



Legal developments in construction law

1. Information on a website – might there be a duty of care?

Thanks to the internet, commercial documents can easily be made available to a wide audience. But if, for instance, company accounts are put on a company's website, does the company owe a duty of care to those who rely on that information?

Taberna, an investment vehicle, alleged that a Danish bank had misrepresented to it the amount of its non-performing loans, probably through a document on the bank's website. The Court of Appeal considered that placing documents on a company's website was not, on its own, sufficient to create the degree of proximity required for a duty of care. To hold otherwise would be inconsistent with *Caparo v Dickman*, which confirmed the principle that a document such as the accounts of a public company can be relied upon as against the directors and auditors only by those to whom it is addressed. For a representation in a document to be actionable by the recipient there has to be a connection between the maker and the recipient of a kind that enables the court to be satisfied that the maker was intending the recipient to rely on the document in a particular way.

On the facts of the case, the Court of Appeal confirmed the judge's finding that the bank had deliberately made the relevant document available to Taberna with a view to its relying on it for investment purposes, but ruled that the bank was entitled to rely on a disclaimer in the document as an answer to the claim.

Taberna Europe CDO II Plc v Selskabet AF
1.September 2008 in Bankruptcy [2016] EWCA Civ
1262

2. Interim payments – how to say goodbye to the change

Interim payment means interim payment, you might say. A final account should produce the exact total figure payable and identify any balancing payment needed. And money paid under a mistake of fact, or law, can be recovered, subject to certain defences. But what if a developer makes a payment to a builder, knowing that it may be more than they owe, but choosing not to ascertain the correct amount. Can any overpayment be recovered?

A developer and builder carried out a number of developments under an oral "*Framework Agreement*". The builder was to receive its "build costs" (although these were never identified) and, on completion, there was to be a sharing of the profits. A costs budget was agreed for each site and, as works proceeded, the builder requested interim payments, which were round sums unsupported by any details or evidence of costs incurred. The developer made the payments because they were within budget and appeared reasonable and he trusted the builder. On completion of each project the parties agreed what sum was due to the builder in respect of the "build costs" and profit share but the developer did not require, and the builder did not provide, any schedule of the "build costs". They proceeded on the basis that these were the same as the budget costs and the developer was content with this arrangement. After the parties' collaboration came to an end, however, the developer claimed repayment of sums overpaid.

The claim failed. The Court of Appeal noted the important principle that, where someone voluntarily makes a payment, knowing that it may be more than they owe, but choosing not to ascertain the correct amount due, they cannot ordinarily recover that overpayment, unless, for instance, there has been fraud or misrepresentation.

Leslie v Farrar Construction Ltd [2016] EWCA Civ 1041

3. The case of the vanishing non-completion certificate

Deducting liquidated damages is simple when compared with the task of having to prove unliquidated damages. But if that option is conditional on complying with a contract procedure, carefully following that procedure can be critical. Under a JCT 2011 Intermediate Contract completion was delayed and the contract administrator issued a certificate of non-completion. They subsequently issued an extension of time but no further certificate of non-completion. The employer later issued a payless notice and deducted liquidated damages but the contractor said they could not do that.

The judge agreed. The contract said that if an extension of time was made after a certificate of non-completion, the certificate was cancelled and the contract administrator “*shall, where necessary, issue a further certificate*”. As they had not done so, that condition for deducting liquidated damages had not been met and they could not be deducted.

The judge also ruled that costs incurred by claims consultants assisting a litigant in person will usually be recoverable on adjudication enforcement proceedings, assuming that the same consultants have represented the party in the adjudication.

Octoesse LLP v Trak Special Projects Ltd [2016] EWHC 3180

4. Payment reporting duty on track for April

The new duty to report on payment practices, policies and performance has moved a step closer with publication of new, revised, draft regulations. April is the government target starting date for the regulations, which will require large UK companies and LLPs to publish details of their payment practices and performance, in relation to business contracts for goods, services or intangible assets, twice per financial year on a government web service. Director approval (or that of a designated person in an LLP) is required to ensure the accuracy of the information, which must be produced within 30 days of the end of the business’s reporting period (i.e. each six months of its financial year).

The information required includes, amongst other details:

- the organisation’s payment terms;
- its process for payment dispute resolution;
- the average time taken to pay invoices from invoice receipt;
- the percentage of invoices paid, within the reporting period, in 30 days or fewer, between 31 and 60 days, and over 60 days; and
- the proportion of invoices due within the reporting period but not paid within agreed terms.

See: <https://www.gov.uk/government/news/boost-to-small-businesses-as-payment-reporting-rules-unveiled-for-large-firms>

5. Updated government guidance for steel procurement in major public projects

The government has issued Action Note PPN 11/16 and revised guidance for steel procurement in major public projects, where steel is a critical component. The PPN and the guidance apply with immediate effect to all Central Government Departments, their Executive Agencies and Non Departmental Public Bodies and the wider public sector (e.g. local authorities and health bodies) can use it in their procurements where appropriate.

Contracting authorities must determine which of their procurements are major projects, as there is no set value for what is major, but major procurement projects are likely to include infrastructure (e.g. rail and roads), construction (e.g. prisons, hospitals, universities, housing, community centres, bridges and schools), flood defences, defence related projects, medical equipment and energy related projects. The relevant organisations are still required to report on compliance with the government’s steel policy through the existing reporting mechanism overseen by the Crown Commercial Service.

The principles in the guidance are also relevant to other materials, to which it could be applied as appropriate.

See: <https://www.gov.uk/government/publications/procurement-policy-note-1116-procuring-steel-in-major-projects-revised-guidance>

6. Consultation on corporate governance

A government consultation on corporate governance is in progress, inviting views on a range of options on executive pay, increasing representation of workers, customers, suppliers and investors in the boardroom, and a stronger corporate governance framework for large private companies.

The consultation closes on 17 February.

See: <https://www.gov.uk/government/news/government-launches-review-of-corporate-governance>

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