



# Legal developments in construction law

## 1. Continuing duty to advise or warn? How do you know?

Whether, or not, a consultant has a continuing duty to advise or warn can be a challenging question to resolve. In Lendlease Construction (Europe) Ltd v Aecom Ltd (Rev1) the court, after reviewing the case law, set out its understanding, noting that:

- the determination in each case is to be based on the terms of the contract in question;
- where the contractual obligation is solely that of providing a design, the contract is unlikely to be interpreted as imposing an obligation on the designer to review the design after it has been supplied;
- where there are duties going beyond the provision of a design, there can be a contractual obligation to review the design;
- the extent to which the duties go beyond the provision of a design, and the nature of the further duties, will be highly relevant factors in considering whether there is a duty to review. Where there are such further duties the court can find that there is an obligation on the designer to review the design up to the time it is incorporated in the construction;
- in such cases the duty will be, as explained in **New Islington & Hackney Housing Association Ltd v Pollard Thomas & Edwards Ltd**, to review when there is a good reason such as would prompt a reasonably competent professional of the relevant discipline to engage in a review;
- a contract can be interpreted to provide for this same duty of review to continue up to the time of practical completion but this is a step further than the duty to review in the period between provision of the design and construction. Consequently there will be cases where, properly interpreted, the contract gives rise to a duty up to the time of construction but where that duty does not continue after incorporation of the design in the construction;
- where there is such a duty, the cause of action in respect of a failure to undertake a review will accrue at the time the review should have been made;
- when considering whether the contract is such as to give rise to a duty to review after provision of a design, it is to be remembered that in **New Islington and Oxford Architects Partnership v Cheltenham Ladies College**, the court was concerned with architects whose contractual obligations involved not only the provision of a design but the subsequent oversight of the construction;
- the obligation to review is not confined to such cases because all will turn on the effect of the particular contract, but the facts of those cases do indicate the type of circumstances in which the contract will be found to have given rise to a duty to review.

Lendlease Construction (Europe) Ltd v Aecom Ltd (Rev1) [2023] EWHC 2620

## 2. Signing a company contract as a deed as directors (who were not). Valid?

In Lendlease Construction (Europe) Ltd v Aecom Ltd the court had to decide the effect of a document signed by two people purporting to execute it as the deed of a company (by signing as directors) when they were not directors, but the company was content that they were authorised to enter the agreement on its behalf.

The court noted, from the case law, that where a person is held out as being in a particular position, or as having particular authority, on behalf of a company, an estoppel can arise, preventing the company from denying that such a person has the authority normally associated with that position. There must be a holding out and reliance upon it but it is clear that both will be readily inferred. The holding out can be by placing the person in such a position that they are able to represent themselves as having the authority in question. Similarly, the necessary reliance can take the form of entering a contract on the basis of the agent's asserted authority.

Although the rules governing the execution of deeds are laid down by statute, a party can be estopped from relying on non-compliance with the requirements of a statute, but a real degree of care is needed before it can be appropriate to find such an estoppel. The statutory requirements that specified formalities are necessary for a document to operate against a company as a deed are not to be readily circumvented.

On the facts of the case, however, the court was satisfied that it was appropriate to infer both representation and reliance in circumstances where both signatories expressly signed, as directors, a document which was predicated on the execution on behalf of their company being by directors of that company and the terms of which made it clear that it was being entered on that basis, where the company had placed them in positions where they were able and expected to perform in that way and where the parties subsequently proceeded on the basis that their dealings were governed by the agreement.

Lendlease Construction (Europe) Ltd v Aecom Ltd (Rev1) [2023] EWHC 2620

## 3. True value adjudication without paying?

In **S&T(UK) Ltd v Grove** the Court of Appeal ruled that the Construction Act and the contract prohibited an employer from starting an adjudication to obtain a re-valuation of work before they had complied with their immediate payment obligation. The Act could not sensibly be construed as permitting the adjudication regime to trump the prompt payment regime, which requires payment of a specific sum within a short period of time. In Lidl Great Britain Ltd v Closed Circuit Cooling Ltd, however, the court had to decide whether this **Grove** principle only applies to true value adjudications where the dispute is limited to a valuation of the same payment cycle as the subject of the notified sum, or extends to any adjudication under the contract, or is subject to some intermediate limitation.

In the court's judgment, there was no possible basis in principle or in case-law for the wide no adjudication prohibition contended for. The obligation to pay the notified sum only applies to what is due in relation to the notified sum under the payment regime in question. There is no rationale for an interpretation of the Construction Act which has the effect of prohibiting any adjudication whilst that notified sum remains unpaid, even where the subject matter of the adjudication has no relation to the notified sum.

The court's attention was drawn to the financial prejudice of having to defend an adjudication whilst not receiving payment for the notified sum but it noted the speedy enforcement procedure for adjudication claims, which substantially ameliorates any such prejudice, and said that the right to adjudicate construction disputes is a valuable right which should not be cut down or restricted save for clear reasons and no such clear reasons appear from the Act or elsewhere.

Lidl Great Britain Ltd v Closed Circuit Cooling Ltd (t/a 3cl) [2023] EWHC 3051

## 4. Assignments, consent and novation – a little revision

In **MW High Tech Projects UK Ltd v Outotec (USA) Inc** the court had to decide whether a settlement agreement operated as a valid and effective re-assignment of a subcontract, when the party purporting to assign had not sought or

obtained the prior consent of the subcontractor before entering into the settlement agreement. In deciding that the assignment required consent and that the re-assignment was ineffective, the court set out the applicable general principles:

- In the absence of an express contractual restriction there is no prohibition upon either of the parties to a contract (A or B) assigning benefits under that contract to a third party (C);
- in the absence of agreement between A, B and C, A may not assign the burden of any obligations arising under a contract to C so as to replace A by C as the party liable to B for the further performance of those obligations. This requires a novation of the contract, under which, by agreement of all three, A is replaced by C as contracting party for all purposes from the date the novation is agreed to take effect;
- a valid assignment of the benefits of the contract by A to C does not, even if it purports to be an assignment of all of the benefits of the contract, have the effect of substituting C as the contracting party. This is a necessary corollary of point 2 above, since A remains the contracting party for the performance of the obligations under the contract;
- the parties may agree in their contract that any assignment from A to C requires the previous consent of B to be effective so as to allow C to enforce the terms of the contract directly as against B. Such a restriction will be effective between the parties according to its express terms;
- there is also a difference between a novation which has the effect of a transfer of the burden as well as the benefit of the contract and what is referred to as the principle of conditional benefits;
- where contractual rights are assigned, the extent of those rights will be defined by the original contract. The conditional benefit principle arises where the right assigned is conditional or qualified, the condition being that certain restrictions shall be observed or certain burdens assumed. The restrictions or qualifications are an intrinsic part of the right which the assignee has to take as it stands. The question whether a contract creates a conditional benefit is one of construction.

MW High Tech Projects UK Ltd v Outotec (USA) Inc & Ors (Rev1) [2023] EWHC 2885

## 5. 1 April 2024 deadline for building control inspectors to register with the BSR

Building control inspectors appointed to undertake any type of building control work in England need to register with the Building Safety Regulator before the profession becomes regulated in April 2024. To complete the registration process, inspectors must demonstrate competence in their work and compliance with the Building Safety Act 2022, as well as existing building regulations. Additionally, all private sector businesses wanting to undertake building control work must also apply to register as a building control approver.

From 1 April 2024, it will be an offence to carry out building control work if not a registered building inspector or approver.

See: [guidance for registering as a building control inspector](#); and [guidance for registering as building control approvers](#)

## 6. Landbanks and planning: CMA to report in February 2024

The Competition and Markets Authority has published two 'working papers' seeking feedback on its assessment on the use of landbanks and how planning rules may be impacting competition and how new homes are delivered.

The CMA is continuing to examine the size of land banks overall, recognising that housebuilders need to hold a pipeline of land as sites pass through the planning system.

On planning, the CMA has developed options that the UK, Scottish and Welsh governments may consider when reforming their planning systems, including:

- whether a zoning or rules-based approach to development may improve competition between housebuilders and boost housing delivery.
- making better use of councils' limited time and resources by requiring them only to consult statutory stakeholders, rather than a wider group, as part of their assessment of planning applications. Late consultee responses on development could also be ignored;
- having an effective housing target reflecting the housing need of specific areas, and improving the ways governments ensure all councils have a proper local plan in place.

The CMA will progress its housebuilding market study before publishing a final report by 27 February 2024.

See: [CMA seeks views on landbanks and planning rules - GOV.UK \(www.gov.uk\)](#)

## 7. JCT Contract Administration Model Forms for SBC, DB, and IC published

JCT has launched new Construction Administration Model Forms for use with the 2016 edition of its Standard Building Contract, Design and Build Contract, and Intermediate Building Contract families. The digital PDF packs provide a series of template forms to assist with the administration of a JCT contract and a construction project.

See: [JCT Contract Administration Model Forms for SBC, DB, and IC Released – The Joint Contracts Tribunal \(jctltd.co.uk\)](#)

## 8. BSR issues 2023-2026 strategic plan

The Building Safety Regulator has issued a strategic plan for 2023-2026. Actions included in the plan include:

- the provision, in early 2024, of a searchable portal of higher-risk buildings in England;
- in spring 2024, starting to call in occupied higher-risk buildings for assessment of their compliance with the new duties to assess and manage building safety risks. If satisfied with compliance, the Regulator will issue a 'building assessment certificate';
- aiming to assess all existing occupied HRBs within five years, prioritising buildings primarily on height and number of dwellings;
- assessments to ensure that Accountable Persons are identifying and managing building safety risks, complying with their new duties and keeping residents safe, while understanding that some Accountable Persons will need support.

- in the first year of assessing occupied higher-risk buildings, the BSR aims to have assessed about 20% of buildings (representing 37% of residential dwellings), prioritising assessments. For example, any buildings with un-remediated ACM cladding will be assessed in the first year.

See: <https://www.hse.gov.uk/building-safety/assets/docs/strategic-plan.pdf>

## 9. Government payment report targets retention reporting

In its review report on payment and cash flow the government has said that it will introduce reporting on retention payments for businesses in the construction sector. It says it would seem consistent with its transparency objective to develop the current reporting Regulations so that the operation of retention payment practices within the construction sector becomes more transparent. Reporting on retention payment practice will, however, only apply to companies that are required to report their payment data under the Regulations and use qualifying construction contracts.

Following consultation, the government is to take forward legislation to extend payment performance reporting obligations.

See: [Payment and cashflow review report 2023 \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

---

Mayer Brown is a distinctively global law firm, uniquely positioned to advise the world's leading companies and financial institutions on their most complex deals and disputes. With extensive reach across four continents, we are the only integrated law firm in the world with approximately 200 lawyers in each of the world's three largest financial centers—New York, London and Hong Kong—the backbone of the global economy. We have deep experience in high-stakes litigation and complex transactions across industry sectors, including our signature strength, the global financial services industry. Our diverse teams of lawyers are recognized by our clients as strategic partners with deep commercial instincts and a commitment to creatively anticipating their needs and delivering excellence in everything we do. Our "one-firm" culture—seamless and integrated across all practices and regions—ensures that our clients receive the best of our knowledge and experience.

Please visit [mayerbrown.com](https://www.mayerbrown.com) for comprehensive contact information for all Mayer Brown offices.

Mayer Brown is a global services provider comprising associated legal practices that are separate entities, including Mayer Brown LLP (Illinois, USA), Mayer Brown International LLP (England & Wales), Mayer Brown (a Hong Kong partnership) and Tauil & Chequer Advogados (a Brazilian law partnership) and non-legal service providers, which provide consultancy services (collectively, the "Mayer Brown Practices"). The Mayer Brown Practices are established in various jurisdictions and may be a legal person or a partnership. PK Wong & Nair LLC ("PKWN") is the constituent Singapore law practice of our licensed joint law venture in Singapore, Mayer Brown PK Wong & Nair Pte. Ltd. Details of the individual Mayer Brown Practices and PKWN can be found in the Legal Notices section of our website. "Mayer Brown" and the Mayer Brown logo are the trademarks of Mayer Brown.

© 2023 Mayer Brown. All rights reserved.

Attorney Advertising. Prior results do not guarantee a similar outcome.