



Legal developments in construction law

1. No contract and no fee but could a professional owe a duty of care in tort?

Mrs Lejonvarn carried out professional services for Mr and Mrs Burgess on their garden landscaping project. They were, until a dispute arose, good friends and there was, so the court found in deciding preliminary issues, no contract between them for the professional services that Mrs Lejonvarn provided for the groundworks phase. There was also no fee for the services; Mrs Lejonvarn expected to charge a fee for a later phase of the project. But, despite that, did Mrs Lejonvarn owe a duty of care in tort?

Yes, said the court. A professional's duty of care in tort to protect against economic loss applies to advice and any service where a professional exercises a special skill and it can extend to negligent omissions as well as negligent acts. The ingredients relevant to the case were an assumption of responsibility by the service provider and reliance by the recipient, in circumstances where a legal remedy was appropriate. A duty of care may arise even where services are performed gratuitously and there is no contract but, if there is no contract, it is important to exercise greater care in distinguishing social and professional relationships.

The services gratuitously provided were not informal or social but were provided on a professional basis. The parties' relationship was akin to a contractual one, even though no contract had been concluded; there was obvious and sufficient proximity between them. Mrs Lejonvarn assumed responsibility to the Burgesses for the professional services and they relied on her for that purpose. A legal remedy in tort was therefore appropriate.

Burgess & Anor v Lejonvarn [2016] EWHC 40

2. Adjudication: same old dispute? Not if it takes a new route

An architect issues a 'Final Certificate'. The contractor sends a letter claiming £115,450.50, and follows up with an adjudication. The adjudicator decides that the 'Final Certificate' was ineffective and the contractor's letter was not a valid payment notice, as it was based on the invalid 'Final Certificate' and it did not make clear that it was a notice and issued under the relevant clause. The contractor sends another letter seeking payment, describing it as a notice pursuant to the same clause, and follows up with a second adjudication, in which the employer (who did not serve a pay less notice) declined to participate, saying that it was the same, or substantially the same, dispute as had been decided in the first adjudication. But was it?

The cases say that whether one dispute is substantially the same as another dispute is a question of fact and degree and the Court of Appeal decided that, in this case, the disputes were not substantially the same. The second adjudicator recognised that both parties were bound by the first adjudicator's finding that the 'Final Certificate' and the contractor's first claim letter were ineffective and was being asked to decide whether a different notice served four months later had different consequences. The contractor was not making good a shortcoming in the earlier letter; it was approaching its claim via a new and different route. It was the new notice, and only the new notice, which founded the contractor's entitlement to be paid.

Brown & Anor v Complete Buildings Solutions Ltd [2016] EWCA Civ 1

3. Is an email exchange enough to vary an agreement?

An agreement provided that any variation of it would not be effective unless made in writing and signed by or on behalf of each of the parties. Would an exchange of emails, signed by the parties, be sufficient for a variation?

In *C & S Associates UK Ltd v Enterprise Insurance Company plc* the Commercial Court ruled that it was. The clause ensured that the parties would not be bound by oral agreements or even by informal unsigned written documents but it did not insist on manuscript signatures, paper documents, or that both parties' signatures must be on the same document. The court could see no reason, as a matter of construction of the clause, why documents in electronic form, in particular an exchange of emails, signed on behalf of both parties, should not satisfy the requirements of the clause, provided of course that the other requirements of contract formation and variation, such as an intention to be bound, are also present.

[C&S Associates UK Ltd v Enterprise Insurance Company Plc \[2015\] EWHC 3757 \(Comm\)](#)

4. JCT BIM Practice Note

The JCT has issued a practice note on BIM: "Building Information Modelling (BIM), Collaborative and Integrated Team Working". It is designed to assist in providing an understanding of BIM to those who may be new or unfamiliar with the concept.

The practice note is available as a free download from JCT's website.

See: <http://www.jctltd.co.uk/bim.aspx>

5. New PPC Alliance contracts on the way

The ACE and the ACA have been consulting on two new contract forms; the "PPC Project Alliance Contract" and "Term Alliance Contract" were both scheduled for publication in October 2015 but are now reported as set for a launch this year. The collaborative, simpler, forms are intended to be suitable for projects of any size, designed to support BIM, integrated, to cover the whole life of an asset, and for use internationally, under any legal system.

6. Whatever happened to the government's new payment reporting requirements?

In March 2015, following a consultation, the government announced its plan to implement the new requirements for large companies to report on their prompt payment practices and policies. It said that the duty is only to apply to large quoted companies, who will be required to report half yearly on:

- standard payment terms;
- average time taken to pay;
- proportion of invoices paid beyond agreed terms;
- proportion of invoices paid in 30 days or less; between 31 to 60 days; and beyond 60 days;
- amount of late payment interest owed and paid;
- whether financial incentives were required to join or remain on supplier lists;
- dispute resolution processes;
- the availability of e-invoicing; supply chain finance; preferred supplier lists; and
- membership of a Payment Code.

Draft secondary legislation and an 'indicative' format for the report accompanied the announcement, but that was March 2015. On 20 January, however, the government said that the regulations will be introduced this year.

See: <https://www.gov.uk/government/speeches/prompt-payment-implementing-the-duty-on-large-companies-to-report-on-payment-practices-and-policies>

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