



Legal developments in construction law

1. Hotel developer's failure to make a reservation dooms challenge to adjudicator's decision

The developer of a hotel resisted enforcement of an adjudicator's decision, claiming that there had been a breach of the rules of natural justice. It said that the adjudicator had failed to deal with certain defences it had put forward. But the developer had previously asked the adjudicator to correct errors in the decision under the slip rule. Was that earlier request fatal to the enforcement challenge?

Yes, said the court. If there are good grounds to object, unless there is an express reservation of rights, either the whole of the relevant decision must be accepted or the whole of it must be contested. The developer had made no such reservation and, by inviting the adjudicator to exercise his powers under the slip rule, it had waived, or elected to abandon, its right to challenge enforcement of the decision, because, in doing so, it had chosen to treat the decision as valid.

Dawnus Construction Holdings Ltd v Marsh Life Ltd
[2017] EWHC 1066

2. Does a death or personal injury exclusion bring down the rest of the clause?

After a fire in a factory, the factory owner sued the company that had supplied and installed a fire suppression system ten years earlier, alleging a defect in a pipework joint. The installer relied on its exclusion of liability for negligence but that exclusion clause applied to death and personal injury, as well as other loss and damage. The Unfair Contract Terms Act says that liability for death or personal injury cannot be excluded. So did that make the whole clause ineffective?

In *Goodlife Foods Ltd v Hall Fire Protection Ltd* the court reviewed the case law, in particular an unreported 1991 Court of Appeal case of *Troxel Products Limited v Merrol Fire Protection Engineers Ltd*. Troxel decided that, where a case seeks to exclude liability for death or personal injury and also liability for other kinds of loss or damage, the former can simply be excised and the remainder upheld as reasonable, if appropriate. Which is, consequently, what the court in *Goodlife* did.

Goodlife Foods Ltd v Hall Fire Protection Ltd [2017]
EWHC 767

3. Subcontractors run out winners in Supreme Court 3-2 insurance decider

It might have been a case about a wrecked ship but a Supreme Court decision about its insurance leaves implications for construction in its wake. Joint insurance of the works in a construction project has, over the years, presented the courts with some legal problems. Does a joint policy mean that a contractor who causes damage to the works is protected from a subrogation claim by insurers who have paid out, under the policy, to the employer? And if the express terms of the contract provide no answer, but the court decides that the contractor cannot be sued, what is the basis of that decision? And where might that leave a subcontractor who caused the damage but was not a joint insured, or protected by a contract term? Can an insurer, who paid out for the loss, bring proceedings in the name of the contractor against the subcontractor to recover its money?

In *Gard Marine and Energy Ltd v China National Chartering Company Ltd* the Supreme Court reiterated that, where there is insurance for the benefit of both parties to a venture, the parties cannot claim against each other in respect of an insured loss. This principle is now best seen as an implied term of the insurance contract and/or of the underlying contract between the co-insureds under which their interests were insured. In *Gard* the Court decided, by a 3-2 majority, that under the co-insurance scheme in the case, the owners had no claim against the charterers, whether or not the insurance monies had been paid. This meant that the insurers who paid out for the shipwreck had, in turn, no claim to pursue, by assignment, against the subcharterers. The commercial purpose of maintaining the joint insurance in question was, said Lord Toulson, not only to provide a fund to make good the loss but to avoid litigation between the joint insured, or the bringing of a subrogation claim in the name of one against the other.

Translated into the world of construction, where this co-insurance arrangement commonly arises, and subject to the relevant contract wording, this decision could protect subcontractors who cause a loss insured under a joint names CAR policy, from a claim advanced by insurers, where subcontract terms do not otherwise protect them.

Gard Marine and Energy Ltd & Anor v China National Chartering Company Ltd & Anor [2017] UKSC 35

4. High Court specialist courts in rebranding exercise

The Commercial Court, (including the Admiralty Court), the Technology and Construction Court and the Chancery Division courts (including those dealing with financial services, intellectual property, competition, and insolvency) are in future to be known collectively as “*The Business and Property Courts of England & Wales*”.

In addition to these specialist courts in London, there will also be Business and Property Courts in the five main regional centres where specialist business is undertaken: Manchester, Birmingham, Leeds, Bristol and Cardiff. The aim is to achieve a critical mass of specialist judges sitting in each of the Business & Property regional centres so that all classes of case can be managed and tried in those regions. It is hoped that in due course Business and Property Courts may also be established in Newcastle and Liverpool.

See: <https://www.judiciary.gov.uk/wp-content/uploads/2017/03/bpc-explanatory-statement-final-20170518-v2.pdf>

5. JCT 2016 – the final chapter

The 2016 editions of the JCT Construction Management and Management Building contract families are set to be launched at the end of June. The

- Construction Management Appointment;
- Construction Management Trade Contract;
- Management Building Contract;
- Management Works Contract Agreement;
- Management Works Contract Conditions; and
- Management Works Contractor/Employer Agreement;

are “*for despatch on 30 June 2017*”.

See: <https://www.jctltd.co.uk/category/construction-management-contract> and <https://www.jctltd.co.uk/category/management-building-contract>

The JCT has also republished the Project Bank Account Documentation, as part of the 2016 contract issue. It is said to contain textual changes in the Guidance Notes.

See: <https://www.jctltd.co.uk/docs/PBA-2016.pdf>

If you have any questions or require specific advice on the matters covered in this Update, please contact your usual Mayer Brown contact.

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