



Construction newsletter

April 2018

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Any comments or queries?

Helen Mitchell

Senior Associate

+44 20 3060 6920

helen.mitchell@rpc.co.uk

Trends and developments in the construction industry

The first quarter of 2018 has been a challenging one for the construction industry. It saw a further decline in construction output in January, with the Office of National Statistics reporting that construction output fell by 3.4% in January from December. This stemmed from a decline in new work, mainly in the private housing sector. In addition, Carillion collapsed in mid-January, undoubtedly taking with it a number of sub-contractors who have yet to be paid.

What does this mean for the future? We anticipate an increase in SME insolvency. The procedures and risk management measures that these companies have in place for obtaining payment security will become increasingly important. Appropriate questions in proposal forms may help identify companies at risk. The risks to an insurer of a insured contractor becoming insolvent include: the possibility of a claim under the Third Parties (Rights against Insurers) Act 2010; an inability to pay the excess; difficulties in obtaining information to defend a claim; and the risk that claims can be brought for longer because insolvency can postpone the expiry of limitation.

Contractor insolvency is also likely to mean that employers will be looking directly to their sub-contractors for alleged errors. The existence and terms of collateral warranties and third party rights agreements could therefore come under increased scrutiny.

Claims for overarching duties, such as a duty to warn, inspect and/or approve are likely to increase. If the contractor that made the alleged error is insolvent, then such claims provide another avenue of recovery for the employer. We have seen an increasing number of claims against architects and approved inspectors, which corresponds with this theme.

On a different note, in the last three months, we have also seen an increase in the number of disciplinary investigations by the Royal Institution of Chartered Surveyors and the Architects Registration Board. Insurers may wish to ensure that proposal forms include appropriate questions about disciplinary matters. Insurers, brokers and insureds may wish to consider whether sufficient cover is included in the insured's professional indemnity policy. This might include the level of defence costs available, as the timetable for disciplinary investigations is relatively quick and can be expensive. The extent of any excess, the availability of any other insurance (for example, whether there is a relevant D&O policy) and exclusions for specific types of conduct may also be relevant.

Specific types of claims that we have seen a lot of in the last three months include claims for cavity wall insulation and claims against surveyors for failing to identify Japanese knotweed. These types of claim seem to be on the target list for claimant solicitor firms. It will come as no surprise that cladding remains firmly on the agenda.



Helen Mitchell
Senior Associate
+44 20 3060 6920
helen.mitchell@rpc.co.uk

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In the news

The collapse of Carillion: The risks and implications for insurers

Carillion, the UK's second largest construction company, entered compulsory liquidation on 15 January 2018, with estimated debts of £1.5bn and a pension deficit of c£800m, following three profit warnings in 2017. The company employs 20,000 people in the UK and 43,000 people worldwide. It is thought that some 30,000 companies may be affected by the liquidation.

Carillion owed in the region of £2bn to its 30,000 suppliers, sub-contractors and short term creditors. UHY Hacker Young predict that creditors can expect to receive less than 1p for every £1, with many receiving nothing at all due to the hierarchy of creditors.

Following the collapse, Insurers have said that they will pay out more than £30m to businesses owed money by Carillion. Sums from £5,000 to several millions will be paid to firms who had trade credit policies to protect against bad debts.

A significant insolvency, such as Carillion, can trigger a domino effect, as a lack of payment travels down the supply chain. With this in mind, the key areas of exposure that could arise and impact insurers are summarised below.

- Risk of further administrations/liquidations as Carillion fail to pay their subcontractors.
- Employers may put more emphasis on suing their consultants for alleged failures to warn, inspect or review on the basis that they won't get anything back from the contractor that made the error.
- Limitation issues – where a company goes into liquidation time stops running for limitation purposes.
- Where the limit of indemnity is not sufficient to cover the claim, there could be issues about whether Insurers are defending for their own purposes, rather than the Insureds – see case of *Chapman v Christopher* [1998] 1 WLR 12.
- Policy coverage issues: in particular, was the error design or workmanship; what is the impact of an insolvency exclusion?
- Attempts to bring other types of claims: D&O claims, third party claims, Contractors All Risk claims, use of performance bonds, use of project specific indemnity policies.
- Delay claims are likely to increase.

As more becomes known about Carillion's collapse and its impact on the market, it will be interesting to follow how both the construction and insurance industry will react and respond.



Harriet Evans
Trainee solicitor
+44 20 3060 6097
harriet.evans@rpc.co.uk

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Rise of the regulators

Over the past 18 months, we have seen an increasing number of investigations by regulators. There is no clear reason for the increase. The majority originate from former clients who are dissatisfied with the service that they have received. Often the complainants appear to be testing the water, to see whether it is worthwhile pursuing civil proceedings. This has clear advantages for the complainant as they are able to test the strength of their claim and obtain information without the risk of an adverse costs award. If the regulator does decide that the professional has acted in breach of their relevant code of conduct, this is likely to assist them in any subsequent claim, and make it difficult for the professional to defend a claim. On other occasions, the complainant appears to have suffered minimal financial loss and the complaints are made simply to “punish” the professional.

On receipt of a complaint, the Regulator will carry out an investigation into the factual background to determine whether it has any merit or reveals any potential breaches of professional obligations. It can then choose whether to take any further action. It may close its file, issue advice to the professional regarding their conduct or refer the matter to a disciplinary panel hearing.

With complaints to the RICS Disciplinary Panel, the Royal Institute of British Architects or the Architects Registration Board, the disciplinary hearing stage is a process akin to a trial. It is formal and adversarial. Should the panel conclude following a hearing that a sanction is appropriate, they have wide-ranging powers, from issuing a formal written reprimand through to deregistration from the relevant professional body. In effect, they have the power to end a professional’s career.

We would recommend that any professional who is subject to an investigation (or disciplinary hearing) by their regulator to forward the letter to their broker at the earliest opportunity - preferably on receipt of the first letter informing them a complaint has been made. A decision can then be made whether it should be notified under any insurance policy and consideration given to what cover may be available to assist with the cost of preparing a response.

There is also clear benefit to be gained from obtaining legal advice at an early stage, whether or not this is covered by an insurance policy. This ensures that an appropriate response is put forward, bearing in mind the potential risk to the professional’s career outlined above. It can represent a significant cost-saving in terms of both management time and legal costs if the matter can be resolved at an early stage. It should also ensure that important deadlines are not missed, which may result in lost opportunities to submit information.

Whilst regulatory investigations do not offer financial compensation for a complainant, and therefore there is no risk of insurers paying out a large sum for damages, a poor outcome can have dire consequences for a professional’s career and it is therefore important that all possible steps are taken from the outset to ensure the professional receives a fair hearing.



Emma Wherry
Associate

+44 20 3060 6995
emma.wherry@rpc.co.uk

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Cases

Contact (Print And Packaging) Ltd v Travelers Insurance Co Ltd [2018] EWHC 83

This article discusses the recent TCC judgment by HH Stephen Davies in *Contact (Print And Packaging) Ltd v Travelers Insurance Co Ltd* [2018] EWHC 83 (TCC), specifically with regards to preserving documents for disclosure, which is a key stage in any litigation. Much of the case turns on the particular facts but the Judge made some comments which are of more general interest, in particular in relation to the business interruption aspect of the claim, which largely failed – the insured recovered c£19k against a claim for c£435k. This was in part due to the complete absence of contemporaneous documentary evidence to support the claim, which the Judge said should have been preserved and disclosed.

The reason behind the lack of documents is that the claimant sold its business shortly after serving a Letter of Claim, and without giving appropriate thought to the possibility that more relevant documentation might be required than had already been obtained, in the event that this claim was pursued. On selling the business, the claimant decided, for financial reasons (which the Judge accepted was understandable) not to renew the operating licences for the principal IT software systems. However, importantly, in so doing, the claimant did not take any steps to ensure continued access to the relevant data for the purposes of the claim, whether from the new purchaser (by way of access either to the data or to the hardware from which the data was accessible) or from the suppliers of the relevant software. Whilst the Judge concluded, having considered the evidence, that there was no realistic likelihood that there were documents relevant to liability which existed and which were not, but could have been, disclosed had proper steps been taken, he was less forgiving in relation to those documents necessary to prove the quantum of the business interruption claim, given the onus was on the claimant to prove its case. The judge took the view that, where the claimant might reasonably have been expected to provide more documentation in relation to a particular issue but had not, it should not be given the benefit of the doubt in relation to that issue, in circumstances where it had failed to take proper steps to ensure that relevant electronic information was preserved for the purposes of this claim.

This case serves as a useful reminder of the importance of preserving your documents and/or access to documents, particularly in circumstances where a claim has arisen or could arise. It is important to note that the Civil Procedure Rules define “documents” very broadly as meaning “anything in which information of any description is recorded”. In addition to hard copy, paper documents (such as correspondence, agreements/contracts, handwritten notes, memos etc), it extends to electronic documents, including e-mail and other electronic communications, word processed documents and databases. In addition to documents that are readily accessible from computer systems and other electronic devices and media (such as mobile phones and memory sticks), the definition covers those documents that are stored on servers and back-up systems and electronic documents that have been “deleted”. It also extends to additional information stored and associated with electronic documents known as metadata. If you or your relevant IT personnel are in any doubt as to which documents need to be preserved and/or how to go about preserving potentially disclosable documents, please do not hesitate to contact us.



Zoe Eastell

Legal director

+44 20 3060 6163

zoe.eastell@rpc.co.uk

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DPM Property Services Ltd v Emerson Crane Hire Ltd [2017] EWHC 3092 (TCC)

The facts

DPM Property Services Limited (the Appellant) claimed the balance due for work carried out for and on behalf of Emerson Crane Hire Limited (the Respondent). The work in question was carried out at two properties: the Respondent's yard; and a residential property owned by the director of the Respondent's company. The Respondent counterclaimed for defects, pleading losses of £4,895 plus VAT for the residential property and £160,175 plus VAT for the Respondent's yard.

At the pre-trial review, the judge allowed the Respondent to rely on a new liability expert, but deleted the parts of the report to which the Appellant objected. The Respondent was also permitted to rely on a new quantum expert, which consequently allowed them to pursue counterclaims for losses totalling £332,671.34. However, the judge permitted this on the basis that this would be restricted to the entitlement to the originally pleaded sum of £160,175 plus VAT. The Appellant appealed.

The appeal was brought on two bases:

1a) that the judge had wrongly concluded that the losses in the expert report had been particularised in the Scott Schedule of defects

1b) that the judge failed to give effect to his earlier order by which the Respondent had been debarred from adducing evidence at trial on any issue that was not particularised in the Scott Schedule

2) the decision to allow the Respondent to advance at trial a counterclaim for losses totalling £332,671.34 and requiring the Appellant to meet those claims despite the fact that the pleaded value was only £160,175 constituted a serious procedural irregularity and was unjust within the meaning of CPR r. 52.21(3)(a) and (b).

Decision

- **Delay:** it was held that the judge did not take into account the critical issues of delay. Had he done so, he would have refused to allow the Respondent to rely on the new expert report.
- **Debarring order:** the Appellant was correct to regard the debarring order as extending to quantum as well as the defects themselves.
- **Losses particularised:** it was considered that, having refused the Respondent's attempt in January 2017 to rely on a report from the new expert that went way beyond the Scott Schedule, the judge should have adopted precisely the same approach at the PTR in October 2017.
- **The so-called cap:** it was held that the judge was wrong in principle to regard the lump sum figure in the original counterclaim as a cap.

Conclusion

The judge gave the appellant permission to appeal and the Respondent does not have permission to rely on the new expert report.



Dani Barnes
Trainee Solicitor
+44 20 3060 6299
dani.barnes@rpc.co.uk

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ICE Architects Ltd v Empowering People Inspiring Communities [2018] EWHC 281 (QB)

In a Judgment handed down in February 2018, Mrs Justice Lambert in the High Court rejected an appeal from a first instance decision in which it had been found that the appellant architect's claim for payment of the balance of an invoice was statute barred under section 5 of the Limitation Act 1980 ("the Act").

The appellant architect, ICE, agreed to provide design services to EPIC for a social housing scheme in Stoke-on-Trent, and was appointed by a letter dated 10 July 2007. Under the heading "Basis of Payment", that letter stated that ICE would invoice EPIC on a monthly basis, and that EPIC would "endeavour to make payment within 30 days of receipt (unless otherwise stated)".

ICE issued an invoice to EPIC on 23 April 2009 for £42,375 plus VAT, which EPIC disputed. Following adjudication, ICE was awarded £24,033.85. ICE commenced Court proceedings on 21 May 2015 for the balance of the invoice. At first instance, it was found that the claim was statute barred, pursuant to section 5 of the Act, as proceedings had been commenced more than 6 years after the cause of action had accrued, which was found to be the date of performance of the services which were the subject of the invoice.

On appeal, the case turned on a single issue: whether ICE's cause of action accrued on (i) the date on which the work was completed, which was as late as December 2008, or (ii) 30 days after receipt of the invoice, by agreement between the parties, given the wording included in the letter.

The parties agreed that the default position was that a service provider is entitled to be paid once work has been completed, and so a cause of action for payment arises at that time. In this case, that would mean the claim was statute barred.

It is, however, possible for parties to reach a different agreement, and ICE argued that the default position had been overridden by the wording included in the 10 July 2017 letter, such that the cause of action did not accrue until 30 days after receipt of the invoice. The Judge disagreed, and did not accept that the "30 day" term in the letter meant that entitlement to payment arose only 30 days after receipt of the invoice. This provision was only relevant to the process of billing and payment, and not to the limitation position. While confirming that the time when a cause of action will usually accrue in such cases is the completion of services, the Judge left no doubt that clear words are required if this default position is to be displaced.



Oliver Bulleid
Senior Associate
+44 20 3060 6456
oliver.bulleid@rpc.co.uk

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Roundup

Risky business: Part 36 offers and their consequences

Mr Justice Foskett has recently delivered judgments on the costs consequences of Part 36 in two claims. In *JMX (a child by his mother & litigation friend, FMX) v Norfolk & Norwich Hospitals NHS Foundation Trust* [2018] EWHC, he considered whether an offer to accept 90% of the sum claimed constituted a “genuine attempt to settle” the dispute for Part 36 purposes. In *Gemma Ballard v Sussex Partnership NHS Foundation Trust* (2018) EWCH 320, he was asked to assess the costs consequences of a withdrawn Part 36 offer.

***JMX (a child by his mother & litigation friend, FMX) v Norfolk & Norwich Hospitals NHS Foundation Trust* [2018] EWHC**

The Claimant made a Part 36 of 90% of his claim shortly before trial. The offer was not accepted. At trial, the Court found in favour of the Claimant and was asked to consider whether the costs consequences of the Claimant’s Part 36 should bite.

The Defendant maintained that the offer was not a genuine attempt to settle the claim because it did not reflect a realistic assessment of the risks of litigation – a factor considered by the Court, under CPR 37.17(5), when deciding whether it would be unjust to enforce the consequences of a Part 36. The Defendant argued also that the letter of offer did not explain why only a 10% discount was being offered. Mr Justice Foskett did not accept the Defendant’s arguments.

Mr Justice Foskett considered an offer to accept 90% was reflective of circumstances where the Claimant’s legal representative’s assessed the Claimant’s case to be very strong but were prepared to offer a small discount to “[...] secure absolute certainty of obtaining substantial compensation” (paragraph 15). The Judge acknowledged that this was a high-value dispute such that the offer of a 10% discount was an opportunity for the Defendant to achieve more than a “token” saving on the claim. Moreover, the costs of five-day trial were significant and settlement even a day before the trial started would have represented a further substantial savings for the Defendant. The Court found that the Claimant’s offer was a genuine attempt to settle the claim and applied the normal Part 36 costs consequences. However, the costs outcome for a lower value claim, with less significant costs, might have been different.

***Gemma Ballard v Sussex Partnership NHS Foundation Trust* (2018) EWCH 320**

Over the course of this personal injury claim, various settlement offers had been made. The Defendant issued three significant letters of offer:

- on 25 January 2016, the Defendant made a Part 36 offer of £50,000 (“the First Offer”)
- on 8 February 2017, the Defendant served a letter, stating that the First Offer was withdrawn
- on 8 February 2017, the Defendant made a second Part 36 offer of £30,000 (“the Second Offer”) and confirmed that all previous offers had been withdrawn.

At the trial, on 2 and 3 March 2017, the Claimant was awarded damages of approximately £23,300. There was no dispute that the Claimant should be liable for the Defendant’s costs following the expiry of the Second Offer (essentially, the costs of the trial). However, at first instance, the Court ordered the Claimant pay the Defendant’s costs from the expiry of the First Offer until the commencement of the trial. On appeal, the Court was asked to reconsider which party was liable for costs for the period between the expiry of the First Offer, which had been withdrawn, and the expiry of the Second Offer.

The Claimant submitted that the Second Offer made it clear that, if the judgment obtained was not more advantageous than the Second Offer, the Defendant would seek an order that the Claimant should pay the Defendant's costs from 1 March 2017. The Defendant argued that, although the First Offer had been withdrawn, the Court had discretion to have regard for the First Offer and make a costs order, which reflected that, had the First Offer been accepted, costs would have been saved by both parties.

Mr Justice Foskett did not accept the Defendant's arguments. The appeal was allowed and the Defendant was ordered to pay the Claimant's costs up to and including 1 March 2017, whilst the Defendant was entitled to its costs thereafter. In his decision, Mr Justice Foskett stated that the Defendant could not escape the precise terms of the Second Offer, which stated that First Offer had been withdrawn. Had the Defendant amended the First Offer, rather than withdrawing it, it would have benefitted from the costs consequences attached to that offer.

These cases serve as an important reminder of the importance of the timing, wording and level of any Part 36 offers made or received and the costs consequences of these offers.



Erica Lehmann
Associate

+44 20 3060 6913
erica.lehmann@rpc.co.uk

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Smash and grab? Think twice

Following the amendments to the Construction Act which came into force in 2011, the proliferation and scale of so-called "Smash and Grab" adjudications would have made the Pink Panthers¹ proud. However, the well-publicised judgment in *Grove Developments Limited v S&T(UK) Limited* [2018] EWHC 123 (TCC) might give potential smash'n'grabbers pause for thought: is it worth adopting that tactic if you might have to give the loot straight back?

A typical Smash and Grab adjudication goes as follows: the contractor submits an interim application and, for whatever reason, the Employer fails to serve a valid Payment Notice or a valid Pay Less Notice. The legislation provides that the Contractor is now entitled to the entire sum for which he applied. If the Employer doesn't pay, the Contractor commences adjudication on this technicality, and he wins: he is entitled to the lot. In *Grove v S&T(UK) Limited*², which concerned the final interim application on the project, the sum in question was £14m.

In previous cases, the TCC had found that a further effect of the legislation was that, in the absence of valid notices, the Employer was deemed to have "agreed" that the amount in the application was payable, irrespective of whether it was clear that there was no way he had **actually** agreed³. As a result, the Employer could not commence an adjudication or legal proceedings claiming that the true amount payable was less than he had been required to pay as a result of failing to issue the correct notices: all he could do was correct the position in subsequent interim applications and/or, ultimately, in the Final Account.

That wasn't necessarily great for the Employer, though: as a project is reaching a conclusion, there are not many opportunities to set the position straight. In addition, many construction contracts do not contain any provision for negative interim payments, and the amount an

1. Click [here](#).
2. [2018] EWHC 123 (TCC)
3. *ISG Construction Limited v Seevic College* [2015] 2 All ER Comm. 545, *Galliford Try Building Limited v Estura Limited* [2015] BLR 321, *Kersfield v Bray and Slaughter Limited* [2017] EWHC 15 (TCC)

Employer could simply withhold might be entirely insufficient to recoup the money he has been forced to pay out. Often, as in Grove, the adjudication concerns the last interim application, meaning that the final account is all that is left, and that might take months to resolve.

Those problems ought to be a thing of the past. In good news for paying parties, Mr Justice Coulson decided the question differently in Grove. He said:

“...the underlying issue: can an employer, whose payment notice or pay less notice is deficient or non-existent, pay the contractor the sum stated as due in the contractor’s interim application and then seek, in a second adjudication, to dispute that the sum paid was the “true” value of the works for which the contractor has claimed? In my view, on the application of first principles, there are six separate reasons why the answer to that question is Yes.”

He then went on to explain his reasoning in extensive detail. The full judgment can be found [here](#)

Grove is understood to be Mr Justice Coulson’s last TCC judgment before he moves up to the Court of Appeal. He said that he found the previous TCC analysis (the deemed agreement described above) to be “erroneous and/or incomplete”.

Unless they have reason to believe that the Employer won’t have the stomach for a further adjudication, or that, for any reason, a second adjudication will be so delayed as to make it worthwhile having the money in the meantime, Contractors faced with the opportunity to smash and grab might now want to think twice.



James Fielden
Legal Director
+44 20 3060 6242
james.fielden@rpc.co.uk

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Contacts

Partners



Alexandra Anderson
Partner
+44 20 3060 6499
alexandra.anderson@rpc.co.uk



Ben Goodier
Partner
+44 20 3060 6911
ben.goodier@rpc.co.uk



Peter Mansfield
Partner
+44 20 3060 6918
peter.mansfield@rpc.co.uk



Alan Stone
Partner
+44 20 3060 6380
alan.stone@rpc.co.uk

For full details of our international construction team click [here](#).

About RPC

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- Winner – Law Firm of the Year – The Lawyer Awards 2014
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- Winner – Commercial Team of the Year – The British Legal Awards 2014
- Winner – Competition Team of the Year – Legal Business Awards 2014

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