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Legal developments in construction law

1. Court of Appeal says co-insurance all risks policy does not cover contractor for defective work

The Rugby Football Union took out a Joint Names All Risks Insurance policy for works at Twickenham Stadium. Power cables forming part of the works were damaged and had to be replaced and the RFU, which alleged that the damage had been caused by defective design and installation of ductwork for the cables, recovered the cable replacement costs from the insurers. The RFU started subrogated proceedings against the ductwork installation contractor, claiming the replacement, and other, costs but the contractor, a co-insured under the policy, argued that the RFU (and the insurers, by subrogation) could not claim against it in respect of losses covered by the policy.

In dismissing the contractor's appeal, the Court of Appeal reviewed the case law and textbooks on co-insurance ("a notoriously complex area of law"). It noted that Colinvaux's Law of Insurance (13th Edition) said that "the mere fact that a policy states that it covers the interests of named or identifiable third parties does not of itself give those third parties the right to enforce the contract or to rely upon its terms" (e.g. the benefit of the waiver of subrogation clause). The textbook went on to identify three cumulative conditions to be satisfied for cover taken out by A to cover B's interest, as well as that of A, where A is required or authorised by a contract with B to insure a risk on behalf of both:

(a) A's authority must extend to making the insurance contract in question;

(b) A must have intended when taking out the policy to cover B's interests; and

(c) the policy terms must not preclude the extension of coverage to B.

From the case law, the Court set out the following broad propositions:

- the mere fact that A and B are insured under the same policy does not, by itself, mean that they are covered for the same loss or cannot make claims against one another;
- where it is alleged that A has procured insurance for B, it will usually be necessary to consider issues such as authority, intention (and the related issue of scope of cover). Such issues are conventionally considered by reference to the law relating to principal and agent (although an alternative approach, referrable to the existence of a standing offer, was identified in another case, dictated by its particular facts);
- an underlying contract between A and B is not a necessary pre-requisite for a proper investigation into authority, intention and scope but a contract may well be implied in any event;
- where, however, there is an underlying contract then, in most cases, it will be much the best place to find evidence of authority, intention and scope. The underlying contract has been called "the most obvious source of authority" and "a powerful indicator";

- the underlying contract will not always provide the complete answer. Circumstances may dictate that the court looks in other places for evidence of authority, intention and scope of cover.

In this case, it was agreed that the relevant contract clause (Option C of the JCT Standard Form) did not expressly require the RFU to effect insurance on behalf of the contractor to cover the contractor against the cost of rectifying damage caused by the contractor's own defective work. The Court of Appeal noted that the judge who heard the case was aware that the policy was a composite insurance policy, so that each co-insured was to be treated as if they had their own policy and the mere fact that the contractor and the RFU were insured under the same policy was insufficient to allow the co-insurance defence. That judge had concluded that the RFU's authority to insure (on behalf of the contractor) was co-extensive with its obligation to do so: in other words, the RFU was obliged and intended to provide Option C cover, but nothing more. The Court of Appeal confirmed his ruling.

FM Conway Ltd v The Rugby Football Union & Ors [2023] EWCA Civ 418)

2. The contract says the Final Account Statement is final and binding. Unless, that is…

Final account sign-offs can give essential finality and certainty to contracting parties, who then know precisely where they stand on the bill for the works. Unless, of course, you can stop the finality door closing by putting a metaphorical foot in the way.

A sub-sub-contract for works at Lord's cricket ground in London required the subcontractor, Atalian Servest AMK, to produce a Final Account Statement of the amount due to the sub-sub-contractor, BWE, and said that the Statement was "final and binding" on BWE, unless the parties agreed to modify it or BWE commenced an adjudication or court proceedings within 20 working days. AMK produced the Final Account Statement and BWE commenced an adjudication and court proceedings challenging the Statement within the time limit, but AMK claimed that the Statement was valid and binding.

In court proceedings, the Scottish appeal court confirmed that it was not. BWE had "their foot firmly in the door" as permitted by the relevant contract clause, by virtue of the adjudication and the timeous, and still pending, litigation. The first adjudicator had resigned but the court said that that did not bring the adjudication to an end. BWE had followed the procedure set out in Scotland's Scheme for Construction Contracts and served a fresh notice. The two referrals were very similar (though not identical) and the fundamental question remained the same: what sum was properly due? The adjudication continued notwithstanding the fresh notice and the resignation of the first adjudicator did not terminate BWE's right to challenge the Statement.

Atalian Servest AMK Ltd v B W (Electrical Contractors) Ltd at: https://www.bailii.org/scot/cases/ScotCS/2023/2023_CSIH_18.html

3. "Excessive" material fails to derail adjudicator's "broad justice at high speed" decision

The courts are reluctant to interfere with an adjudicator's award unless the adjudicator has acted ultra vires by, for example, failing to answer the questions posed to them or if they have acted contrary to the rules of natural justice (the principle of fairness). But what if, as in a Scottish case, the adjudicator in a valuation dispute was faced with "a nigh impossible task", because the volume of written materials was enormous, so enormous that the adjudicator first appointed had resigned?

It would, said the court, have required a "super-human" effort to carry out a precise valuation exercise before the adjudication deadline, but the adjudicator cut the issue down to a straightforward one of assessing roughly what he considered to be payable. That was the question he was asked and which he answered in a clear and succinct way.

In rejecting a challenge on the grounds of unfairness, because of the limited time to make an adequate response to the referral, the Scottish court said that there was no basis for the proposition that the adjudicator failed to give AMK a fair crack of the whip. All issues, including those that the adjudicator was entitled to raise on his own initiative, were extensively canvassed in a series of formal pleadings and in email correspondence. The court noted that, by invoking the Construction Act adjudication provisions, the claimant sub-sub-contractor, BWE, was entitled to a decision within the prescribed short timescale, as extended by the

parties, a decision that was bound to involve "broad justice at high speed". The presentation of an excessive amount of material, by both parties, and the tabling of a wide range of legal and factual issues, could not be allowed to derail the robust and summary adjudication process, which was not intended to resolve disputes by reference to innumerable rounds of pleadings and submissions.

The adjudicator's figures might prove to be in error, in subsequent court proceedings, but his efforts were not a frolic of his own but a reasoned attempt to value the work that BWE had carried out and for which they were entitled to be paid. Having "cut to the chase" the adjudicator used a "broad axe with a blunt edge" to reach a robust and summary conclusion.

Atalian Servest AMK Ltd v B W (Electrical Contractors) Ltd at: https://www.bailii.org/scot/cases/ScotCS/2023/2023_CSIH_18.html

4. Evidence: How reliable are memories? Is writing a better bet?

Your memory may not be as good as you think it is. Which makes it all the more important to write down, at the time, whatever it is that was said or agreed. Judges dealing with conflicts of oral evidence have the difficult task of assessing the "demeanour" of a witness as a guide to truth and accuracy and the effect on memory of a continued re-consideration of a case and of documents over time. In approaching this task ("with great caution"), the court in Connoisseur Developments Ltd & Ors v Koumis referred to a summary of case law on the courts' approach, which contained a number of observations, including these:

- We believe memories to be more faithful than they are; memories are fluid and malleable, being constantly rewritten whenever they are retrieved. Events can come to be recalled as memories which did not happen at all or which happened to somebody else.
- The process of civil litigation itself subjects the memories of witnesses to powerful biases; considerable interference with memory is introduced in civil litigation by the procedure of preparing for trial. Statements are often taken a long time after relevant events and drafted by a lawyer who is conscious of the significance for the issues in the case of what the witness does or does not say.
- The best approach from a judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts. The value of oral testimony lies largely in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.
- Oral evidence under cross-examination is far from the be all and end all of forensic proof and it has increasingly been recognised that it is usually unreliable, and often dangerous, to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth.
- A witness, however honest, rarely persuades a judge that their present recollection is preferable to that which was taken down in writing immediately after the incident occurred. Therefore, contemporary documents are always of the utmost importance.

The judge in this case noted that the contents of the case summary provide much of the rationale underlying the new regime governing witness statements, and best practice in relation to their preparation, in the Business and Property Courts. Paragraph 1.3 of the Appendix to Practice Direction 57AC says:

"1.3 Witnesses of fact and those assisting them to provide a trial witness statement should understand that when assessing witness evidence the approach of the court is that human memory:

(1) is not a simple mental record of a witnessed event that is fixed at the time of the experience and fades over time, but

(2) is a fluid and malleable state of perception concerning an individual's past experiences, and therefore

(3) is vulnerable to being altered by a range of influences, such that the individual may or may not be conscious of the alteration."

Connoisseur Developments Ltd & Ors v Koumis [2023] EWHC 855

5. 30 September deadline for HRB registration

All occupied high-rise residential buildings must be registered by 30 September 2023. After this date, it is an offence if a building is occupied but not registered.

New buildings completed after 1 October 2023 must have a relevant completion certificate or final notice and must be registered before the building is occupied.

A high-rise residential building is a structure that has:

- at least 7 floors or is at least 18 metres in height
- at least 2 residential units
- No registration is required of buildings that are entirely used as a:
- hospital
- care home
- secure residential institution
- hotel
- military premises
- prison.

The principal accountable person, which can be an individual or an organisation such as a housing association, local authority or company, is legally responsible for making sure the building is registered.

After registration, structure and safety information must be submitted:

- within 28 days of applying to register the building, or
- by 30 September 2023,

whichever is the longer period.

See: Register a high-rise residential building (buildingsafety.campaign.gov.uk)

6. HRB regulations detailing key building information for the BSR in force

The regulations detailing the key building information required by the Building Safety Regulator from the accountable person for a higher-risk building came into force on 6 April 2023.

The information required (in electronic format) includes information about potential risk factors including use, change of use, the external wall system, the structural design type of the building, the number of storeys and staircases, energy supplies, the evacuation strategy for the building, and whether it is attached to any other building.

The Higher-Risk Buildings (Key Building Information etc.) (England) Regulations 2023 (legislation.gov.uk)

7. Construction product testing regime report raises serious concerns

The independent review of the construction product testing regime carried out by Paul Morrell OBE and Anneliese Day KC has been published. The 174 page review set out to identify any potential weaknesses in the system and to make recommendations for improvement. It does both and in the list of systemic gaps or weaknesses identified in the current system are these findings:

- the Construction Products Regulations assessment process is so complex that few people properly understand it, and there is a concerning disconnect between those involved in the assessment process and those who design and construct buildings;
- the whole system (for setting standards, conformity assessment and oversight) is overloaded and slow. This represents both a threat to quality and a barrier to reform; and there is a particular urgency in addressing capacity issues relating to the ending of recognition of CE marking in January 2023; and
- enforcement has been almost totally non-existent, so that bad actors feel that they can bypass the regulations without consequence.

In its comments on proposed legislation the review also notes, among other things, that the issue of enforcement raises questions as to:

- how effective the new regime will be, given its added complexity, the fragmentation of responsibilities, and the extent to which it places a reliance on Trading Standards officers – most of whom are not trained or experienced in the construction products sector, are already overstretched, and who demonstrate little enthusiasm for taking on a more active role in this market;
- whether and how the industry can be persuaded that enforcement will be both energetic and effective; and
- how regulatory continuity will be established in following products from manufacture to installation and use on site, given the split of responsibilities between the two new regulators.

The review also considers that there should be a clearer statutory duty upon Conformity Assessment Bodies to be aware that they are acting in the public interest when carrying out the conformity assessment process - whether regulatory or voluntary.

See the review at: https://www.gov.uk/government/publications/independent-review-of-the-construction-product-testing-regime

8. Draft Responsible Actors Scheme Regulations laid in Parliament

The draft affirmative Building Safety (Responsible Actors Scheme and Prohibitions) Regulations 2023, made under Sections 126, 127, 128 and 129 of the Building Safety Act, have been laid before Parliament. They establish a Responsible Actors Scheme which requires developer members to identify and remediate (or pay for remediation) of life-critical fire safety defects in residential buildings over 11m in height, which they developed or refurbished in England between 1992 and 2022. To join the scheme, members will be required to enter into the developer remediation contract with the Department for Levelling Up, Housing and Communities (see: Developer remediation contract - GOV.UK (www.gov.uk)) and comply with its terms.

The regulations also establish prohibitions, which will be used in relation to developers (and persons they control) who are eligible for the scheme and opt not to join the scheme or comply with its conditions. They establish a planning prohibition to prevent a prohibited person carrying out major development, and a building control prohibition that prevents a prohibited person receiving building control approvals.

The government plans to issue guidance on the scheme's operation and to local authorities on the operation of the statutory prohibitions. The guidance is to be publicly available by summer 2023 and, because of the time limits in the regulations, well in advance of the prohibitions being applied to any developer.

See: *https://www.gov.uk/government/publications/responsible-actors-scheme*

9. New IChemE EPCM Blue Book

The IChemE have published a new EPCM Blue Book for project management, design, procurement, construction supervision and commissioning services of process plants. It has a model form of agreement, general conditions and guidance notes.

See: NEW The Blue Book - Engineering Procurement and Construction Management – IChemE

10. BSA Gateways start date, the further regulations and s38 – still no definite news

No definite dates yet for the start of the Building Safety Act Gateway process or for the issue of the further regulations. The Department for Levelling Up, Housing and Communities says that the start of the Gateway process is "..expected.." this autumn and that the further regulations "..will be published in due course.."

The DLUHC also says that section 38 of the Building Safety Act 1984 has not yet been brought into force because some potential unintended consequences were identified. It is carefully considering its next steps and "..will set these out in due course.."

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