made in applying to the adjudication nominating body, the application for nomination of an adjudicator is invalid, as if no application had been made and it did not matter whether the RICS was deceived or not. Alternatively there was a breach of an implied term that a party applying for nomination of an adjudicator by the RICS under the subcontract should not act dishonestly. If a party, in breach of contract, fails to follow the correct adjudication process in a way which goes to the heart of the appointment then the adjudicator does not have jurisdiction.

[Eurocom Ltd v Siemens Plc](#)

#### 2. Interpreting exclusion and limitation clauses - how do they do that?

A dispute about a cavity wall insulation contract involved conflicting interpretations of clauses excluding liability for indirect loss and limiting liability for direct loss. The modern judicial approach to these issues is summarised in *Fujitsu v IBM* where the court said that:

- a party seeking to rely on an exemption or limitation clause must generally show that the clause covers the relevant obligation or liability;
- in every case it is a question of construction of the instrument as a whole;
- an exemption or limitation clause is construed in the same way as any other contract term.

In the cavity wall case, the court had to decide if a loss of profit claim was caught by the indirect loss exclusion clause. A claim for loss of profits, said the court, will be a direct loss if, when the contract is made, it was likely to result from the relevant breach. It will, however, be indirect if there are special circumstances known to the contract breaker at the time of the contract so that a breach would be liable to cause more loss. The exclusion clause in question was ambiguous but the court ruled that it did not apply to the claim for loss of profits, which was direct loss. If loss of profits was intended to be indirect loss and excluded from recovery, it would have been relatively easy to say so. Clear express words must be used to rebut the presumption that neither party intends to abandon any remedies for a breach of contract arising by operation of law. The clause wording did not clearly indicate that the parties intended to abandon a claim for direct loss of profits.

[Polyp Pearl Ltd v E.On Energy Solutions Ltd](#)

### 3. No pay less notice – goodbye to challenging the amount due – ever?

A contractor under an amended JCT Intermediate form of contract served notice of termination. It was then entitled to (and did) submit its account and the employer had to pay “the amount properly due in respect of the account” within 28 days. An adjudicator found that the employer’s pay less notice was non-compliant, mainly because it did not specify the basis of calculation, and said the contractor was then automatically entitled (under the Construction Act default setting) to the notified sum. In enforcement proceedings the contractor argued that the adjudicator had therefore determined “the amount properly due”.

The court disagreed. The employer had not forever lost its right to challenge the contractor’s account. It was open to the employer to have determined, by adjudication or litigation, what sum was properly due in respect of the contractor’s account. That right did not, however, detract from its obligation to comply with the adjudicator’s decision in the meantime by paying the sum ordered.

The court also ruled that a decision by an adjudicator on a party’s primary case did not prevent a second adjudicator from determining, if necessary, an alternative case put in the first adjudication.

Harding (t/a M J Harding Contractors) v Gary George Leslie Paice Kim Springall

### Future issues

### 4. Large businesses faced with reporting their payment performance

The government is consulting on its plan to bring in a prompt payment reporting requirement for large businesses. It does not intend to dictate payment practices but is proposing to require companies to report, quarterly, on the proportion of invoices paid beyond terms, the proportion paid over 30, 60 and 120 days and the average time taken to pay. It is also seeking views on including additional information such as details of standard payment terms and a company’s invoice dispute resolution process. It also

proposes that the information should appear on a company’s website, where this exists. A director would be responsible for ensuring accuracy of the report, with a criminal sanction attached to any breach of the requirement.

The requirement is to apply to large companies and Limited Liability Partnerships (LLPs), and all listed companies (irrespective of size) with businesses reporting on an individual rather than on a group consolidated basis. The Companies Act definition of a small or medium company or LLP, requiring them to satisfy two or more of the qualifying conditions, is the proposed threshold for reporting. Those conditions are turnover – not more than £25.9m, balance sheet total – not more than 12.9m and number of employees – not more than 250.

The consultation runs until 2 February 2015.

See: <https://www.gov.uk/government/news/new-proposals-to-tackle-late-payment>

### 5. Spring 2015 target for changes to prompt payment regime

There is also a new advisory board for the Prompt Payment Code, with representatives from Aviva, Barclays, Bury Council, City of London Corporation, Fujitsu, Greggs, Skanska and Stort Chemicals. Its task is to improve and monitor enforcement of the Code, to promote awareness of it and to advise on any updating needed.

It aims to implement concrete proposals in Spring 2015.

See: <https://www.gov.uk/government/news/government-and-industry-join-together-to-tackle-late-payment>

In the meantime the government has initiated a consultation on changes to the Code.

See: <https://www.gov.uk/government/consultations/proposals-to-change-the-prompt-payment-code>

## 6. RIBA new building contracts

The RIBA has unveiled two new forms of building contract:

- the RIBA Domestic Building Contract, for all types of non-commercial work, including renovations, extensions, maintenance and new buildings; and
- the RIBA Concise Building Contract for small scale commercial building projects of a standard and straightforward nature.

The RIBA is also updating the RIBA Agreements, to be available online.

See: <http://www.ribacontracts.com/>

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