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# Legal developments in construction law

## 1. Was the payment application late? Court considers 'days' and 'clear days' (but not fractions)

An adjudicator ruled that a subcontractor was entitled to be paid £3,950,190.53, excluding VAT. The main contractor claimed, however, that the subcontractor's application was received late and was therefore invalid. The JCT subcontract said that the subcontractor's payment application should be received "*…not later than 4 days prior to the Interim Valuation Date for the relevant payment …*". The Interim Valuation Date was agreed to be 25 October 2022 and the application was sent and received by email on 21 October, timed at 22.07, but the contractor claimed that the application should have been served four clear days before the 25th, i.e. on 20 October, and before the end of site working hours.

The parties' dispute was settled after the draft judgment had been handed down to the parties but the judge considered it appropriate to hand down the judgment, despite the settlement, because it related to the proper construction of an important element of a widely used JCT standard form.

The court accepted that the term '*clear days*' is a well-known concept and is different from 'days', meaning '*a day or days, with no part occupied or deducted*'. There is an important distinction between the two and in the subcontract there was no reference to '*clear days*'. The subcontract could not be sensibly construed as meaning '*clear days*' when that was not the language used.

The court also noted, from the cases, that the court does not deal in fractions of a day. Generally, where a contract specifies a day for performance of an obligation, the obliged party has until the end of that day to perform it. This meant that, unless the subcontract provided otherwise, a payment application that had to be received by the contractor no later than 21 October 2022 could be made so as to be received at any time up to 23.59.59 on that day, because the law does not count in fractions of a day.

Parties can, of course, require in a contract that particular documents or notices need to be provided in defined time periods (whether loosely (e.g. '*within business hours*') or specifically (e.g. '*between 9:00 a.m. and 5:00 p.m.*')) Just as the subcontract was not specific that there needed to be four 'clear' days, neither did it stipulate that the application had to be received by a particular time period on the relevant day.

The payment application was consequently not late and was valid and the adjudication award was enforced.

Elements (Europe) Ltd v FK Building Ltd [2023] EWHC 726

## 2. Is your DRP enforceable? Court of Appeal looks at the test

A party started court proceedings without activating the contract dispute resolution procedure. The Technology and Construction Court decided that the DRP was a condition precedent to court proceedings (a finding not challenged on appeal) but was the DRP enforceable? The TCC judge ruled that it was not, but did the Court of Appeal agree?

In deciding that they did, the Court of Appeal reviewed the law on the enforceability of dispute resolution provisions. They noted that, wherever possible, the court should endeavour to uphold the parties' agreement but that, where there is a dispute about the enforceability of alternative or bespoke dispute resolution provisions which are relied on to defeat or delay court proceedings, the courts have not shied away from concluding that such provisions may be unenforceable. This may be because clear words are needed to oust the jurisdiction of the court, even if only on a temporary basis.

The Court noted, in the case law, that the starting point is that an agreement that parties shall seek to settle their disputes amicably, and only refer the matter to arbitration in the event of being unable to settle, is not a legally enforceable obligation. In another case, however, while there was an obvious lack of certainty in a mere undertaking to settle a dispute amicably (as the court would have insufficient objective criteria to decide whether one or both parties were in compliance or breach) a clause that went on to prescribe how an attempt to resolve the dispute should be made, was different.

The test, according to a 2012 judgment, is whether the provision prescribes, without the need for further agreement:

(a) a sufficiently certain and unequivocal commitment to commence a process;

(b) from which may be discerned what steps each party is required to take to put the process in place and which is

(c) sufficiently clearly defined to enable the court to determine objectively

  (i) what, under that process, is the minimum required of the parties to the dispute in terms of their participation in it and

  (ii) when, or how, the process will be exhausted or properly terminable without breach.

Kajima Construction Europe (UK) Ltd & Anor v Children's Ark Partnership Ltd [2023] EWCA Civ 292)

## 3. When does a contractor owe a concurrent duty of care in tort?

Sometimes it can be important to know if a contractor owes a duty of care in tort not to cause economic loss, as well as a duty in contract. ***Sheffield Teaching Hospital Foundation Trust v Hadfield Healthcare Partnerships Ltd*** was one of those occasions, where the design and construct contractor claimed, among other issues, that it owed no such duty. In dismissing the application for summary judgment, or to strike out the claim against the contractor, the court revisited Lord Justice Jackson's review of the law in ***Robinson v PE Jones (Contractors) Ltd***. In this case the court, for the purpose of the application, set out the relevant principles from the judgment:

- When A assumes responsibility to B as in the classic case of ***Hedley Byrne***, A owes a duty of care in tort to B, which may extend to protecting B against economic loss;
- the existence of a contract between A and B does not prevent such a duty from arising; but
- it does not automatically give rise to such a duty of care in tort, co-extensive with the contractual terms and carrying liability for economic loss;
- it is necessary to consider the relationship between the parties, together with the factual and any contractual matrix, to ascertain in any case whether A assumed responsibility to B as in ***Hedley Byrne***, so as to give rise to a concurrent duty of care in tort;
- the allocation of risk in the contract between A and B, including any exclusion or limitation of liability, may, on a proper construction, preclude the imposition of any duty of care in tort.

The court accepted the argument that whether a concurrent duty of care at common law not to cause pure economic loss, by virtue of defective workmanship or the use of defective materials, can arise in circumstances such as the construction contract before the court, remains unsettled and is controversial, for a number of reasons, including, in summary:

- it was arguable that ***Robinson v Jones*** could be distinguished on its facts. In this case it was argued that the construction contract contained both design and workmanship obligations, did not contain any exclusion of liability in tort and must be construed in the context of complex PFI contractual arrangements;

- there was an argument that ***Robinson v Jones*** does not preclude the existence of a concurrent duty of care in tort where the factual circumstances give rise to an assumption of responsibility, as explained by Lord Goff in ***Henderson v Merrett***;
- it was right to question, as a matter of law, whether there is any basis on which building contractors should be distinguished from other professionals when ascertaining whether there has been any ***Hedley Byrne*** assumption of responsibility. The range of recognisable professions generally has expanded since ***Hedley Byrne*** and ***Henderson*** and, in particular, in the construction industry today there are many disciplines of special skill and expertise which could be described as professional; and
- the court accepted that there may be a fine line between design and workmanship responsibility in respect of the fire protection issues. This was likely to be a matter on which factual and expert opinion evidence would be required.

Sheffield Teaching Hospital Foundation Trust v Hadfield Healthcare Partnerships Ltd [2023] EWHC 644

## 4. Responsible Actors Scheme: government sets out details and targets early summer start

The government intends to bring in a 'Responsible Actors Scheme' for residential developers under sections 126-9 of the Building Safety Act 2022. Subject to Parliamentary approval, the regulations are to be brought into effect by early summer.

Under the Scheme, in accordance with the DLUHC developer remediation contract, any member must:

- identify 11m+ residential buildings they developed or refurbished over the past 30 years and any of those buildings known to have life-critical fire safety defects;
- remediate and/or mitigate, or pay for the remediation/mitigation of, life-critical fire safety defects in those buildings; and
- reimburse government schemes for taxpayer-funded work to remediate and/or mitigate defects in those buildings.

The Scheme regulations will make provision for company groups and will be supported by planning and building control prohibitions imposing commercial consequences on any developer eligible for the Scheme that does not sign it and comply with it.

The Scheme will initially focus on major housebuilders, and other large developers who have developed or refurbished multiple residential buildings known to have life-critical fire safety defects, by virtue of having been assessed as eligible for a relevant government cladding remediation scheme.

The Scheme will in time be expanded to cover other developers who developed or refurbished defective 11m+ residential buildings.

**Eligibility**

Developers will be eligible for the Scheme if they meet one or more of three sets of criteria:

- their principal business is residential property development; they meet the '*profits condition*' below; and they developed or refurbished 11m+ residential buildings in England in the last thirty years (other than solely as a contractor);
- they are a developer who meets the '*profits condition*'; and developed or refurbished (other than solely as a contractor) multiple buildings assessed as eligible for a relevant government cladding remediation scheme;
- they are a developer who developed or refurbished (other than solely as a contractor) at least one 11m+ residential building that qualifies for remediation under the developer remediation contract; and they volunteer to sign the contract and join the Scheme.

The '*profits condition*' will be met by any developer whose average annual operating profit over a three-year period (companies' financial years ending 2017, 2018, and 2019) was £10 million or higher. Certain exceptional items and unrealised value adjustments will be excluded from consideration. The regulations will set out the detail of the profits condition, including the required adjustments to the operating profits figures in accounts.

See, for more details: Responsible Actors Scheme: key features - GOV.UK (www.gov.uk)

## 5. Responsible Actors Scheme: joining, not joining and consequences

Where a developer appears eligible for the Scheme, the Secretary of State will invite them to join. If it is determined that a developer is eligible, they will be expected to join the Scheme. Developers who have not been invited to join will be able to seek a direction as to whether they are eligible and will be able to make representations supported by evidence as to their eligibility.

If an eligible developer opts not to join, the Secretary of State will add them to a published list of entities to which the prohibitions set out in the regulations will be applied. They will be prohibited from carrying out '*major development*' in England. '*Major development*' will include schemes providing 10 or more residential units, residential schemes on a site at least 0.5 hectares in size (where it is not known if it will provide 10 units or more), commercial development creating at least 1000 square metres of floorspace, and development on a site over one hectare in size.

Prohibited persons will have to notify the relevant local authority about their prohibited status when making relevant planning applications, reserved matters applications and prior approval applications. They must also notify the Local Planning Authority if they acquire or transfer an interest in land which has the benefit of planning permission for major development.

They will also be prevented from obtaining building control approval for building work. In some cases, this may result in a notice to terminate or suspend the work.

See, for more details: Responsible Actors Scheme: key features - GOV.UK (www.gov.uk)

## 6. FIDIC contract guidance on effects of inflation and unavailability of goods and labour

FIDIC has published contracts guidance on the effects of inflation and the unavailability of goods and labour following the global COVID-19 pandemic and the war in Ukraine.

See: https://www.fidic.org/sites/default/files/Guidance Memo - War memorandum_170323_final.pdf

## 7. New infrastructure levy to replace s106 contributions

The government is consulting on a new infrastructure levy to replace section 106 contributions for most developments. Under the proposals, councils will able to set the applicable rates and the amount developers will have to pay will be calculated once a project is complete, instead of when a site is given planning permission, so that councils benefit from increases in land value.

Councils will be given a new '*right to require*', so they can specify how much of the levy is delivered through affordable housing on site in new developments, and how much is given in cash for other infrastructure, such as new schools, transport links or GP surgeries. A portion of the money will be passed directly to communities as a '*neighbourhood share*' to fund their infrastructure priorities, while councils will be required to engage with communities and create a infrastructure delivery strategy.

The levy will be introduced as part of the Levelling Up and Regeneration Bill and will be introduced through '*test and learn*' over a 10-year period, with a small number of councils initially implementing the levy and testing its operation in practice, before being rolled out more widely.

The consultation closes on 9 June 2023 and the government anticipates that it will consult further on proposed regulations, when the consultation responses have been fully considered.

The government has also launched a consultation on a new Environmental Outcomes Report.

See: https://www.gov.uk/government/news/new-levy-to-make-sure-developers-pay-fair-share-for- affordable-housing-and-local-infrastructure

## 8. HRB registration regulations and more Building Safety Act sections in force

The Building Safety (Registration of Higher-Risk Buildings and Review of Decisions) (England) Regulations 2023, which came into force on 6 April 2023, specify the requirements for the registration of higher-risk buildings with the Building Safety Regulator. They set out the provisions that the Regulator and principal accountable persons must follow in relation to the registration regime and the review of decisions made by the regulator and also set out the registration fee.

The explanatory memorandum notes that the Building Safety Act (s77) requires higher-risk buildings to be registered with the Regulator and a principal accountable person is guilty of an offence if it allows an HRB that is not registered to be occupied. If convicted, the principal accountable person could be subject to a fine or imprisonment or both. The memorandum states that the offence will not come into force until 1 October 2023, at the earliest, to allow for a period of voluntary registration, which began on 6 April.

In a fourth set of commencement regulations, further sections of the Building Safety Act have been brought into force.

See: https://www.legislation.gov./uksi/2023/315/made

and

The Building Safety Act 2022 (Commencement No. 4 and Transitional Provisions) Regulations 2023

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