2011 Construction Case Law Summary

There were a number of important decisions made in the Courts in 2011. Below is a selection of cases that may affect our clients and contacts within the construction and property sectors:

Costello and another v MacDonald and others [2011] EWCA Civ 930

Unjust enrichment and SPVs: The building contractor in this case had entered into a building contract with an SPV (Special Purpose Vehicle company). This SPV had no assets of its own and the sole shareholders were Mr and Mrs Costello. When the SPV defaulted on payment the contractor sought restitution from the Costellos on the grounds of unfair enrichment (as the Costellos had benefitted from the contractor's works as owners of the land and should therefore pay). The contractor's claim was rejected. The contractor had voluntarily contracted with the SPV, not the Costellos, and had therefore accepted the risks of the SPV not being able to pay. The contractor could have protected itself by asking for a guarantee from the Costellos. This case highlights the importance to contractors to carry out due diligence on their employers and ask for a guarantee if necessary.

Fernhill Properties (Northern Ireland) Ltd v Mulgrew [2010] NICH20

Penalties: Although this was a Northern Irish decision it is an interesting one for English construction law practitioners to consider. The Judge in this case held that a contractual interest rate of 15% between a property developer and a buyer was unenforceable because it was a penalty designed to deter a purchaser from defaulting on completion, rather than a genuine pre-estimate of the developer's loss. The Court of Appeal in England has previously held in Taiwan Scott v Masters Golf that a contractual interest rate of 15% was not a penalty. This was distinguished in Fernhill on the grounds that in Taiwan Scott the parties were both commercial concerns, whereas in Fernhill the buyer was an individual.

Golden Ocean Group Ltd. v Salgaocar Mining Industries PVT Ltd & Anor [2011] EWHC 56 (Comm)

Negotiations by email: In this shipping case the Court held that negotiations by email and related documents could arguably amount to a guarantee for the purposes of the Statute of Frauds 1677, even though no hard copy of the final form of guarantee was signed. Parties should therefore remember to be careful when conducting commercial negotiations by email that they do not unintentionally enter into an agreement. The best way of seeking to do that is by expressly making such communications "subject to contract".
**Harrison & Ors v Shepherd Homes Ltd & Ors [2011] EWHC 1811 (TCC)**

**Notification of defects – NHBC:** Defects to foundations had arisen across an entire development of 94 houses. The Court found the developer to be in breach of the duties imposed by section 1 of the Defective Premises Act 1972, and also considered whether written notice of defects was a requirement to recovery under the NHBC Buildmark scheme. Section 2 of the relevant Buildmark scheme states that the builder must put right the defects notified to him in writing within the relevant period of cover (the first 2 years). Some of the homeowners had not given notice to the developer in writing within the two year period. It was held however that the developer could not rely on the failure to give written notice in those cases. The developer had received written notice of the defects in other properties which it was discovered were a problem across the development – this amounted to constructive notice. It was also held that there had been an election to waive the notice requirements in correspondence. Developers should therefore take care not to unintentionally waive the requirement for written notice to be given, and should not assume in a case where defects cover a number of properties that a failure to give written notice will prevent liability for defects in the properties where no written notice is given.

**Jenson & Anor v Faux [2011] EWCA Civ 423**

**Defective Premises Act:** The Court of Appeal confirmed that substantial renovations to a property will not fall within section 1 of the Defective Premises Act 1972. The section only applies to new dwellings. To fall within the Act therefore the party seeking to rely on section 1 must therefore show that the building is demonstrably new.

**Jet2.Com Ltd v Blackpool Airport Ltd [2011] EWHC 1529 (Comm)**

**All reasonable endeavours:** In this case it was held that an obligation on a party to use “all reasonable endeavours” could include an obligation to act against its own commercial interests. What constitutes “all reasonable endeavours” will depend on the facts of any case but this highlights the need for caution when accepting such an obligation.

**Jones v Kaney [2011] UKSC 13**

**Experts’ immunity:** The Supreme Court held by a majority that experts’ immunity from a claim where they have been negligent and/or in breach of contract in carrying out their services as experts should be abolished.
Robinson v P.E.Jones (Contractors) Ltd [2011] EWCA Civ 9

Builders' tortious duties: The Court of Appeal provided clear guidance on the extent to which a builder (or seller), owes concurrent duties in tort alongside contractual obligations arising under the building contract. The Court of Appeal upheld the first instance judgment that, although a builder can owe concurrent duties in tort and in contract, the builder will not have tortious liability for pure economic loss (i.e. for losses other than the cost of repair) unless he has assumed responsibility and the client has relied upon this (as per the Hedley Byrne v Heller principles).

In addition, in this case, the builder had limited its liability for defects to liability for defects covered by the NHBC Agreement. The Court held that this limitation satisfied the requirements for reasonableness under the Unfair Contract Terms Act and accordingly the claimant's claim in tort (in respect of defective flues which emerged some 12 and a half years after completion) failed.

Adjudication disputes

CN Associates (a firm) v Holbeton Limited [2011] EWHC 43 (TCC) and Durham County Council v Jeremy Kendall (t/a HLB Architects) [2011] EWHC 780 (TCC)

Adjudicator's jurisdiction: These two cases are a useful reminder that where you disagree that the adjudicator has jurisdiction to decide a dispute, you should expressly reserve your position in both correspondence and your submissions, and also regularly maintain and state the reservations that you are relying on throughout the adjudication to allow these reservations to be pursued in any later challenge in the Courts to the adjudicator's jurisdiction.

Lanes Group Plc v Galliford Try Infrastructure Ltd (t/a Galliford Try Rail) [2011] EWCA Civ 1617

Forum shopping and bias: This Court of Appeal case concerned conjoined appeals in three separate actions from 2011 concerning an adjudication decision (see the previous cases between the parties: [2011] EWHC 1234 (TCC) (07 April 2011), [2011] EWHC 1035 (TCC) (19 April 2011), [2011] EWHC 1679 (TCC) (06 July 2011)).

Galliford applied to the ICE to appoint an adjudicator. The ICE appointed Mr Klein and he accepted the appointment. Galliford's solicitors however did not then serve the referral documents, on the basis that Mr Klein would be biased due to a robust clash that Galliford's solicitors had previously had with him in an earlier case. Galliford then applied to the ICE to appoint a new adjudicator, and ICE accordingly appointed Mr Atkinson. Lanes contended
that Mr Atkinson did not have jurisdiction on the grounds that only Mr Klein was appointed to hear the dispute. Lanes' attempt to restrain Mr Atkinson from proceeding was unsuccessful.

Before Lanes had issued their response Mr Atkinson issued a document of his "Preliminary Views". Lanes challenged his ultimate decision on the basis that it was the product of bias as he appeared to have made up his mind on the bulk of the issues without seeing Lanes' response (and again sought to challenge jurisdiction). The Judge held that there was no bar to Galliford abandoning its first adjudication and serving a fresh notice, but did hold in Lanes' favour that there had been apparent bias. The issues were referred to the Court of Appeal.

The Court of Appeal held that Mr Atkinson did have jurisdiction to decide the dispute. The Court noted that it does sometimes happen that an adjudication is not pursued after the preliminary steps have been taken, but there is no authority to state that if you do not pursue it you lose the right to adjudicate that dispute forever. There are also a number of situations where the procedure could be thwarted if there was no right to re-start an adjudication, for example a postal delay. It was argued that there might be some distinction to be made when deliberately and without good reason failing to serve the referral, however (although the Court noted that forum shopping is never attractive), the Court did not agree that this could be implied here. In the previous decision Judge Waksman had also doubted that forum shopping in adjudication is a real problem in the construction industry.

The Court disagreed that there was apparent bias, noting that the Preliminary View was marked as provisional, and also that there is nothing objectionable in a judge setting out their preliminary view at an early stage to allow the parties to correct any errors in the judge's thinking. It was also noted that adjudication is carried out at great speed and that the adjudicator will need to fashion his procedure in whatever way so as to allow him to discharge his duties most swiftly, effectively and fairly.

Profile Projects Ltd v Elmwood (Glasgow) Ltd [2011] ScotCS CSOH 64

Tolent clauses: The Scottish Court of Session (somewhat surprisingly) followed the earlier decision of Bridgeway v Tolent rather than the more recent Yuanda v WW Gear case and held that the clause requiring the referring party to pay the whole costs of adjudication, including both parties’ costs and the adjudicators’ expenses did not fall foul of section 108 of the Construction Act. It will be interesting to see how "Tolent" clauses are interpreted by the Courts following the introduction of the Local Democracy Economic Development and Construction Act 2009 which intended to outlaw such provisions but arguably has done the opposite!
**Witney Town Council v Beam Construction (Cheltenham) Ltd [2011] EWHC 2332 (TCC)**

**Dispute or disputes?** The Council in this case argued that more than one dispute had been referred to adjudication (including disputes as to a draft Final Account, a later Final Account, interest on underpayment of retention and a claim for the payment of the whole of the retention). Beam argued that there was only one dispute encompassing what was due and owing. Mr Justice Akenhead held that there were clear links between the Final Account and the other matters in dispute and that it was unrealistic to say that these were different disputes. Accordingly the Judge held that there was only one dispute, as to what was due and owing to the contractor. The case highlights that where the dispute in question relates to several issues the matters that are referred to the adjudicator and the relief sought must have some common link to avoid being challenged in enforcement proceedings as having encompassed more than one dispute.

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**To discuss the cases above contact us**

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