



Legal developments in construction law

1. When making a contract can get personal

Making sure a contract is finalised and executed is important, but so is knowing with whom you are contracting. Mr Collins entered into an oral agreement for the construction and sale of a residential property on his development site but was it with Fairhurst Developments Limited or Mr Fairhurst, who wholly owned and controlled FDL? FDL was VAT registered, whereas Mr Fairhurst was not; it had its own bank account and the judge was satisfied that the project was always intended to be, and was, undertaken by FDL, as FDL ordered and paid for all plant and materials (other than those obtained through the builder's merchant) and the subcontract packages and labour. FDL also obtained finance for the works and reclaimed VAT on the supplies, and payments were made by Mr Collins through his company and his partner, to FDL. Mr Fairhurst had not, however, always conducted his development projects through FDL and Mr Collins claimed that the development agreement was entered into with Mr Fairhurst personally and not with FDL.

In determining the identity of the contracting party, the approach is objective and the parties' private thoughts are irrelevant and inadmissible. What would a reasonable person, with all the relevant information up to contract formation, conclude? On the facts in this case, the essential principle was that the person whose words and/or conduct resulted in the contract being formed is the contracting party unless it is made clear at, or prior to, contract formation, that they are speaking and/or acting as officer of a company. In such a case as this there was no duty on a contracting party to enquire as to the capacity in which the other is acting and if Mr Fairhurst did not tell Mr Collins

about his ownership of, and carrying out his construction business through, FDL, its VAT registration and that he was not contracting in his personal capacity, but as director of FDL, then those matters could not be taken into account. Mr Fairhurst never made it clear that he was acting on behalf of any limited company, let alone FDL and the court decided that Mr Fairhurst was the contracting party.

[Fairhurst Developments Ltd & Anor v Collins & Anor \[2016\] EWHC 199](#)

2. Court gives adjudicator a helping hand with contract formation issues

An employer's notice of adjudication asked for a declaration that there was a binding construction contract and that its terms included those of the JCT ICD 2011 form. The adjudicator decided, however, that, as claimed by the contractor in its defence, there was a contract on the terms of a letter of intent, rather than the ICD form. In court proceedings by the contractor for a declaration that the decision was enforceable, the employer claimed that the adjudicator was not entitled to reach it, because the notice of adjudication did not invite any determination of what the contract terms were, if not including the ICD form. Adjudicators derive their jurisdiction from the terms of the notice of adjudication but the court said that it is not appropriate to construe a notice of adjudication so as to deprive the responding party of a defence. It was impossible for the adjudicator to decide the dispute identified in the notice as to the existence of a valid construction contract without deciding whether basic terms had been agreed and, if so, what precisely those terms were.

The judge also added his view that because, since the Construction Act amendments, construction contracts no longer have to be in writing and adjudicators may have to deal with contract formation issues, as well as underlying claims, in the 28 day period, the courts should, in such cases, give adjudicators some latitude in grappling with these difficulties. In an ordinary case, and depending on the notice's wording, it may be unduly restrictive to conclude that an adjudicator could decide what the contract was not, but not what the contract was. Similarly, it may be unduly restrictive to say that any notice of adjudication raising issues of contract formation and terms with financial claims somehow involved more than one dispute. The employer's arguments therefore failed.

Penten Group Ltd v Spartafield Ltd [2016] EWHC 317

3. Court of Appeal gives reminder about drafting exclusion clauses

If you want to exclude a contractual liability, you need to be clear in your drafting. If not, the court may construe the exclusion clause narrowly. That is the message from the Court of Appeal in *Nobahar-Cookson v The Hut Group Ltd*.

After discussing the Latin tag *contra proferentem* and what it might mean, the Court considered the principle that, if necessary to resolve ambiguity, exclusion clauses should be narrowly construed, including in relation to commercial contracts. This is because an exclusion clause cuts down or detracts from an important contractual obligation or a general law remedy. The parties are not lightly to be taken to have intended to cut down legal remedies for breach of important contractual obligations without using clear words to that effect.

This approach to exclusion clauses is not now a presumption or a special rule justifying giving strained meanings to exclusion clauses. Commercial parties can allocate the contractual risks in any way they choose. Nor is the approach to be mechanistically applied to an ambiguous exclusion clause. The court must still use all its tools of linguistic, contextual, purposive and common-sense analysis to discern what the clause really means.

Nobahar-Cookson & Ors v The Hut Group Ltd [2016] EWCA Civ 128

4. April launch for new utilities and concession contracts regulations

The new Utilities Contracts Regulations 2016 and the Concession Contracts Regulations 2016, implementing the EU Directives, apply to procurement exercises starting on or after 18 April 2016, except as set out in the Regulations. The concession contracts rules apply to the public sector and utilities. The utilities rules only apply to contracts let by certain utilities.

The government last year prioritised the Public Contracts Regulations 2015, which took effect from 26 February 2015, because they affected the rules governing the most procurement spend and activity.

See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/508998/PPN_for_laying_of_UCR_and_CCR_-_final_version_to_publish.pdf

5. New BSI official BIM Level 2 website

BIM Level 2 standards and guidance are now in one place on a new BSI/BIS website. The site offers free downloads or links to Level 2 documents, which include PAS 1192-2, 3 & 5, BS 1192-4 & BS 8536-1 and the CIC BIM Protocol and Best Practice Guide for professional indemnity insurance when using BIM.

See: <http://bim-level2.org/>

6. New Framework Alliance Contract on the way

A new ACA/ACE Framework Alliance Contract is scheduled for general release this summer. It is said to fill a major gap in the market and can apparently be used with JCT, NEC, FIDIC and any other standard form construction contract, in any jurisdiction.

See: <http://acarchitects.co.uk/wp-content/uploads/2015/10/Alliance-Contracts-and-Consultations.pdf>

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