



Legal developments in construction law

1. Supreme Court rules bank owes no duty of care for gambler's credit reference

A bank was asked to provide a credit reference in respect of a customer. The request came from Burlington Street Services Ltd, a company acting for the Playboy Club, but the true purpose of the inquiry, and the fact that the reference was required for the benefit of another company was not disclosed. The bank confirmed that the customer had an account with them and was trustworthy up to £1.6 million per week but the account was not opened until two days after the reference was sent and had a nil balance until it was closed two months later. The Club was left with losses when the customer's cheques were returned unpaid and sued the bank, claiming that the bank owed it a duty of care in giving the reference. The Court of Appeal said the only party owed a duty of care was Burlington but the Club appealed to the Supreme Court, claiming that it was owed a duty of care because, borrowing the contract law agency concept, it was Burlington's undisclosed principal.

In rejecting the Club's appeal the Court said that it does not follow from the fact that a non-contractual relationship between two parties is as proximate as a contractual relationship, that it is legally the same as a contractual relationship or involves all of the same legal incidents. Whether a relationship is sufficiently proximate to give rise to a duty of care is essentially a question of fact from which the law draws certain conclusions. The liability of a contracting party to its counterparty's undisclosed principal, however, is not a legal conclusion from any factual relationship between them. A person may be brought into contractual relations with someone with whom they have no factual relationship at all. Such a relationship is by definition not proximate nor, in any relevant sense, voluntary or consensual so as to give rise to an assumption of responsibility. And the law on undisclosed principals is a complex bundle of interrelated rights and liabilities, most of which are entirely inapposite to tort law.

The Bank had no reason to suppose that Burlington was acting for someone else, and they knew nothing of the Club. In those circumstances, it was plain that they did not voluntarily assume any responsibility to the Club.

Banca Nazionale del Lavoro SPA v Playboy Club London Ltd & Ors [2018] UKSC 43

2. Court of Appeal confirms contract clause bars eot for concurrent delay

A building contract clause said that, where there was a delay for which the contractor was responsible, concurrent with a delay for which the employer was responsible, the employer delay would not be taken into account in calculating any extension of time. But was the clause contrary to the 'prevention principle' and therefore ineffective, as the contractor claimed?

On appeal, the Court of Appeal confirmed that the clause was effective. It was unambiguous and clearly sought to allocate the risk of concurrent delay to the contractor. The prevention principle is not an overriding rule of public or legal policy but operates by way of implied terms; it was not applicable in the case and had no obvious connection with the separate issues that might arise from concurrent delay. The clause was designed to do no more than reverse the result in the *Malmaison Hotel* and *Walter Lilly* cases for this particular contract and, perhaps most important, it was an agreed term and there is no suggestion in the cases considered that the parties could not contract out of some, or all, of the effects of the prevention principle; in fact the contrary was the case. The contractor also claimed that, even if the clause was enforceable, there was an implied term that would prevent the employer from levying liquidated damages, because the damages did not flow from a delay for which the contractor was responsible. This argument also failed. There was a proper causal link between the delay and the liquidated damages, the

extension of time provisions were inextricably linked to the liquidated damages provisions and any implied term which sought to take away the employer's entitlement to liquidated damages for concurrent delay would be contrary to the express contract terms. A term cannot be implied if it contradicts express terms. Additionally, any such implied term would not go without saying and pass the 'officious bystander' test and would not be required to make the contract work, in accordance with the 'business efficacy' test. The result was not, in any way, uncommercial or unreal. A period of concurrent delay, properly so-called, arises because a delay has occurred for two separate reasons, one being the responsibility of the contractor and one the responsibility of the employer. Each can argue that it would be wrong for the other to benefit from a period of delay for which the other is equally responsible. Either result may be regarded as harsh on the other party but neither could be said to be uncommercial or unworkable.

An issue that the court did not decide was whether, where there is concurrent delay, it could, or could not, be said that the employer had actually delayed the contractor at all.

North Midland Building Ltd v Cyden Homes Ltd
[2018] EWCA Civ 1744

3. Failure to obtain assignment of engineer's report sinks duty of care claim

Consulting engineers prepared a site investigation report for the vendors of a site in South Wales. The report stated that it was for the vendor's use and should not be passed on to others without the consultant's express consent, but that it could be assigned to the eventual site purchaser. The consultant's contract with the vendor also contained a third party rights exclusion and caps on liability. The vendor disclosed the report to the purchaser but its benefit was never assigned and there was therefore no contract between the consultant and the purchaser. But did the consultant owe the purchaser a duty of care in tort?

The court noted some relevant key principles from case law; that it is always necessary to consider the circumstances and context, commercial, contractual

and factual, including the contractual structure, in which the parties' inter-relationship arises. Not every careless misstatement is actionable or gives rise to a duty of care. Foreseeability of loss is not enough (by itself). It is necessary to establish that the duty relates to the kind of loss suffered and to determine the scope of any duty of care, again considering the context and circumstances. Disclaimers are simply one factor, but possibly an important one, in determining whether a duty of care arises. Telling everyone concerned that you are not accepting a responsibility is usually inconsistent with voluntarily undertaking it. In finding that no duty of care was owed in tort, the court said that the no use, no passing on and assignment statements in the report, when read in the context of the contract containing the third party rights exclusion and the liability limitation, made it reasonably clear, on an objective assessment, to the purchaser that, if it wanted to place legal reliance on the report, it would have to obtain an assignment or other legal document from the consultant to do so.

BDW Trading Ltd v Integral Geotechnique (Wales) Ltd
[2018] EWHC 1915

4. New government consultation on amended Building Regs fire safety guidance

The government is seeking views on the improved clarity and usability of new draft guidance on fire safety in Building Regulations Approved Document B, following recommendations made by Dame Judith Hackitt. The clarified draft contains revised guidance on restricting the use of assessments in lieu of tests and the use of combustible materials in the external walls of high-rise buildings, both the subject of separate consultation.

The government is to produce a detailed impact assessment based on the information received from the consultation to inform its final policy decision.

The consultation closes on 11 October 2018.

The Secretary of State for Communities has also said that he will conduct a full-scale review of the Approved Document B guidelines, commencing in the autumn. The technical review will assess, amongst other things, whether the underlying policy should be

updated to reflect modern building practice, the latest understanding of fire risks and technical and scientific innovations.

https://www.gov.uk/government/news/brookshire-moves-to-review-building-regulations-fire-safety-guidance?utm_source=93f2acf4-8cda-4846-929e-6d2e2bc5e5a2&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate

5. Revised NPPF published

The government has published the revised National Planning Policy Framework, setting out its planning policies for England and how these are expected to be applied, and replacing the previous version of the NPPF, published in March 2012.

See: https://www.gov.uk/government/news/governments-new-planning-rulebook-to-deliver-more-quality-well-designed-homes?utm_source=5c5e8622-3dcb-4c68-8db8-a0c0325fe0f0&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate

6. Government plans new measures on insolvency and corporate governance

The government has published its response to the consultation on insolvency and corporate governance. The document sets out its proposed next steps; in some areas the government will legislate but in other areas further consultation will be needed.

The proposed insolvency reforms include

- the introduction of a new moratorium to give ultimately viable financially distressed companies a period of time when creditors (including secured creditors) cannot take action against the company, allowing it to make preparations to restructure or seek new investment;
- prohibition of enforcement by a supplier of termination clauses in contracts for supply of goods and services, on the grounds that a party has entered a formal insolvency procedure, the new moratorium or the new restructuring plan; and
- creation of a new restructuring vehicle that would include the ability to bind dissenting classes of creditors who vote against it.

See: <https://www.gov.uk/government/news/new-tools-to-improve-rescue-opportunities-for-financially-distressed-companies> and

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736163/ICG-Government_response_doc_-24_Aug_clean_version_with_Minister_s_photo_and_signature_AC.pdf

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