



UNCOMMONLY INDEPENDENT

CLYDE & CO

# Contractual terms, collateral warranties and construction case law update

—  
25<sup>th</sup> March 2021



# Contractual terms, collateral warranties and construction case law update



**Jonathan Brown**  
Partner, London



**Peter O'Brien**  
Partner, Bristol



**Andrew Kelcher**  
Senior Associate, London

# Contractual terms

Jonathan Brown, Partner, London

---

# Contractual terms

- Standard of care
- Fitness for Purpose
- Indemnity clauses
- LADs
- Exclusions/caps on liability

# Standard duty of care

- *"The [Consultant/D&C Contractor] warrants to the Employer that it has exercised and will continue to exercise reasonable skill and care in the performance of its services under the Appointment."*

# Enhanced duty of care

- *"The [Consultant/D&C Contractor] warrants to the Employer that it has exercised and will continue to exercise all the reasonable skill, care and diligence in the performance of its duties under the Appointment to be expected of a prudent, experienced, properly qualified and competent [Consultant/D&C Contractor] with experience of carrying out services similar to its duties under the Appointment in connection with projects of a similar size, scope, nature, complexity and value to the Development"*
- *"The Consultant is to provide the services to the highest applicable standards" (emphasis added)*

# The negligence test

## **Bolam v Friern Hospital Management Committee [1957] A professional:**

- *“... is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art .... Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view ...”*

## **Guidance on what is a ‘reasonable body’ of professionals comes from the case of Bolitho v City & Hackney Health Authority [1998] A.C. 232:**

- *‘The Court is not bound to hold that a defendant doctor escapes liability for negligent treatment or diagnosis just because he leads evidence from a number of medical experts who are genuinely of opinion that the defendant’s treatment or diagnosis accorded with sound medical practice... the court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis. In particular in cases involving, as they so often do, the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter.’ (emphasis added)*

# The negligence test (ctd)

## Patel v Daybells [2001] EWCA Civ 1229

- *“If a practice in the profession exposes clients or patients to a foreseeable and avoidable risk, the practice may not be capable of being defended on rational grounds, and in those circumstances the fact that it is commonly (or even universally) followed will not exclude liability for negligence.”*

## Potential relevance to post-Grenfell cladding claims?

Thomson v Smith Shiprepairers (North Shields) Ltd [1984] Q.B. 405 the High Court said that a defendant is not:

- *“... exonerated simply by proving that other[s] ... are just as negligent, but ... the standard of what is negligent is influenced, although not decisively, by the practice in the industry as a whole.”*

# Fitness for purpose

- *"The design when completed shall be suitable for the purpose stated in the Contract Documents and will, when complete, comply with any performance specification or requirement included or referred to in the Contract Documents."*

**MT Højgaard A/S v E.On Climate & Renewables UK Robin Rigg East Ltd & Anor [2017]** ("Robin Rigg case")

# Indemnity clauses

- *"The [Consultant/D&C Contractor] shall indemnify and keep indemnified the Employer from and against any claims, actions, costs, losses and expenses made or suffered by the Employer as a result of any breach by the [Consultant/D&C Contractor] of the provisions of this Contract."*
- May increase limitation period
- May increase scope of damages recoverable beyond the common law position

# LADs

- *“The Insurer shall not be liable to indemnify the Insured in respect of liability arising by virtue of the provisions contained in contracts or agreements entered into by the Insured and having the nature of the following:....any express liquidated damages.....Provided that this exclusion shall not apply in respect of liability which would have attached to the Insured in the absence of the above.”*

**Triple Point Technology v PTT Public Co [2019]**

# Exclusions/caps on liability

- *"The [Consultant's/D&C Contractor's] liability under or in connection with this Agreement shall not exceed the sum of [XXX]."*
- *"The [Consultant's/D&C Contractor's] liability shall be limited to the reasonable cost of repair, renewal or reinstatement of the Works, to the extent that (a) the Employer incurs that cost, or (b) the Employer is or will be liable for that cost."*
- *"The [Consultant's/D&C Contractor's] liability for costs under this Agreement shall be limited to that proportion of such costs which it would be just and equitable to pay having regard to the extent of the [Consultant's/D&C Contractor's] responsibility for the same and on the basis that [list other relevant parties] shall be deemed to have provided contractual undertakings on terms no less onerous than this clause."*

## **West v Ian Finlay & Associates (Court of Appeal, 2014)**

- Exclusion of consequential losses
- GB Gas Holdings Limited v Accenture (UK) Limited and Others [2010]

# Collateral Warranties

Andrew Kelcher, Senior Associate, London

# Collateral Warranties

## What are Collateral Warranties?

- A contract between two parties to a construction project where one did not previously exist
- Contracts (Rights of Third Parties) Act 1999 – does this help?
- Why have collateral warranties? For certainty – to avoid the problem of relying on the vagaries of negligence
- Some big claims have arisen under collateral warranties:
  - Swansea Stadium Management Company Limited v City and County of Swansea
  - Friends Provident v McAlpine
  - Parkwood Leisure v Laing O'Rourke

# Collateral Warranties

## Collateral warranties in practice

- Consider different procurement models
- From the perspective of an employer or funder in a design and build model
- From the perspective of a contractor in a traditional model
- Or consider a consultant where its own appointed sub-consultant has provided specialist advice up the chain to the owner or developer
- Insolvency risks?

# Collateral Warranties

## Pitfalls and insurance problems

- PI Insurance and common exclusions
- Warranting fitness for purpose
- Providing greater or longer lasting benefit than under your original contract or appointment
- Number of assignments?

# Collateral Warranties

## ...and some drafting tips - things you do want to see as warrantor

- No greater liability
- Equivalent rights of defence
- Net contribution clause
- Collateral warranty also executed by other parties simultaneously
- A limit on the types of losses recoverable?

# Using the Construction Act in Professional Negligence Claims and Legal Updates

Peter O'Brien, Partner, Bristol

# Introduction

- *“There must be cash flow in the building trade – it is the very lifeblood of the enterprise”.*

**Lord Denning, Master of the Rolls *Gilbert Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd (1973)***

# HGCRA 1996 (as amended)

**The Construction Act is one of the seminal pieces of legislation introduced to combat unfair payment practices in the industry.**

Construction Act – 2 Main Parts:

- Payment
  - right to be paid interim, periodic or staged payments
  - Payment Notices, Pay Less Notices
  - right to suspend performance for non-payment
  
- Adjudication

# Who the Construction Act applies to...

## **S104 (1) – Construction contract means an agreement ...for the following:**

- The carrying out construction operations
- Arranging for the carrying out of construction operations

## **S104 (2) (a)**

- Includes an agreement to do architectural, design or surveying works in relation to construction operations.
- The Construction Act will apply to most construction professionals whether as designers or contract administrators.
- Construction Act requires all construction contracts to have mandatory terms regarding payment and adjudication otherwise these are imported from the Scheme.

# Adjudication

- Brutal – Queensberry Rules v Streetfighting
- 28 or 42 days to decision
- “At any time...”
- Ambush
- Can insurers react?
- Enforceable even if incorrect in fact and law
- Pay now argue later
- Change who is Claimant and Defendant

# Payment Provisions

- Serve correct Payment Notices or Pay Less Notices in the correct timescales or pay what is asked for!!!
- Game changer
- Worth a try
- Examples!

# The ‘Smash & Grab’ trend

## ‘Smash & grab’

- Contractor makes payment application and employer/contract administrator fails to issue valid and/or timely payment or pay less notices
- Amount claimed by contractor = ‘notified sum’
- By default, employer obliged to pay ‘notified sum’ without the true value of the claim being assessed

## Rationale per Justice Edwards Stuart in *ISG V Seevic (2014)*:

- ‘...if the employer fails to serve the relevant notices...it must be deemed to have agreed the valuation stated in the relevant interim application, **right or wrong.**’
- Affirmed in *Galliford Try v Estura (2015)* but clarified that:
  - ‘...There is nothing to prevent the employer challenging the value of the work on the next application...’

Therefore the position before S&T was that “smash & grab” Adjudications were acceptable and the “true value” of that certificate could not be adjudicated as the valuation was agreed.

# Grove v S&T - TCC

TCC was asked to determine whether, in principle, an employer (Grove) was entitled to commence an adjudication to assess the true value of the sum due to the contractor (S&T)

## Held:

- That the Payment Notice was valid
- That “smash & grab” and “true value” were separate disputes
- Provided the employer pays the contractor the sum stated as due in the “smash & grab” Decision, the employer may then seek, in a second adjudication that the sum paid was the “true value” of the works in that certificate

# Grove v S&T - COA

- S&T appealed
- Agreed with TCC that Grove's Payment Notice was valid and effective
- Grove was entitled to commence a second adjudication seeking a decision as to the "true value" of its interim application but only after the sum determined in the "smash & grab" had been paid
- This is contrary to ISG v Seevic / Galliford Try v Estura
- Result: Pay "smash & grab" now adjudicate on the "true value" later

# Grove v S&T - Issues

- S108 “at any time” – a new fetter?
- Potential Problems – in the consultant/employer context :
  - Consultant commences a “smash & grab” Adjudication (Adj #1)
  - Before a decision is published in Adj #1 Employer states a “true value” Adjudication (Adj #2) on the same payment application
  - Jurisdiction of the Adjudicator in Adj #2?
- Standard forms – JCT – no upstream payment provisions until Final Account
- How does an employer recover an overpayment?
  - Implied term?
  - Restitution?
  - Inherent jurisdiction of the adjudicator

# Grove v S&T – The Continuing Landscape

- “Smash & Grab” adjudications are still valid
- Contractors/sub-contractors/consultants more likely to pursue “smash & grab” adjudications in respect of final interim payments
- Interim payment provisions – amendments to recover overpayment prior to Final Account
- Reduction in “Smash & Grab” adjudications?
- Increase in “True Value” cross adjudications?
- Parallel Adjudications and jurisdictional issues

---

# Questions?

---

# 440

Partners

---

# 1,800

Law yers

---

# 4,000

Total staff

---

# 2,500

Legal professionals

---

# 50+

Offices worldwide\*

---

[www.clydeco.com](http://www.clydeco.com)

---

\*includes associated offices

Cly de & Co LLP accepts no responsibility for loss occasioned to any person acting or refraining from acting as a result of material contained in this summary. No part of this summary may be used, reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, reading or otherwise without the prior permission of Clyde & Co LLP.

© Clyde & Co LLP 2019

---