

Introduction to Construction Law

Jennie Wild and Emma Healiss

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- ***“Building contracts are pregnant with disputes”***

(Linden Gardens Trust Ltd v Lenesta Sludge Disposal Ltd [1994] 1 AC 85, per Lord Browne-Wilkinson at p105E)

- ***“I shall seek to dispel the idea that construction cases are somehow different and apart from the general law and that they only concern Scott Schedules, lists of defects and delay claims”***

(Lord Dyson, Keating Lecture 2015, “The Contribution of Construction Cases to the Development of the Common Law”)

- Contract, tort, restitution
- Key legislation:
 - Housing Grants, Construction and Regeneration Act 1996
 - Defective Premises Act 1972
 - Building Act 1984 > Building Regulations
 - Procurement -related legislation
 - Arbitration Act 1996
- Standard forms:
 - JCT
 - NEC
 - FIDIC
 - LOGIC, SAJ, NEWBUILDCON, etc
- Forums:
 - TCC, arbitration, adjudication and other forms of ADR
- People:
 - Workers, engineers, project managers, commercial teams, insurers/funders, employers, solicitors/advisers, experts (delay, technical, quantum etc)

Important statutes:

The Housing Grants etc. Act 1996



“The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced, pending the final determination of disputes by arbitration, litigation or agreement...”

Dyson J (as he then was), *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93

Important statutes: The Housing Grants etc. Act 1996



Statutory adjudication

- Where the parties have expressly incorporated the provisions of the Scheme in the contract; or
- The contract falls within the definition of a “construction contract” to which the HGCRA applies and:
 - The express contractual provisions do not contain the eight requirements set out in sections 108(1)-(4); or
 - There are no express contractual provisions.

Important statutes:

The Housing Grants etc. Act 1996



➤ Adjudication – Part I of the Scheme

- Provisions which add to the basic requirements of section 108 HGCRA are permissible; however, provisions that alter or omit those basic requirements are not.
- Section 108(5): if the contract does not comply, "*the adjudication provisions of the Scheme for Construction Contracts apply*".
- Even if the non-compliance with is partial, the incorporation of Part I of the Scheme will be '*lock, stock and barrel*'.

Yuanda (UK) Co Ltd v WW Gear Construction Ltd [2010] EWHC 720 (TCC) at [61] and Coulson on Construction Adjudication, 4th edition at [4.11]-[4.12]).

Important statutes:

The Housing Grants etc. Act 1996



➤ Payment

- Contractors have a statutory right to interim payments unless the duration of the works is less than 45 days: Section 109
- There must be an adequate mechanism for determining what payments are due under the contract and when and, in respect of each payment, a final date for payment: Section 110
- No conditional payments: Section 110(1A)-(1D)
- Provisions for (1) payer's notice, (2) payee's notice and (3) payless notice: Sections 110A, 110B and 111.

Important statutes: The Housing Grants etc. Act 1996



➤ Payment – Part II of the Scheme

- Unlike the adjudication provisions at Part I, the payment provisions at Part II are not incorporated wholesale in the event of non-compliance.
- Section 110(3) makes plain that that the provisions at Part II are incorporated only "*if or to the extent that*" the contract does not contain the relevant provisions.
- Confirmed to be settled law in *Bennett (Construction Ltd) v CIMC MBS Ltd* [2019] EWCA Civ 1515 at [54].

Important statutes:

Defective Premises Act 1972



- Imposes duties upon a person taking on work for or in connection with the provision of a dwelling to see that the work which he takes on is done in a workmanlike manner or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed: section 1(1).
- The duties are additional to any duty otherwise owed.
- “Dwelling” is not defined, although presumably includes all buildings used or capable of being used as a residence.

Important statutes:

Defective Premises Act 1972



- The question of whether a person has taken on work within the meaning of the Act is to be assessed according to whether they do work which positively contributes to the creation of the dwelling.
- Thus ordinarily it will include the main contractor and any professional person, such as an architect, engineer or quantity surveyor and any sub-contractor specifically employed on or in connection with the provision of the dwelling and those supervising the construction of the works: see *Lessees and Management Co of Herons Court v Heronslea Ltd* [2019] EWCA Civ 1423.

Contract:

Key cases/interesting principles



- Formation: **Courtney and Fairbairn v Tolani Brothers (Hotels) Ltd** [1975] 1 WLR 297

“If the law does not recognise a contract to enter into a contract ... it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force. No court could estimate the damages because no one can tell whether the negotiations would be successful or would fall through: or if successful, what the result would be.”

(Lord Denning at p301H)

Contract:

Key cases/interesting principles



➤ Implied terms: Young & Marten v McManus Childs [1969] 1 AC 454

“There are, in my view, good reasons for implying such a warranty if it is not excluded by the terms of the contract. If the contractor's employer suffers loss by reason of the emergence of the latent defect, he will generally have no redress if he cannot recover damages from the contractor. But, if he can recover damages, the contractor will generally not have to bear the loss: he will have bought the defective material from a seller who will be liable under section 14 (2) of the Sale of Goods Act, 1893, because the material was not of merchantable quality. And, if that seller had in turn bought from someone else, there will again be liability, so that there will be a chain of liability from the employer who suffers the damage back to the author of the defect.”

(Lord Reid at p466)

Contract:

Key cases/interesting principles



- Damages: Ruxley Electronics v Forsyth [1995] 3 WLR 118

“Damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party from which it follows that the reasonableness of an award of damages is to be linked directly to the loss sustained. If it is unreasonable in a particular case to award the cost of reinstatement it must be because the loss sustained does not extend to the need to reinstate.”

(Lord Jauncey at p357E)



➤ Scope of duty of care

- A builder who does no more than build pursuant to a “normal” construction contract does not owe a duty of care to avoid causing economic loss: *D & F Estates v Church Commissioners* [1989] AC 177 HL and *Robinson v PE Jones* [2011] EWCA Civ 9.
- A builder may owe such a duty where it has assumed responsibility for designs: *Burgess v Lejonvarn* (2017) 171 Con LR 188 at [111] and *Broster v Galliard Docklands Ltd* [2011] EWHC 1722 (TCC) at [21].
- A building control inspector does not owe a duty of care to purchasers of houses to safeguard them against economic loss: *Murphy v Brentwood DC* [1991] 1 A.C. 398 HL at [480] and *Lessees and Management Co of Herons Court v Heronslea Ltd* [2019] EWCA Civ 1423.

➤ Duty to speak/warn

- There is usually no duty to speak or warn. Any such duty normally arises under an express or implied contract term.
- What about where there is a clear defect or something that is obviously dangerous?
 - The duty to warn will often arise where there is an obvious and significant danger either to life and limb or property.
 - It can arise when a careful professional ought to have known of such danger, having regard to all the facts and circumstances.
 - Unlikely to be liable merely because there was a possibility in the future of some danger.

Goldswain and Hale v Beltec Ltd [2015] EWHC 556 (TCC) at [47]

Jennie Wild and Emma Healiss
jwild@keatingchambers.com
eheliss@keatingchambers.com