



Legal developments in construction law

1. Court of Appeal revisits “black hole” fix for failure of performance for third party

What if one party owns a defective new building but a different party originally contracted for its construction? The first party has suffered the loss but the second party, which has the benefit of the contract and is entitled to sue, has suffered no loss. In the absence of a warranty or third party rights, does the loss fall into a legal “black hole” and the contract breaker enjoy a windfall? Over the years the courts have understandably struggled with this issue, the concept of “transferred loss”, and in ***BV Nederlandse Industrie Van Eiprodukten v Rembrandt Enterprises, Inc.*** the Court of Appeal had to revisit the case law.

The courts have previously debated two ways to deal with transferred loss and thereby avoid the legal “black hole”, the “narrow” and “broader” grounds. The essential feature of the “broader” ground is that the contracting party, although not itself suffering physical or pecuniary damage, has suffered its own damage, the loss of its performance interest, with the failure to provide the third party with the benefit that the contract breaker had contracted for the third party to receive. In ***Rembrandt*** Lord Justice Coulson considered that the “broader” ground (the relevant ground in the case) was good law but had to decide if, for it to apply, the benefit to the third party is the known object of the transaction.

In his view, based on the case law, the known third party benefit is an essential component of the broader ground. He had no hesitation in concluding that, as a matter of law, for a successful claim for transferred loss that seeks to rely on the so-called broader ground, the claimant must show that, at the time that the underlying contract was made, there was a common intention and/or a known object to benefit the third party or a class of persons to which the third party belonged.

BV Nederlandse Industrie Van Eiprodukten v Rembrandt Enterprises, Inc. [2019] EWCA Civ 596

2. Ignorance is no problem for those with third party rights

Thanks to the Contracts (Rights of Third Parties) Act, rights under a contract can be given to third parties. These can be used on construction projects to provide warranty rights for third parties, without going down the traditional route of obtaining an executed warranty document, perhaps some time after the project is completed. Third parties need not be known, or even exist, when the original building contract or appointment is executed, so long as they are identified, if not by name, then “..as a member of a class or as answering a particular description..”.

In ***Chudley v Clydesdale Bank Plc*** the Court of Appeal had to decide if investors who knew nothing of an arrangement between an property investment company, through whom they were to invest their money, and the bank instructed by the

company to open a segregated client account for the project in question, were entitled to third party rights under the arrangement. In one of the few cases on the Act, after deciding that the arrangement, a letter of instruction, was a valid binding contract, the Court ruled that determination of whether there had been express identification of a class, of which the claimant investors were members, depended on the construction of the contract as a whole, viewed against the admissible factual matrix.

Reference to “a client account” in the letter of instruction was found to be express identification of the class, clients of the investment company who were investing in the project in question, and the claimant investors were within that class, so that the requirements of section 1(3) of the Act were satisfied. The Court could also see no principled reason why the same term of the contract could not also satisfy section 1(1)(b), the Act’s requirement that the term purports to confer a benefit on the third party. And it was not a requirement of the Act that a third party entitled to the benefit of a contract should be aware of the contract when it was made, or at any subsequent time.

Chudley & Ors v Clydesdale Bank Plc (t/a Yorkshire Bank) [2019] EWCA Civ 344

3. Government cranks up prompt payment pressure on its suppliers

Under new government rules on prompt payment, which come into force this autumn, suppliers who bid for government contracts above £5m per annum, who cannot show they are paying 95% of invoices within 60 days, risk being prevented from securing government contracts.

In advance of the new rules coming into force, officials from the Cabinet Office have written to more than 10,000 businesses, including all the government’s current strategic suppliers, to warn them about the new rules.

See: <https://www.gov.uk/government/news/businesses-urged-to-pay-suppliers-on-time-or-risk-losing-out-on-government-contracts>

4. New NEC Practice Note

The NEC has issued Practice Note 5 for NEC4.

The Practice Note deals with using a Dispute Avoidance Board for contracts covered by the Construction Act and responds to feedback from UK-based users who would like to use an independent DAB, rather than using the parties’ Senior Representatives, to resolve disputes in a contract where Option W2 would normally be used. Sample wording is provided, which can be included as a Z clause.

See: <https://www.neccontract.com/getmedia/b6f0563b-dcb4-4dde-a75d-f47f8642b116/NEC4-ECC-Practice-Note-5.pdf>

5. Summer launch for BRE Standard BPS 7014 for offsite construction

The new industry certification scheme, BPS 7014 Standard for Modular Systems for Dwellings, is set for a summer launch. With industry and the government looking to speedier offsite construction to play its part in meeting the housing shortage, BPS 7014 will provide a standard for demonstrating performance levels of new modular building construction systems and components. It covers a range of performance characteristics, including safety, sustainability and wellbeing and is to assist manufacturers in demonstrating Building Regulations compliance and additional functionality performance levels.

See: <https://www.bregroup.com/expertise/innovation/offsite-construction/>

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