



**HAWKSWELL
KILVINGTON**

Specialist Construction Solicitors



Quarterly Newsletter – April 2023

Introduction

Welcome to our new quarterly newsletter. In this first issue we will share with you a range of news items, including information about our recent office relocation and key strategic hires as well as a carefully curated selection of case summaries and construction law updates.

For details of our upcoming events and training, please see the ‘Dates for Your Diary’ and sign up if you wish to attend.

Please feel free to make contact with us on any of the items covered, or on any topic important to your business.

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Construction law updates

The latest NEC4 amendments: What you need to know

Following publication of the NEC4 suite of contracts in June 2017, there has been substantial feedback from users and industry experts suggesting how the contracts could be further enhanced. In light of this feedback, NEC published a set of amendments in January 2019 and in October 2020. They have now issued a further set of amendments in January 2023. This bulletin explains the main changes and the effects they have on the NEC4 suite of contracts.

Climate Change

The most notable amendment is in relation to Secondary Option X29 regarding climate change. NEC published Secondary Option X29 as a standalone Option in July 2022 but, the latest January 2023 amendments have incorporated this into each relevant main contract.

This amendment is an attempt to help NEC users in their drive towards achieving net zero greenhouse gas emissions and other climate related targets. The Option enables users to state their climate change requirements in the Scope and provides a new climate change plan for suppliers to set out their strategy for achieving the requirements.

Working from home

As you will no doubt be aware, in recent years it has become increasingly common for people to work from home or from other locations outside of the Working Areas/Service Areas. NEC have acknowledged this change and have made amendments to the Schedule of Cost Components (“SCC”) and the Short Schedule of Cost Components (“SSCC”) to address the issues surrounding this.

The SCC now includes an option for users to identify in the Contract Data people whose costs can be recovered as part of Defined Cost even if they are not normally based within the Working Areas/Service Areas and are working outside of the Working Areas/Service Areas. The SSCC has been amended to allow the cost of people who would normally be based in the Working Areas/Service Areas to be recovered as part of Defined Cost when they are not working within the Working Areas/Service Areas provided they are working on the contract.

Design obligation

Another important change introduced by these latest amendments, is to the Engineering and Construction Short Contract and the Engineering and Construction Short Subcontract regarding the Contractor/Subcontractor’s liability for design.

As you will be aware, the default position regarding design responsibility under these contracts is that the Contractor/Subcontractor is liable for any failure. However, these contracts now include a new Option in the Contract Data allowing this liability to be reduced to exercising the level of skill and care normally used by professionals designing works similar to the works. This amendment has been introduced in light of the reluctance of suppliers to accept liability for design other than on a reasonable skill and care basis.

Limit of liability

In order to bring the short form contracts in line with the main contracts, a new clause has been added to the Contract Data/Subcontract Data allowing the parties to specify a total limit on liability. This addition will be welcomed by contractors and sub-contractors.

Early Contractor involvement

Various amendments have been made to Secondary Option X22 in an attempt to enhance collaboration in Stage One and to provide further certainty when the works do not proceed to Stage Two. These amendments include:

1. The Project Manager and the Contractor can agree a change to the Site Information during Stage One.
2. Compensation Events under Stage Two are judged against the date of the notice to proceed rather than the Contract Date, allowing any information gathered during Stage One to be taken into account when assessing Compensation Events; and
3. Compensation Events before the date of the notice to proceed are deemed to be included within the changes in Prices and Completion Date in the notice to proceed. This allows settlement of outstanding Compensation Events before Stage Two works commence, providing greater clarity.

Adjudication

To ensure it is in keeping with the requirements of the Housing Grants, Construction and Regeneration Act 1996 (as amended), dispute resolution Option W2 has been amended to clarify that the Adjudicator decides the procedure and timetable for the adjudication.

Payment on termination

In order to bring the Supply Short Contract in line with the other NEC4 Contracts, NEC have made various amendments in respect of the payment that becomes due to the Supplier when the contract is terminated because of a Purchaser's default or for the Purchaser's convenience.

Loss and damage to property

New provisions have been added to both the Facilities Management Short Contract and the Facilities Management Short Subcontract to confirm that the Service Provider/Subcontractor is liable for loss or damage to the Client's property which arises from the Service Provider/Subcontractor providing the Service/Subcontract Services. Additional provisions have also been added to allow this aforementioned liability to be limited to an amount (if any) specified in the Contract Data.

Summary

These are welcome amendments that demonstrate NEC's commitment to ensuring the NEC4 suite of contracts continue to suit the ever-evolving construction industry.

If you require it, a schedule of amendments detailing all amendments being made is available for each contract on the NEC website. From January 2023 copies of all of the contracts published contained the amendments and a table summarising them.

Case Reviews

This section contains a digest of some of the more interesting cases to have emerged from the courts in recent months. For more in-depth analysis of these and other decisions of relevance for the construction industry, please visit our news section at www.hklegal.co.uk.

LDC (PORTFOLIO ONE) LTD V (1) GEORGE DOWNING CONSTRUCTION LTD AND ANOTHER [2022] EWHC 3356 (TCC)

In LDC (Portfolio One) Ltd v (1) George Downing Construction Ltd and (2) European Sheeting Limited (in Liquidation) the TCC was required to consider a contractual obligation to exercise reasonable skill and care alongside the requirement for compliance with the applicable Building Regulations. The outcome was that the Court held the defendant external wall sub-contractor liable for fire safety defects.

Background to the Case

A dispute arose following the discovery of fire safety and water ingress issues caused by defective cladding to three high-rise (18m) towers (18m+) comprising a university halls of residence in Manchester. The freeholder initially pursued the main contractor and external wall sub-contractor under the terms of two collateral warranties for the cost of rectifying the defects. The freeholder managed to settle its claim with the contractor and thereafter sought recovery from the sub-contractor, ESL, for the cost of remedial works (c£16.4m) and loss of income (£4.6m). The contractor also sought an indemnity and/or contribution from ESL for the same defects pursuant to its sub-contract.

What did the Court decide?

By the time of trial, the sub-contractor was insolvent. Despite the sub-contractor's failure to attend trial, the TCC was nevertheless obliged to consider the issues which had previously been raised in its Defence to the claims. In finding for the Claimant, the Court rejected ESL's argument that under the terms of its sub-contract, its design obligations were confined to a requirement to exercise reasonable skill and care. In reconciling this with the terms of ESL's warranty, which included a strict obligation to comply with statutory requirements, the Court held that ESL's duty to exercise reasonable skill and care was a minimum requirement which did not derogate from the strict requirement to comply with the applicable Building Regulations.

As such, the court found in favour of the freeholder who was entitled to recover c.£21m from the sub-contractor for the cost of remedial works and loss of income. The contractor was also entitled to an indemnity from the sub-contractor following its failure to honour the terms of its sub-contract which had put the contractor in breach of the main contract. The TCC added that in the absence of an indemnity, it would still have held the sub-contractor liable under the Civil Liability (Contribution) Act 1978.

Discussion

This is one of the first relevant reported judgments post-Grenfell, and illustrates the commitment of the courts to dealing with cladding and fire safety defect claims in a robust way. A duty to exercise reasonable skill and care is likely to be construed as a minimum requirement only, and one which does not derogate from a designer's strict obligation to comply with Building Regulations.

For more information [Download the case file here](#)

SUDLOWS LTD V GLOBAL SWITCH ESTATES 1 LIMITED [2022]

In an unusual turn of events, the TCC in *Sudlows Ltd v Global Switch Estates 1 Limited* [2022] found that an adjudicator's alternative decision was enforceable despite his primary decision being unenforceable because of a breach of natural justice.

Background to the Case

A dispute arose after a specialist employed to fit out and upgrade a new electricity substation in London refused to connect replacement cables pulled through by an alternative contractor, resulting in delay and associated loss & expense. The contract was a JCT Design and Build 2011 with amendments.

What did the Court decide?

The adjudicator had been wrong to conclude that he was bound by a previous adjudicator's decision, because the dispute referred to him was not the same or substantially the same as that previously determined. In taking too narrow a view of his jurisdiction, the adjudicator had breached the rules of natural justice.

But in an unusual turn of events, the court decided the adjudicator had nevertheless covered himself against that possibility by producing an 'Alternative Decision' alongside his primary findings. The court held that the Alternative Decision was enforceable despite the earlier breach of natural justice.

Discussion:

The court was impressed by what was considered a "very sensible approach" of the experienced adjudicator, who had been astute to foresee the potential problem. Importantly, the adjudicator had obtained the prior consent of both parties to his alternative approach, and it will not be in every case that the process is handled so deftly.

Furthermore, the court reiterated that whilst adjudication is a quick and efficient method of resolving construction disputes (which sometimes results in 'rough justice' being served), the adjudicator must always be mindful of his or her jurisdiction and observe the rules of procedural fairness and 'natural' justice.

For more information: [Download the case file here](#)

WRB (NI) LTD V HENRY CONSTRUCTION PROJECTS LTD [2023]

In *WRB (NI) Ltd v Henry Construction Projects Ltd* [2023] EWHC 278, the TCC refused to grant a main contractor a stay of execution to establish its alleged crossclaims against a dormant company.

Background to the Case

Henry Construction placed a sub-contract with WRB, a dormant company, to undertake the design, supply and installation of mechanical and electrical public health systems at a development in London.

Following a payment dispute between the parties, WRB commenced adjudication proceedings in relation to the value of its interim application for payment. Henry Construction contested the adjudication, claiming WRB had been overpaid.

The Adjudicator awarded WRB a net payment of c.£120k plus interest and directed Henry Construction to pay his fees and expenses.

When Henry Construction failed to comply with the adjudicator's decision, WRB applied to the TCC for summary judgment. Henry Construction did not resist judgment, but applied for a stay of execution to establish its alleged crossclaims. In light of WRB's parlous financial position, Henry Construction argued that any money paid to WRB now would not be available to repay later, were the crossclaims to succeed.

What did the Court decide?

Applying the principles summarised in the well-known case of Wimbledon Construction Company 2000 Ltd v Vago, the Court did not consider that there were special circumstances rendering it inexpedient to enforce the judgment in WRB's favour.

Henry Construction had been aware that WRB was dormant, and the risk it now complained of was an '*inevitable consequence*' of entering into a contract with that dormant company.

Discussion:

The case serves as a useful reminder of the approach the Court is likely to take when considering any application for a stay of execution, including the financial position of a party at the time the contract was entered into.

As such, it demonstrates the importance of checking the identity and status of the proposed parties to an intended contract, and the risks inherent in contracting with a dormant company.

For more information: [Download the case file here](#)

J&B HOPKINS LIMITED V A&V BUILDING SOLUTION LIMITED

We recently represented J&B Hopkins Limited in the case of J&B Hopkins Limited ("JBH") v A&V Building Solution Limited ("A&V") in which the Technology & Construction Court ("TCC") was required to consider the enforcement of an adjudicator's final account decision.

Background to the Case:

JBH was appointed as M&E contractor as part of a project for the construction of new student accommodation at the University of Brighton's Mouslecoomb University Campus at Lewes Road, Brighton.

By a sub-contract dated 18 December 2019, JBH engaged A&V to carry out certain plumbing installation works.

A&V referred a dispute, concerning the true value of its final account under the sub-contract, to adjudication seeking a determination that a further sum of £455,526 was payable from JBH to A&V.

The adjudicator decided that the true value of the Sub-Contract Works was £289,182 which, taking into account previous payments by JBH to A&V, meant that a balance of £82,956 was in fact payable from A&V to JBH. In other words, A&V had been overpaid for the works completed. A&V was also required to pay the adjudicator's fees in full.

A&V refused to comply with the decision. JBH settled the adjudicator's fees and issued proceedings seeking summary judgment by way of enforcement of the decision.

Defendant's grounds for resisting enforcement.

A&V resisted enforcement on two main grounds. Firstly, as JBH was the responding party in the adjudication, the adjudicator had no jurisdiction to order a payment to JBH. Secondly, A&V argued that the decision ought not to be enforced as the adjudicator had, according to A&V, made a number of errors in his assessment of the evidence and in his valuation of the final account.

Judgment

In his judgment Mr Roger Ter Haar KC (sitting as a Deputy High Court Judge) considered and applied the relevant principles in deciding an adjudication enforcement application. These principles were helpfully summarised by Fraser J in *J&B Hopkins Limited v Trant Engineering Limited*, to which the judge referred, including Fraser J's following comments:

"There are on contested enforcement applications, therefore, two bases only upon which a decision will not lead to summary judgment as the jurisprudence is conventionally understood. These are if the decision was one made without jurisdiction; and the other is if the decision was made in the presence of material breaches of natural justice."

The Judge accepted JBH's arguments and confirmed *"there is nothing in the matters raised before me which crosses the threshold so as establish a breach of natural justice which would justify me in refusing to enforce the Decision."*

Finally, the Judge confirmed that the adjudicator's conclusion that a sum had become due to JBH was legitimate. The Decision was enforced accordingly with summary judgment awarded in JBH's favour.

Analysis

The Judgment in this case re-emphasises that, absent clear issues with jurisdiction or a material breach of natural justice, the Courts will enforce adjudicator's decisions.

For more information: [Download the case file here](#)

Firm News

OFFICE RELOCATION



Earlier this year we celebrated further expansion with a move to a new office at Thorpe Park in Leeds. The new office design incorporates state-of-the-art technology and provides a welcoming environment in which our team can work collaboratively and efficiently with our clients.

Partner, Daniel Silberstein commented, *“This is an incredibly exciting time for the firm. We have brilliant people, superb clients, and a great future. The move is a significant investment and underlines the confidence we have in our growth plans. The new office perfectly reflects our ethos as being a forward-thinking law firm.”*

Partner, Thomas Salter commented, *“We are focused on driving the firm forward in a more eco-friendly and sustainable way. We recently achieved the Carbon Neutral Plus Standard which recognises our efforts to reduce carbon emissions through energy and resource efficiency. The new office space, including its EV charging points, will allow us to continue our journey to a more sustainable future”.*

APPOINTMENT OF SENIOR SOLICITOR



We are delighted to continue the expansion of the firm with the appointment of a new Associate, Rebecca Jackson.

Rebecca brings considerable expertise and in-depth knowledge of construction law and specialises in resolving complex construction disputes via all forms of dispute resolution, including litigation, adjudication, and arbitration.

David Spires, Partner at Hawkswell Kilvington, said: *“Hot on the heels of our office move, this is an incredibly exciting appointment for us. Rebecca is a vastly experienced solicitor who I am confident will be a great addition to the team and will further strengthen our offering.”*

Rebecca commented *“I am thrilled to be joining Hawkswell Kilvington not only because of the firm’s continued investment in growth, but also because of HK’s unique position nationally as eminent construction specialists. I look forward to contributing in every way I can to the growth of the firm and the breadth of expertise that HK offers.”*

FUNDRAISING



Legal Directors Matthew Leonard and Ross Galbraith completed the Sheffield Half Marathon in March raising over £750 for our charity of the year, Yorkshire Cancer Research.

Their recent interview with Yorkshire Cancer Research can be found here: [Yorkshire Cancer Research Newsletter](#)

TEAM NIGHT OUT



On Friday we enjoyed a team night out at Electric Shuffle. It was a very enjoyable evening and the night ended in a draw!



Dates for the Diary

Seminars

Spring 2023 Construction Law Update

Our Spring seminar will provide a valuable Building Safety Update; an always-relevant Construction Act Update examining the latest decisions in respect of payment and adjudication; and will conclude by providing timely practical guidance in relation to issues surrounding supply chain insolvency.

- 25th April – Thorpe Park, Leeds
- 11th May - Worsley Park Marriott Hotel & Country Club, Manchester
- 8th June - IDRC, London

For more information or to book a space [click here](#)

Training

Hawkswell Kilvington provide tailored in-house training solutions on a wide range of legal, commercial, and contractual issues relating to construction and engineering. Our In-house training is an ideal opportunity to receive advice and guidance from experienced speakers.

Featured Workshops:

- Project Contract Training Workshop
- Management Training in Construction
- Understanding JCT Contracts
- Construction Contracts and Commercial Awareness

For more information or to book a place [click here](#)

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