



# Sloan Plumb Wood

## SOLICITORS

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## Legal Update

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## Local Democracy, Economic Development and Construction Act 2009

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# Introduction

Welcome to the Winter edition of the Sloan Plumb Wood LLP legal update.

In this issue we cover:

1. Case Law Updates
2. Local Democracy, Economic Development and Construction Act 2009



If you would like any advice or further information on any of the topics in this issue, or would like to suggest any subjects that you would like to see covered in future issues please get in touch with one of the following:

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# Case Law Updates

## Concurrent Liability in tort

### Robinson v PE Jones (Contractors) Ltd [2011] EWCA Civ 9

In this case the court of appeal considered the issue of concurrent liability, that is, liability owed both in contract and in tort. Lord Justice Jackson explained the premise of concurrent liability as follows, “*Contractual obligations are negotiated by the parties and then enforced by law because the performance of contracts is vital to the functioning of society. Tortious duties are imposed by law (without any need for agreement by the parties) because society demands certain standards of conduct.*”

Pursuing a claim on concurrent grounds of contract and tort can often be helpful where otherwise the claim might be barred, for example, due to the expiry of a limitation period for a claim in contract.

The claimants contracted to purchase a property to be built by PE Jones (Contractors) Ltd for £351,700 in April 1992. The property contained two gas fires and had NHBC cover.

Twelve years later, in September 2004 the claimant arranged for a service engineer to attend the property and service the gas fires, both of which were found to be defective. The flues in the fires had not been constructed (a) in accordance with good building practice or (b) in accordance with the Building Regulations in force at the time when the house was constructed.

The defects were latent and were discovered more than 12 years after completion so the proceedings were issued outside of the time limit for claims in contract. The claimants attempted to preserve their claim using various arguments including an argument that the defendant owed a concurrent duty of care in tort to the claimants.

The original claim in this matter was struck out following the trial of preliminary issues on the grounds that (a) the claims in contract against the builder were statute-barred (due to the passage of time) and (b) the claimant had no cause of action in tort against the builder. The claimants appealed.

Lord Justice Jackson, delivering the leading judgment, gave a succinct account of the current law in this area and on the question of whether the law imposed a concurrent liability in tort on the builder. Lord Justice Jackson noted that the parties had entered into an NHBC agreement and had agreed certain exclusions in their contract. Lord Justice Jackson considered that “*the law does not automatically impose upon every contractor or sub-contractor tortious duties of care co-extensive with the contractual terms and carrying liability for economic loss.*”

Lord Justice Jackson concluded that in this case “*the relationship between (a) the manufacturer of a product or the builder of a building and (b) the immediate client is primarily governed by the contract between those two parties*” and “*It would be inconsistent with the whole scheme of this contract, if the law were to impose upon the defendant duties of care in tort far exceeding the defendant's contractual liabilities.*” Those contractual liabilities were sufficient in this case and although it was unfortunate that the claimants may have suffered economic loss as a result of the defendant's negligence, this was a consequence of the contractual allocation of risk between the parties.

The appeal was dismissed.

## Case Law Updates Continued

### Exclusion of Liability for specific losses

#### **GB Gas Holdings Ltd v Accenture (UK) Ltd & Others [2009] EWHC 2734**

The traditional approach when dealing with exclusion of liability is to define liability by general exclusions. In the past this approach has meant that some losses which have not specifically been identified by the parties may be recoverable in the event of breach of the contract.

In this case Accenture entered into a contract with Centrica to provide British Gas with a customer billing system. The contract excluded liability for any indirect or consequential loss suffered by either party.

The contract provided that *"any losses, damages, costs or expenses whatsoever to the extent that these are indirect or consequential or punitive"* would be excluded and further that liability for the following losses would also be excluded:

- Loss of profits or of contracts arising directly or indirectly;
- Loss of business or of revenues arising directly or indirectly;

Due to a fundamental defect in the system provided, Centrica claimed for damages in the region of £30 million (the claim included a head of damage in respect of ex gratia compensation in the sum of £8 million paid to Centrica's customers). Accenture argued that all the losses incurred by Centrica fell under the heading of indirect loss. The judge at first instance decided that all losses were direct and recoverable under the contract. The appeal was heard in July 2010 and allowed the claim in part. In particular, the ex gratia customer compensation was considered a direct loss, not an indirect loss.

This case suggests that attempts to place limitations on liability in contracts may in some cases benefit from a more focused and less general approach. Parties should consider adopting a bespoke inclusion (or exclusion) clause which specifies as far as practically possible the actual losses that they hope to recover (or exclude) in the event of a breach of contract and reasonable financial caps on liability could be agreed with contracting parties in certain circumstances.

#### **Rohlig (UK) Ltd v Rock Unique Ltd [2011] EWCA Civ 18**

In this case, Rohlig is a freight transporter and Rock is a supplier of, amongst other things, sandstone paving imported from India. Rock contracted with Rohlig for freight forwarding services orally. When dispute arose between the parties Rohlig sought to rely on its standard terms of business and those of the British International Freight Association and in the court proceedings Rock accepted that these terms were incorporated.

The two relevant clauses in this dispute provided firstly that Rock was not entitled to refuse to make any due payment or reduce any due payment by any counterclaim or set-off and secondly that any claim made after nine months from the date on which the cause of action arose was time barred.

Rock argued that these clauses were unreasonable, seeking to rely on section 3 of the Unfair Contract Terms Act 1977 (UCTA) as Rock contracted on Rohlig's standard terms. UCTA provides that when a party seeks to restrict its liability for breach of contract under its standard terms of business, it will only be enforceable if it satisfies the reasonableness test.

As to the first clause considered, Lord Justice Moore-Bick recognised that cash-flow is "the life blood of business" and that a clause seeking to ensure payment of sums that are due is frequently used in commercial contracts of this type. Rock argued that if it had a valid cross claim against Rohlig, the sums claimed by Rohlig would not in fact be "due". The court was unable to accept the suggestion that if any part of any sum claimed in an invoice is disputed, nothing is due. Rock therefore had to make payment of any sum due to Rohlig and thereafter seek to pursue any claim against Rohlig separately. This was not unreasonable for the purposes of UCTA.

As to the second clause seeking to limit claims by a nine month time-bar, again, the court considered that such a clause is not unusual in commercial contracts of this type. Rock could have chosen to contract with another freight forwarder if it wished to avoid such a clause and the clause was not therefore unreasonable for the purposes of UCTA.

Rock's appeal was dismissed.

## Case Law Updates Continued

### Adjudication and Tolent Clauses

#### Yuanda (UK) Ltd v WW Gear Construction Ltd [2010] EWHC 720 (TCC)

This case arises out of a contract for a luxury hotel on Westminster Bridge Road, London. The parties met to discuss the terms on which the contract between them would be based prior to the commencement of the works, however, two terms were included in the contract without discussion. These terms were then the subject of this litigation.

The first term related to contractual adjudication provisions and sought to provide that, notwithstanding the result of any adjudication, where the sub-contractor commences adjudication the sub-contractor was to be responsible for all of the costs of the adjudication to include the whole of the contractor's costs and those of the adjudicator.

This type of clause had effectively been approved by the court in *Bridgeway Construction Ltd v Tolent Construction Ltd (2000) CILL 1662* hence "Tolent" clauses, however, the court considered that the practice of including such a clause could lead to a position where the successful sub-contractor to an adjudication would be denied the benefit of any adjudication award as it would be off-set against the costs of the adjudication which could be in the region of £50,000. The provision would also allow the contractor to expend considerable sums in defending any adjudication claim without proper regard to the merits of any defence.

Mr Justice Edwards-Stuart considered that the practical effect of such a clause was to deny the successful sub-contracting party to adjudication the benefit of any award (in certain cases). This was contrary to the spirit of the Housing Grants, Construction and Regeneration Act 1996 and effectively it appears that the Tolent decision and Tolent clauses have been disapproved of in this case. Tolent type clauses will be limited in any event by the new Local Democracy, Economic Development and Construction Act when in force (see below for more details in this regard).

The second term that was considered by the court related to the contractual rate of interest set out in the sub-contract. The Late Payment of Commercial Debts (Interest) Act 1998 provides that late payment of qualifying debts will attract interest at the statutory rate (currently 8% above base rate) but that the parties may agree an alternative arrangement provided there remains a "substantial contractual remedy for late payment".

In this case the contract provided for interest on late payments at a rate of 0.5% above base rate. The court considered that this was not a "substantial contractual remedy for late payment" in accordance with the Act. If the parties had legitimately agreed a low rate due to other concessions or provisions within the contract this might have been acceptable, however, there was no evidence of such in this instance.

### Email Contracts

#### Nicholas Prestige Homes v Neal [2010] EWCA Civ 1552

It can often be difficult to determine the point at which a contract is formed between parties. This is particularly the case where no written agreement is entered into. In this case a contract was formed between the parties by email correspondence.

The defendant wished to sell her home and the claimant was appointed as agent for that purpose. The dispute centred on whether or not the parties agreed the claimant would be appointed as sole agent or on a multi-agency basis. The claimant sent the defendant by email various documents setting out the basis on which it would be appointed as a sole agent including a term preventing the defendant from appointing other agents. The defendant responded to that email saying "That's fine..." but later argued that there had never been any intention to appoint the claimant as sole agent.

The judge at first instance decided that a contract was formed between the parties when the defendant replied to the claimant's email accepting the documents attached to that email and the terms therein. The claimant's claim was however dismissed on the basis that it did not introduce the ultimate purchaser of the defendant's home and was therefore entitled to no commission.

The claimant appealed to the Court of Appeal where the judge at first instance's finding that a contract had been formed was upheld. The Court of Appeal was concerned that the judge at first instance had apparently failed to deal with the claimant's claim for damages arising from breach of contract. Notwithstanding that it did not introduce the ultimate purchaser, it lost the chance to do so by the defendant's breach of contract and the Court of Appeal therefore decided in the claimant's favour and allowed the appeal.



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## Email Guarantees

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

The Statute of Frauds 1677 provides that a guarantee must be in writing and signed by (or for) the guarantor. In this case the parties had apparently contracted by a number of emails passing back and forth over a number of months. In a draft charter agreement there was reference to one of the contracting parties being “*fully guaranteed by Salgaocar Mining Industries*”.

No contract was ever formally executed and nor was a guarantee formally executed. When the claimant sought to enforce the guarantee in respect of a claim for \$54 million, the defendant argued that there could be no guarantee due to the provisions of the Statute of Frauds and applied to strike out the claim.

The court considered that there was an arguable claim that a guarantee formed by the correspondence passing between the parties is an agreement in writing which does not fall foul of the Statute of Frauds as, on a commercial basis, it is highly desirable that the law should give effect to agreements made by a series of e-mail communications which follow, the sequence of offer, counter offer, and final acceptance, by which the law determines whether a contract has been made. The email signatures were sufficient to satisfy the requirements of the Statute of Frauds 1677.

## Local Democracy, Economic Development and Construction Act 2009 - Update

The Housing Grants Construction and Regeneration Act 1996 (“HGCRA”) will be amended by the passing into law of the Local Democracy, Economic Development and Construction Act 2009. For details of the substance of the amendments resulting from the Act see SPW legal update October 2010.

Whilst the Act received Royal Assent on 12 November 2009 its passage into law has been delayed due to the need for amendment of certain documents (for example, the Scheme for Construction Contracts) and consultations with various trade bodies.

It is however now anticipated that the Act may come into effect in October 2011.

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