



Legal developments in construction law

1. Project insurance is no protection for roofing subcontractor after fire

A fire causing damage on a building site usually means an insurance claim. Which might be followed by a subrogation claim, by the insurers who have paid out on the original claim, against the party responsible. But what if that party is a subcontractor and the project CAR policy includes subcontractors in its list of insureds? Does the policy protect the subcontractor against a subrogation claim?

In the first case where the court has had to decide how construction subcontractors participate in project insurance policies, the court analysed the subcontractor's position. It concluded that a standing offer is made by insurers to insure those who are subsequently ascertained as members of the defined group. The offer is accepted by a subcontractor joining, on executing the subcontract, and that acceptance leads to the implication of a term in the subcontract. In this case, however, under its subcontract, the roofing subcontractor was required to obtain its own insurance cover. Did that make a difference?

The court ruled that that express obligation excluded the possibility of implying a term to the contrary. The court also noted that the cases repeatedly emphasise that the answer in any particular case is one of construction, which therefore critically depends, in each case, on the provisions of the particular contract. In this case that meant the terms of the roofing subcontract and the judge questioned how the parties could have intended to create an insurance fund as the sole avenue for making good relevant loss or damage, when they had expressly agreed that the subcontractor would obtain its own separate insurance. To the extent that the subcontractor was contractually required to have its own individual insurance cover, it was therefore not entitled to the protection of the project insurance and the project insurers could bring a subrogated claim against it.

Haberdashers' Aske's Federation Trust Ltd v Lakehouse Contracts Ltd & Ors [2018] EWHC 558

2. Good faith back on the agenda – for “relational contracts”

Sheikh Tahnoon and Mr Kent entered into a joint venture to run a luxury hotel business, and subsequently, an online travel business. But, because of business difficulties, they entered into a framework agreement, to demerge the business, and Mr Kent entered into a promissory note with Sheikh Tahnoon, agreeing to repay him certain sums. In proceedings brought by Sheikh Tahnoon, however, Mr Kent claimed that his consent to the agreements was obtained by unfair means and in breach of fiduciary duties and/or a contractual duty of good faith. But was there a duty of good faith?

Lord Justice Leggatt noted growing recognition that such a duty may readily be implied in a relational contract, i.e. a category of contract where the parties are committed to collaborating with each other, typically on a long term basis, in ways which respect the spirit and objectives of their venture but which they have not tried, and which it may be impossible, to specify, exhaustively in a written contract. Such 'relational' contracts involve trust and confidence but of a different kind from that involved in fiduciary relationships. The trust is not in the loyal subordination by one party of its own interests to those of another. It is trust that the other party will act with integrity and in a spirit of cooperation. The legitimate expectations which the law should protect in relationships of this kind are embodied in the normative standard of good faith. Examples of such relational contracts might include some joint venture agreements.

The contract between Sheikh Tahnoon and Mr Kent seemed to the judge to be a classic instance of a relational contract. The implication of a duty of good faith was essential to give effect to the parties' reasonable expectations and satisfied the standard

business necessity test for implication of a contract term. The same conclusion could also be reached by applying the *Liverpool City Council v Irwin* test for the implication of a term in law, on the basis that the nature of the contract as a relational contract implicitly requires (in the absence of a contrary indication) treating it as involving an obligation of good faith. The court went on to identify two forms of furtive or opportunistic conduct which seemed incompatible with good faith in the circumstances of the case.

Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Kent (aka John Kent) [2018] EWHC 333

3. So whose job is it to obtain planning permission?

Activity on a construction site was suspended for more than a year after the local planning authority told the contractor that work to a rear wall required conservation area consent. The scheme design was changed, planning permission for the revised scheme was eventually granted and the work re-started. The contractor said that a Relevant Event and Relevant Matters, as defined in the contract, had occurred and claimed a 53 week extension of time. But whose job was it to obtain the necessary permissions? Was there an implied term that the employer should apply for any required planning approvals and, if so, just how should that obligation be worded? And would such a term affect the parties' contractual risk allocation?

In ruling on preliminary issues, the Court of Appeal said that, if an express contract term does not deal with obtaining planning permission, the employer is not always responsible for obtaining necessary planning approvals, or ensuring that they have been obtained, before work begins. But the cases provide some support for the proposition that the employer will generally bear this responsibility, as carrying out the work would otherwise be unlawful. In this case the parties agreed that the employer had primary responsibility for obtaining planning permission but

the key issue was just how strict that obligation was – to *ensure* it was obtained or a more limited obligation? The Court ruled that, although the implied term should require the employer to be responsible for seeking planning permission and conservation area consent, it could not realistically extend to an obligation to *ensure* that it was granted, or granted within a particular time. The Court's wording for the implied term said that the employer would "*use all due diligence*" to obtain any required permission or other approval. This requirement would extend to an obligation to make a timely application, or ensure one was made on their behalf, for this permission or approval, to ensure sufficient supporting information was provided to the planning authority, and to co-operate with the authority in this process. A timely application would be one that assisted each party in performing its contract obligations, and with a view to avoiding any delay to the Works. And no further implied terms were required to adjust the contractual allocation of risk.

Clin v Walter Lilly & Co Ltd [2018] EWCA Civ 490

4. Winfield Rock and BIM Protocol 2

The Winfield Rock report "*Overcoming the legal and contractual barriers of BIM*" was published in February and the Construction Industry Council has subsequently issued the second edition of its BIM Protocol.

The second edition of the Protocol is closely aligned with PAS 1192-2 and applies to information, not just models. It is a more flexible document, which can be used with a range of different contractual arrangements. It also now includes additional provisions in relation to the increasingly important issue of security, reflecting PAS 1192-5.

See: http://www.ukbimalliance.org/media/1185/the_winfield_rock_report.pdf and

<http://cic.org.uk/admin/resources/bim-protocol2nd-edition-1.pdf>

5. Government keeps payment practices in its sights

Part of the government's consultation on insolvency and corporate governance is seeking views on whether more should be done to help protect payments to suppliers, particularly smaller firms, in the specific event of the insolvency of a customer. In seeking views it also wants to understand whether there would be any wider, perhaps unintended consequences, from taking such steps and how they might be managed.

Possible approaches include increasing the use of specific mechanisms such as Project Bank Accounts and preventing the misuse of certain typical construction payment provisions, for example, the withholding of retention, the subject of the consultation that closed in January.

The government has also launched a consultation on whether it would be appropriate to exclude suppliers from major government procurements if they cannot demonstrate a fair, effective and responsible approach to payment in their supply chain management.

See: [https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/691857/Condoc - Insolvency and Corporate Governance FINAL .pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/691857/Condoc_-_Insolvency_and_Corporate_Governance_FINAL_.pdf) and

<https://www.gov.uk/government/consultations/prompt-payment-by-government-suppliers>

6. Sir Oliver provides an update on the build out review

Sir Oliver Letwin has provided an update on the progress of his review of build out of planning permissions into homes. He says he is now focussing exclusively on why, once major house-builders have obtained outline planning permission to build large numbers of homes on large sites, they take as long as they do to build those homes.

Sir Oliver is proposing to publish a Draft Analysis, containing only a description of the problem and its causes, by the end of June and will seek comments from interested parties and experts before finalising the Analysis. He hopes to be able to formulate robust recommendations from the summer onwards in order to produce a Final Report containing recommendations in time for the Budget.

See: [https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/689430/Build Out Review letter to Cx and Housing SoS.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/689430/Build_Out_Review_letter_to_Cx_and_Housing_SoS.pdf)

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