



Legal developments in construction law

1. Does discovering a dangerous defect mean goodbye to a negligence claim?

The famous snail in the ginger beer case, *Donoghue v Stevenson*, is, you might say, the godfather of the tort duty of care in negligence. In that case the duty was not to cause personal injury but the duty was later expanded to include physical damage to other property. A key issue in *Donoghue* was the fact that the danger was hidden, but what if a dangerous defect is discovered before causing damage. Is there still liability in tort?

An aerospace component factory had safety devices installed to protect against the fire risk in a number of heated tanks. One of the safety devices failed and twice caused a fire which was swiftly put out. The manufacturer bought an alternative safety device but, some days later, before it was installed, the original safety device failed again and the resulting fire caused £20 million worth of damage. Was the manufacturer of the faulty original device still liable?

No, said the Court of Appeal. The collective knowledge of the relevant employees, those to whom the directors of the component company had entrusted the safe maintenance and operation of the tanks, should be attributed to the company. And once the end user is alerted to the dangerous condition of a chattel, if they voluntarily continue to use it and personal injury or damage is caused as a result, they normally do so entirely at their own risk.

[Howmet Ltd v Economy Devices Ltd & Ors \[2016\] EWCA Civ 847](#)

2. Natural justice; what if an adjudicator knows something important that you do not?

Beumer, a subcontractor for a baggage handling system at Gatwick Airport, started adjudication proceedings about NEC3 compensation events against the main contractor, Vinci, claiming that Airport Operational Readiness (AOR) had been achieved by 16 December 2015. At the same time, it started another adjudication, before the same adjudicator, against its sub-subcontractor, Daifuku Logan, concerning alleged failure by Logan to meet contract dates and claiming liquidated damages for delay. In this second adjudication Beumer said that Logan's works, (forming part of Beumer's works) had not achieved AOR by at least 12 April 2016. The two statements were, as the court found, factually inconsistent. Vinci did not know about the Logan adjudication but the adjudicator did. Should he have told Vinci about it?

The court said that it is important that adjudicators should not only act, but be seen to act, fairly. If unilateral telephone calls to an adjudicator are strongly discouraged, if not prohibited, because of apparent unfairness, it is very difficult, if not impossible, for an adjudicator to be permitted to conduct another adjudication, involving one of the same parties at the same time, without disclosing that to the other party. That other adjudication might involve telephone conversations and would involve the receipt of communications, including submissions, and possibly a hearing. If that all takes place secretly, unknown to the other party, there is a real possibility of bias.

Beumer's inconsistent case in the Logan adjudication could have been relied upon by Vinci to support its own case as to the correct AOR date. It was, however, deprived of the opportunity to seek an order from the adjudicator for disclosure of relevant material because the other adjudication's existence was kept from it. The breach of natural justice was plainly material. The question of the correct date for AOR was central to considerations of delay, and delay was central to considerations of whether instructions were indeed compensation events. The breach of natural justice was sufficiently material for the decision not to be enforced.

Beumer Group UK Ltd v Vinci Construction UK Ltd [2016] EWHC 2283

3. Is there a concluded contract? What can a court consider?

A claimant in litigation made an offer to settle all claims between the parties. The defendant's solicitor replied by email "*The claimant accepts your offer.*" and attached a draft consent order for consideration and approval. That draft consent order contained, however, a date for payment that differed from the date in the claimant's offer. Was that response an acceptance of the original offer or a counter offer and, in deciding that issue, was the court restricted to looking at just those two documents? In deciding, because of the different payment dates and despite the stated acceptance, that the reply was a counter offer, the court said that it was well established that, in considering whether an agreement has been concluded, the court is entitled to have regard to all the communications between the parties. The House of Lords had previously confirmed that "*In order to determine whether a contract has been concluded in the course of correspondence, one must first look to the correspondence as a whole...*" The subsequent correspondence between the parties confirmed the court's analysis.

Caroline Gibbs v Lakeside Developments Ltd [2016] EWHC 2203 (Ch) (unreported)

4. April 2017 date set for new large business payment reporting requirements

The government has named the start date for the statutory duty for large businesses to report on payment practices. It is due to come into force from 6 April 2017 for financial years starting after that date. More detail is to be available this autumn as the government confirms the metrics that will be required, which will include the Prompt Payment Code. Guidance is to accompany the secondary legislation.

See: <http://www.cicm.com/wp-content/uploads/2016/09/Letter-to-signatories-Sept2016.pdf>

5. JCT D & B 2016 is here!

The JCT has now released the 2016 D & B family of contracts:

- Design and Build Contract 2016;
- Design and Build Contract Guide 2016;
- Design and Build Sub-Contract Agreement 2016;
- Design and Build Sub-Contract Conditions 2016; and
- Design and Build Sub-Contract Guide 2016.

Next to arrive will be the Standard Building Contracts, Collateral Warranties and the Intermediate Building Contracts. Publication of the 2016 Edition is set to continue through 2017.

Free downloads are also available, for the 2016 D & B main contract and subcontract, of the:

- Model forms for the Rights Particulars; and
- Fluctuations Options B & C.

For updates sign up to the JCT Network.

See: <http://corporate.jctltd.co.uk/jct-launches-design-and-build-contract-2016/> <https://www.jctltd.co.uk/useful-documents>

6. Neighbourhood Planning Bill under way

The Neighbourhood Planning Bill is now on its way through Parliament. It deals with planning and compulsory purchase and aims to help identify and free up more land for house building and to speed up the delivery of new homes. Measures included in the Bill are intended to strengthen neighbourhood planning, require a developer's consent to pre-commencement planning conditions and make changes to the compulsory purchase regime.

See: <https://www.gov.uk/government/news/new-bill-will-boost-growth-and-housebuilding>
<http://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0061/en/17061en.pdf>

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