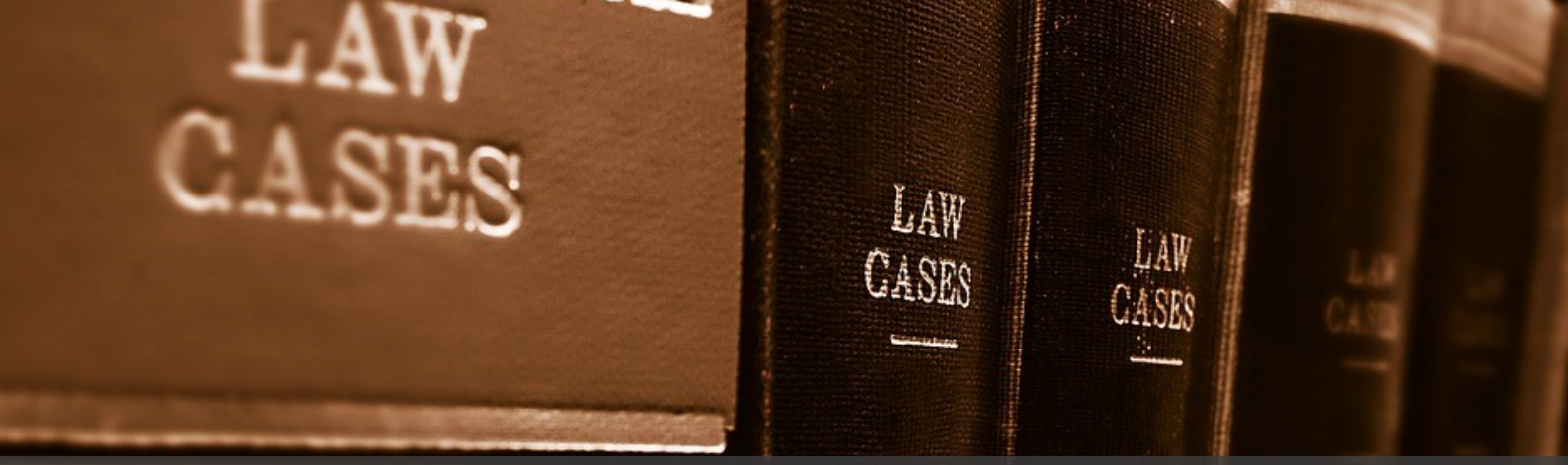

Looking Back
The Lesser Known Cases of 2018

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2018 was an interesting year, with a number of high-profile cases with implications for construction law and practice. Equally interesting, however, are the lesser known cases with implications of their own. This article highlights the key lessons construction professionals can take from these cases.

1. Know what you are pricing

Colas Ltd and Ors ("CVU") v Transport for London ("TfL") [2018] EWHC 831 (TCC) centred around the allocation of risk and pricing during procurement. Under the contract, CVU carried out road maintenance works and were paid via a schedule of rates, some of which required permits from the London Permit Scheme ("*LoPS*"). CVU argued that the rates did not include the restrictions placed by the LoPS, as these could not be predicted at the time of pricing and, as such, they were entitled to an increase in costs.

The court determined that, as under the contract the rates "*are deemed to be the full inclusive value of the task work, including any limitations or restrictions on the working conditions imposed by the permits*", the restrictions placed by the permits were a contractor risk, and CVS was not entitled to an uplift.
The case serves as a good reminder that the court does not provide rescue from a bad bargain. Tenderers need to be sure that they know what they are pricing. If they are at all uncertain, they must price accordingly. There will be no relief for the unwary.

2. Don't rely on the prevention principle (or any common law principle)

The 'prevention principle', whereby employers cannot hold contractors to obligations they prevented them completing, has been weakened previously by the inclusion of condition precedents in contracts. These require contractors to meet certain conditions, such as notifications, when they are delayed b the actions of the employer. If they do not, they face being time barred.

Now, in *North Midland Building Ltd v Cyden (Homes [2018] EWCA 1744 (Civ)*, the Court of Appeal has made clear that the prevention principal does not take precedence over expressly agreed terms in contracts. The case related to concurrent delay; the court found that the parties had agreed that the contractor

took the risk of concurrent delay and therefore was not entitled to an extension time, despite the fact that the delay coincided with a fault of the employer.

Therefore, Construction professionals need to be aware that expressly agreed terms take precedence over common law rules and principles, so should be mindful of any terms which seek to reduce or remove their rights under common law.

3. Liquidated damages have been solidified

In *GPP Big Field LLP and (2) GPP Langstone LLP v Solar EPC Solutions SL (formerly known as Prosolia Siglio XXI) [2018] EWHC 2866 (Comm)* the court was asked to consider the validity of liquidated damages. In such cases, the general rule is that such damages cannot be penal and must either be a "*genuine pre-estimate of loss*" or for the "*protection of legitimate interest*."

The court decided that the damages were not punitive in this instance with the decision reinforcing the proposition that damages which ensure the timely performance of a contract will generally be considered to protect a "*legitimate interest*."

4. Consider the intention of insurances

Haberdashers' Aske's Federation Trust Limited and The Mayor and Burgesses of the London Borough of Lewisham v Lakehouse Contracts Limited and (2) Cambridge Polymer Roofing Limited & Ors. [2018] EWHC 558 (TCC) raised some questions over project insurance between a main contractor and a subcontractor. The subcontract works caused a fire which damaged the works, the client claimed against the main contractor, and subsequently the main contractor claimed against the subcontractor. The subcontractor went to the project insurance to cover its liabilities, arguing that it was entitled to do so as it was co-insured.

The court found that as there was an express term in the subcontract requiring it to provide its own insurance, it was not able to rely on the project insurance as its first priority. The decision was hinged on the intent of the main contractor in requiring the separate insurance to be provided by the subcontractor. Industry professionals should therefore be aware that when asked to provide separate insurance on contracts, this will be the first port of call should they later be found liable.

5. 'No oral modification' clauses are enforceable

Several standard form construction contracts include 'no oral modifications' clauses or words to the effect that the agreement cannot be amended save in writing and/or signed by the parties. *Rock Advertising Ltd v MWB Business Exchange Centres Ltd [2018] UKSC 24* concerned such clauses, with the court finding that they would be enforced except in the very limited circumstances of estoppel or "*necessary implication*."

For the industry, this reinforces the advice we give our clients to ensure that everything contractual is captured in writing and verbal instructions are confirmed and recorded. As ever, I am reminded by the eternal words of Max Abrahamson and his quote on the importance of records:

"A party to a dispute … will learn three lessons (often too late): the importance of records, the importance of records and the importance of records. It is impossible to exaggerate the extent to which lawyers can find unexpected grounds … on which to cast doubt on evidence if it is not backed by meticulously established records."

Conclusion

These cases have several specific points to bear in mind, however, the overriding theme is to read any contract carefully, ensure you know what you are signing up for and what the obligations placed on you will be.

Quigg Golden can provide training to make this task easier, or, for more complicated matters, provide drafting services for employers or detailed contract review services for contractors. For further details on these services, contact John at John.Doherty@QuiggGolden.com