



Legal developments in construction law

Current issues

1. Defective premises and the Act – what premises and how defective?

The Defective Premises Act applies to dwellings, but is a block of flats a ‘dwelling’? If an individual flat is a ‘dwelling’ where does that leave the common parts of the block? And what does ‘*fit for habitation*’ mean? 120 owners of apartments in two blocks in Leeds sued the contractor, under the Act, for defects in the apartments and in the common parts of the blocks.

The court decided that each block was a building containing a number of separate ‘*dwellings*’, individual apartments together with, possibly, those parts of the building to which occupiers had exclusive access for living, e.g. a balcony. It also decided that work to the structural and common parts of each block was work carried out ‘*in connection with*’ the provision of each apartment in the block so that section 1 of the Act applied. It noted, however, that applying the section to any particular piece of work is very fact specific.

The court also said that, for a dwelling to be ‘*fit for habitation*’ under the Act, it must, on completion (without remedial works), be capable of occupation for a reasonable time without risk to the health or safety of the occupants and without undue inconvenience or discomfort to the occupants. Where a dwelling is, or is part of, a new building, what is a reasonable time will be a question of fact and may or may not be the design life of the building.

[Rendlesham Estates Plc & Ors v Barr Ltd\[2014\]](#)
[EWHC 3968](#)

2. Construction Act, construction operations and a degree of attachment

The Construction Act applies to contracts for the carrying out of ‘*construction operations*’ but working out whether work is caught by the Act can be tricky. A conveyor system was installed in a warehouse and when the contractor tried to enforce adjudication proceedings for payment, the court, in deciding if ‘*construction operations*’ were involved, had to determine whether the system formed part of the land.

The court ruled that, for the purposes of the Construction Act, it did and set out the applicable legal principles, which included:

- whether something forms or is to form part of land is ultimately a question of fact and degree; real property law principles on fixtures are relevant but not conclusive;
- to be a fixture or part of the land, an object must be annexed or affixed to the land, actually or in effect (e.g. resting on the land under its own weight without fixings);
- consider the objective purpose of the object or installation in question; if installed to enhance the value and utility of the premises, that is a strong pointer to it forming part of the land;
- where machinery or equipment is placed or installed, particularly if it is all part of one system, the installation should be regarded as a whole;
- machinery and plant can be structures, works (including industrial plant) and fittings under sections 105(1)(a) to (c) of the Construction Act;
- simply installing something in a building or structure does not necessarily mean that it becomes a fixture or part of the land;
- fixing with screws and bolts is a strong pointer to the object becoming a fixture and part of the land but it is not absolutely determinative; and

- ease of removability is a pointer to whether it is to be treated as not forming part of the land; the fact that the fixing can only be removed by destroying or seriously damaging it or the attachment, or a significant degree of permanence of the object or installation, can point to it being considered as part of the land.

Savoie and Savoie Ltd v Spicers Ltd [2014] EWHC 4195

3. Why issuing payment and pay less notices is so very important

It may sound obvious but a contractor's right to payment depends on the terms of the contract. So under DB 2011, for instance, the contractor's only entitlement to payment during the project is by way of an interim application and the sum due is either the amount stated in the application or the lesser amount stated in the employer's payment notice (if it has served one). If the employer claims to be entitled to withhold money on other grounds, it can serve a pay less notice.

Unless fraud is involved, in the absence of a payment or pay less notice, the contractor becomes entitled to the amount stated in its interim application, irrespective of the true value of the work carried out. As the court said in *ISG Construction Ltd v Seevic College*, if the employer fails to serve any notices in time, it must be taken to agree the value stated in the application. There is no contractual right to claim that payment at any particular time in the contract is a sum equal to the value of the work properly executed up to that time, less any sums already paid. Such a right would undermine the statutory regime.

ISG Construction Ltd v Seevic College [2014] EWHC 4007

Future issues

4. More planning go-faster changes on the way

The government's plans for speeding up the planning and consenting systems are set out in the updated 2014 National Infrastructure Plan. Key actions for the period to 2020 include:

- streamlining and updating the compulsory purchase regime;
- making practical improvements to the Nationally Significant Infrastructure Planning Regime;
- improving the planning system for infrastructure outside the NSIP regime, further measures to include ensuring that the principle of development need only be established once, steps to speed up section 106 negotiations and improving transparency on the use of section 106 funds and keeping the speed of decisions on major applications under review, with the minimum performance threshold increasing to 50% of major decisions on time.

See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/381884/2902895_NationalInfrastructurePlan2014_acc.pdf

5. And the government targets quicker utility connections

The government has issued a practical guide to utilities. The guide, which offers a clear code of practice, is intended to speed up utility connections for new developments and to drive up the performance of utilities companies.

Although targeted at housing developers, the guide is said to be relevant to all kinds of development.

See: <https://www.gov.uk/government/news/new-guidewill-better-connect-our-new-homes-to-vital-services>

6. Revamped CDM on track for April 2015 - and here are the draft regulations

The HSE has published *draft* Legal (L) Series guidance on the legal requirements for CDM 2015. Subject to Parliamentary approval, the 2015 regulations will come into force on 6 April, but with a 6 month transitional period for projects started before 6 April. A final version of the guidance will be available on 6 April.

The features outlined by the HSE are:

- replacement of the CDM co-ordinator role with principal designer; responsibility for coordination of the pre-construction phase will rest with an existing design team member;
- the draft regulations recognise the client's importance as head of the supply chain, best placed to set standards for the project;
- competence will be split into skills, knowledge, training and experience, and, if relating to an organisation - organisational capability;
- the Part 4 technical standards are essentially unchanged.

There are a series of *draft industry guides* for the five dutyholders under CDM 2015, and one for workers and the HSE will be working with stakeholders in the entertainments industry to provide specific guidance for that industry.

See: <http://www.hse.gov.uk/pubns/books/l153.htm> (*where the text of the draft Regulations is set out in italics in the guidance.*)

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