



## Legal developments in construction law

### 1. Court of Appeal tackles Japanese knotweed and the law of nuisance

Two home owners brought claims in private nuisance against Network Rail on the basis that Japanese knotweed on Network Rail's land had caused damage to their properties. They were awarded damages and, in dismissing Network Rail's appeal, the Court of Appeal summarised the present principles of the cause of action of nuisance. The summary included the following principles:

- A private nuisance is a violation of real property rights, involving either an interference with a landowner's legal rights, including a legal interest in land such as an easement, or interference with the amenity of the land, the right to use and enjoy it.
- Although nuisance is sometimes broken down into different categories, these are merely examples of a violation of property rights as described.
- The frequently stated proposition that damage is always an essential requirement of the cause of action must be treated with considerable caution. In particular, interference with an easement or a profit à prendre is actionable as a nuisance without the need to prove specific damage; in the case of nuisance through interference with the amenity of the claimant's land, physical damage is not necessary to complete the cause of action.
- Nuisance may be caused by inaction or omission as well as by some positive activity; an occupier will be liable for continuing a nuisance created by another person if, with knowledge or presumed knowledge of its existence, they fail to take reasonable means to bring it to an end when they had ample time to do so; an occupier will also be liable if they fail to act with reasonable prudence to remove a hazard, whether natural or man-made, on their land of which they were aware and where it was foreseeable that it would risk damaging their neighbour's land and goes on to do so.

The broad unifying principle in this area of the law is reasonableness between neighbours.

For the full summary see: *Network Rail Infrastructure Ltd v Williams & Anor [2018] EWCA Civ 1514* at paragraphs 40-45.

### 2. Adjudications: liquidators 'regularly' start them - but should they?

It has recently been claimed that liquidators across the country regularly refer disputes to adjudication. But are they legally entitled to do that? What, exactly, happens to claims and cross claims when a company goes into liquidation?

In a recent case, the court said that, when a liquidator is appointed, claims and cross claims can no longer be separately enforced. Because of the liquidation the only dispute that can then arise is that in respect of the balance of the account between the parties, to be identified as part of the final and certain process under Rule 4.90 of the Insolvency Rules. And an adjudicator cannot conduct such an account under the Insolvency Rules.

But what about the right of a party to a construction contract to adjudicate at any time? Because, on the liquidator's appointment, any number of disputes between the parties to a construction contract becomes a single one, a dispute relating to the account under the Insolvency Rules and this is the only claim that can then exist. The court did not consider such a dispute to be 'a dispute arising under the contract' under the Construction Act, or 'any dispute under the contract' under the Scheme. It said that it is a dispute arising in the liquidation and noted that clear words in the Construction Act would be required to change the law of insolvency. Which meant that the adjudicator in the case had no jurisdiction to determine the dispute referred to him.

*Michael J Lonsdale (Electrical) Ltd v Bresco Electrical Services Ltd [2018] EWHC 2043*

### 3. Court rules on a payment mechanism for milestones

Payment under a subcontract to design, supply and instal hotel modular bedroom units to be made in China was triggered by milestones. The Housing Grants Act applied to the subcontract, which consequently had to have an adequate payment mechanism. The amounts of the milestone payments, which were percentages of the contract price, were not in issue but three of the milestones, which were all dependent on “sign-off”, were challenged. The court decided that “sign-off” meant, in the case of two of them, approval by underlying clients as well as the main contractor and which would then be the due date. But did that arrangement comply with S110(1)(a) of the Construction Act, which targets, in its requirements, promptness and certainty in payment terms?

The court ruled that it did not. Nowhere did the payment terms, or even the specification, say by what date the sign-off must be done; and it is not possible to imply a term as to reasonable time to solve the problem, because that would still generate an opportunity for uncertainty or dispute, which is what S110 was designed to prevent. In addition, the criteria for “sign-off” for both milestones were uncertain.

“Sign-off” for the other milestone was significantly differently worded. The court considered that it simply meant proof of delivery of the units in Southampton once discharged from the vessel carrying them and did not involve checking to see whether they were damaged as a condition for a sign-off for payment. That milestone therefore was compliant.

The judge also noted that the use of stages or milestones to trigger payment is not, in principle, objectionable under S110. The question is what triggers for payments are actually used and whether they are adequate.

*CIMC MBS Ltd v Bennett Construction Ltd*  
(unreported)

### 4. Moderating a procurement bid – court spells out how it should be done

Any moderation process used to determine bidders’ final scores under the Public Contracts Regulations 2015 has to be right. It needs to comply with the relevant procurement rules on equal treatment and transparency. If it does not it is potentially open to challenge.

The court in *Lancashire Care NHS Foundation Trust v Lancashire County Council* has provided some important guidance:

- There is no general obligation for an authority to disclose the notes of its moderation exercise. Where, however, it seeks to rely on those notes as the written reasons for its decision, its moderation process, and the notes relied on, must comply with well-established procurement standards of equal treatment and transparency.
- The notes must be recorded in a consistent and clear manner, and provide a full and transparent record of the authority’s reasons and reasoning behind the conclusions reached, which is not the same as providing a list of factors taken into account. (The court emphasised its agreement with the claimants’ submission that “a procurement in which the contracting authority cannot explain why it awarded the scores which it did fails the most basic standard of transparency”.)
- Contracting authorities are free to decide how to structure their examination and analysis of bids, provided that this does not have the effect of amending the contract award criteria (e.g. by affording unequal weightings to criteria where none is specified).
- The judgment also reaffirmed the now familiar position that the court will not generally interfere with the margin of appreciation afforded to contracting authorities by re-marking the tender bids itself.

See: *Lancashire Care NHS Foundation Trust & Anor v Lancashire County Council* [2018] EWHC 1589

## 5. Government announces ban on combustibile cladding

Following its consultation on the use of combustibile materials on external walls of high-rise buildings, the government has confirmed that it will ban their use on all high-rise buildings that contain flats, as well as hospitals, residential care premises and student accommodation above 18 metres.

The ban will be delivered through changes to building regulations guidance and will limit materials available to products achieving a European classification of Class A1 or A2.

See: <https://www.gov.uk/government/news/government-announces-new-housing-measures>

## 6. New Homes Ombudsman

The government has also announced that there is to be a New Homes Ombudsman, a homebuyers' watchdog, and that it intends to legislate to apply the new arrangement to all new developers.

The government says that it will work with consumers and industry to develop its proposals and will publish more details in due course. In the meantime, it expects industry to continue to improve the current redress arrangements and the consistency of quality for new build homes.

See: <https://www.gov.uk/government/news/government-announces-new-housing-measures>

## 7. New NEC Practice Note for offsite modular construction

NEC has issued a free Practice Note (4) explaining how the NEC4 suite of contracts can be used to support the use of offsite modular construction.

To download a copy see: <https://www.neccontract.com/About-NEC/News-Media/New-NEC-Practice-Note-Modular-Construction>

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

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