

Legal issues and case law update

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23rd April 2015

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Dilapidations – the law

Main legal developments of substantive law over the last twelve months

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Dilapidations – so what else has happened?

- Background Court developments
 - Mitchell v News Group Newspapers Ltd (2013)
 - Denton v TH White Limited (2014)
 - 78th update of the Civil Procedure Rules
 - Impact of Coventry v Lawrence
 - Dilapidations protocol

Courtwell v Greencore PF (UK) Limited

- Landlord makes dilaps claim for £1.7m at expiry of tenant's lease
- Tenants counter with 'no loss' defence
- Breakdown in relationship at all levels between parties
- Offers made and rejected – settlement shortly before trial
- Who pays the costs? What lessons to learn?

The magic words?

- “Without prejudice”
- “Subject to contract”
- “Part 36”

Adjudication: From pruning to cherry-picking; from smash and grabs to windfalls

- Adjudication
 - Fast track process
 - 28 days (subject to extension)
 - Statutory right
 - Interim binding: “Pay now, argue later”
 - Enforced by the Technology and Construction Court (TCC)

Valuation: From pruning to cherry-picking

- *St Austell Printing Company Ltd v Dawnus Construction Holdings Ltd [2015] EWHC 96 (TCC)*
 - Interim application for £2.3m, £900,000 of measured work
 - Adjudication for the measured value of 115 specific changes and variations
 - Sought payment, rather than a declaration as to entitlement
 - Adjudicator ordered payment of c.£418,000 plus fees

Valuation: From pruning to cherry-picking

- Jurisdiction challenge failed:
 - Dispute had crystallised
 - Cherry-picking not only permissible, but to be encouraged
 - Decision reflected existing liability to pay
 - Not prevented from defending claim or raising their own cross-claim by way of set-off

Notices: Smash and grabs

- *Galliford Try Building Ltd v Estura Ltd [2015] EWHC 412 (TCC)*
 - No notice, no defence
 - Cannot challenge valuation at date of application: *ISG Construction Ltd v Seevic College [2014] EWHC 4007 (TCC)*
 - Not lose ability to challenge in the future
 - Summary judgment for £4.075m
 - Overpayment can be put right on future applications or final account

Notices: Smash and grabs

- Partial stay of enforcement:
 - Irreparable prejudice
 - “very unusual circumstances”
 - “facts of this case as being exceptional”
 - “those in the industry should take note...appropriate only in rare cases”
 - “experience shows that loss and expense claims are frequently significantly overvalued”

Conclusion

- Selectivity
- Consider the broader context
- Not just about “winning”

Professional Negligence

- Duty of Care
- Standard/Scope of Duty
- Breach of Duty
- Causation & Loss

Duty of Care

- Breach of Contract and/or Negligence
 - *Platform Funding v Bank of Scotland* [2008]
- At least concurrent liability
 - Negligence could be wider, if advice given which is outside scope of retainer
 - *Goldswain & Another v Beltec Ltd* [2015]
- Duty to Third Parties (not your client)
 - *Scullion –v- Bank of Scotland* [2011]
 - *Freemont (Denbigh) Ltd v Knight Frank LLP* [2014]

Standard of Duty

- Ordinarily skilled man/reasonably competent surveyor
- RICS handbook
- *MW High Tech Projects UK Ltd v Haase Enviromental Consulting GmbH* [2015]

Breach of Duty

- Failure to follow instructions to standard of reasonably competent surveyor
- Limitations – extent of inspection/exclusions
- Follow the trail – timber defects /roof defects /subsidence
- Margin of error in valuations
 - Idea of a range of non-negligent valuations

Causation and Loss

- Did advice play a real and substantial part in decision to enter into transaction? (But For...)
- SAAMCo [1996]
 - Over-valuation, responsible for the difference between the valuation as stated and the accurate value at that time
 - Not responsible for fall in property prices
- *Tiuta International Ltd (in Liquidation) v de Villiers Chartered Surveyors Ltd* [2015]

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