

RECENT DEVELOPMENTS IN

COMMERCIAL LAW

&

CONSTRUCTION LAW

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CONTRACT

Admission of evidence of pre-contractual negotiations

ProForce Recruit Ltd v Rugby Group Ltd [2006] EWHC Civ 69.

Evidence of pre-contractual negotiations admitted to show that the parties negotiated on an agreed basis and that the term “preferred supplier status” bore a particular meaning.

Chartbrook Ltd v Persimmon Homes Ltd [2007] EWHC 409 (Ch)

Admissibility of pre-contractual negotiations when interpreting a contract and in particular what the term “additional residential payment” meant. Lengthy consideration of the policy reasons for the rule excluding such evidence. *ProForce* not applied in a situation where the contract contained an express definition of the term in question.

Maggs v Marsh [2006] BLR 395 (CA)

The Court of Appeal held that the principle that the court should not have regard to the parties' subsequent conduct did not apply to an oral contract. Determining the terms of an oral contract was a question of fact. Establishing the facts would usually depend upon the recollections of the parties and other witnesses. The accuracy of those recollections could be tested and elucidated by things said and done by the parties or witnesses after the agreement had been concluded, and there was nothing to prevent the court from looking at the post-contact actions of the parties.

Battle of the forms

Sterling Hydraulics Ltd v Dichomatik Ltd [2007] 1 Lloyds Rep 8.

In a 'battle of the forms' case the judge applied the dictum of Lord Denning in *Butler Machine Tool v Ex-Cell-O Corporation* [1979] 1 WLR 401 that in many cases the traditional offer and acceptance approach is out of date and found that the seller's written acknowledgment of the buyer's purchase order did not make it sufficiently clear that it purported to introduce fresh terms which so added to, modified or contradicted the terms in the order that the two sets of terms could not form part of a binding agreement without further assent from the buyer. In other words, the written acknowledgment did not rank as a counter-offer – the only shot that counted was 'the first shot' i.e. the purchase order. The court went on to consider the interpretation of the seller's exemption clauses and their reasonableness under UCTA.

Interpretation – general approach

Ravennavie SpA v New Century Shipbuilding Co Ltd [2007] 2 Lloyd's Rep 24 (CA)

The case concerned the interpretation of two written contracts. Giving the judgment of the court Moore-Bick LJ observed [12] "*As will already have become apparent, this case raises no more than two short points of construction, one of which relates to what might be described as a one off clause in a one off commercial document. Such questions of construction are often far from easy to decide, but when that is the case it is usually because of the inherent difficulty of ascertaining with confidence the meaning which the parties intended the document to bear rather than a need to analyse complex written provisions. In my view this is case which has suffered from over-elaboration and an over-analytical approach on the part of the parties. The result has been skeleton arguments of considerable complexity running to a total of 101 paras (in the case of the buyer) and 112 paras (in the case of the yard) respectively...Unless the dispute concerns a detailed document of a complex nature that can properly be assumed to have been carefully drafted to ensure that its provisions dovetail neatly, detailed linguistic analysis is unlikely to yield a reliable answer. It is far preferable, in my view, to read the words in question fairly as a whole in the context of the document as a whole and in the light of the commercial and factual background known to both parties in order to ascertain what they were intending to achieve...*"

Provisional sum - meaning

Midland Expressway v Carillion Construction Ltd (CA) 2007 Con LJ Vol.23 No.1 p.75:

"1. The term provisional sum is generally well understood in the construction industry. It is used in pricing construction contracts to refer either to work which is truly provisional, in the sense that it may or may not be carried out at all, or to work whose content is undefined, so that the parties decide not to try to price it accurately when they enter into their contract. A provisional sum is usually included as a round figure guess. It is included mathematically in the original contract price but the parties do not expect the initial round figure to be paid without adjustment. The contract usually provides expressly how it is to be dealt with. A common clause in substance provides for the provisional sum to be omitted and an appropriate valuation of the work actually carried out to be

substituted for it. In this general sense, the term provisional sum is close to a term of art but its precise meaning and effect depends on the terms of the individual contract.”

Unfair contract terms

Domsalla v Dyson [2007] EWHC 1174; [2007] TCLR 4 (HHJ Thornton QC).

Unfair Terms in Consumer Contracts Regulations 1999 applied. Reliance by the contractor on the adjudication provisions was not unfair because it did not substantially alter the balance of the parties' rights and obligations but the withholding notice provisions were unfair.

Shepherd Homes Ltd v Encia Remediation Ltd [2007] BLR 135 (Christopher Clarke J.).

Sub-contractor's terms and conditions included a term limiting its liability to no more than the subcontract price. Held that the term was incorporated because the sub-contractor had done what was reasonably necessary to give the other party fair notice that its offer was subject to the condition limiting its liability to the contract price; and that the term was not unreasonable under UCTA.

Contract determination

Reinwood Ltd v L Brown & Sons Ltd [2007] BLR 10 at first instance – N.B appeal allowed at [2007] EWCA Civ 601 (CA).

The Court of Appeal allowed the employer's appeal against the decision of HHJ Gilliland QC that the contractor had validly determined the JCT contract by a notice of determination under clause 28.2.4. The Court of Appeal held that if the conditions for the deduction of LADs from a payment certificate are satisfied when an employer gives a notice of intention to deduct, the employer is entitled to make the deduction even if the certificate of non-completion is cancelled by a subsequent extension of time. Accordingly, the contractor was not entitled to give notice of determination based on the non-payment of the full amount of the certificate. Note – although the appeal was allowed, Judge Gilliland's observations of what amounts to giving a notice '*unreasonably and vexatiously*' are still of interest.

Frustration

The Sea Angel [2007] 1 Lloyd's Rep 335.

The defendants argued that the charterparty had been frustrated as a result of delay caused by the action of the port authorities. Gross J. held that, although there was a realistic argument that the probable length of the delay compared to the unexpired period of the charterparty meant that the charterparty was frustrated, in all the circumstances of the case, there had been no frustrating event. Paragraphs [80] to [85] contain a useful summary of the law of frustration.

JCT Form – method of service of notice

Construction Partnership UK Ltd v Leek Developments Ltd [2006] CILL 2357

Notice of determination sent by fax or ordinary post constituted 'actual delivery' for the purposes of IFC 98 cl 7.1.

Repudiation

Multiplex [2006] 107 Con LR 1 TCC

Pay when paid

Midland Expressway No.2 [2006] 106 Con LR 154 TCC

Tender contract

J&A Developments v Edina [2007] CILL 2417

Agreement to pay sum to be agreed “in good faith...acting reasonably” enforceable

Tramtrack Croydon Ltd v London Bus [2007] All ER (D) 14; [2007] EWHC 107 (Christopher Clarke J)

Under clause 23 of the agreement the claimant had to accept as valid such tickets as the regulatory might specify, the parties agreeing that in that event they should “*in good faith agree, acting reasonably*” the financial arrangements to compensate the claimant. The court held that the clause was not devoid of legal content and too uncertain – the court or an arbitrator could determine the amount if necessary using reasonableness as the criterion.

Entire agreement clause

Sutcliffe v Lloyd [2007] 10 EG 183; [2007] EWHC 153 (CA)

An ‘entire agreement’ clause in a shareholders’ agreement did not preclude the claimant from introducing extraneous evidence to give rise to an estoppel because (1) the matter in issue was not “*dealt with*” in the shareholders’ agreement and so was outside the entire agreement clause and (2) an entire agreement clause could in any event only preclude the admission of evidence of matters that occurred before the agreement was made, not afterwards.

Meaning of “reasonable endeavours” and “best endeavours”

Rhodia International v Huntsman [2007] EWHC 292 (Comm) (Julian Flaux QC)

“*Reasonable endeavours*” and “*best endeavours*” do not mean the same thing. A party required to use the former has only to take one of a range of reasonable courses open to him; a party required to use the latter should take all the reasonable courses he can: see paras [30] to [35].

HGCRA s.111

Pierce Design v Mark Johnston [2007] EWHC 1691 (HHJ Coulson QC)

Melville Dundas v George Wimpey [2007] 1 WLR 1136 could not be confined to its particular facts. JCT clause 27.6.5.1 was consistent with HGCRA s.111.

Article 6 not infringed by term excluding right to appeal arbitration award

Stretford v Football Association Ltd [2007] EWCA Civ 238

An arbitration agreement incorporated a rule which precluded the right of appeal – the rule was not onerous or unusual and had been fairly and reasonably drawn to the claimant’s attention. The rule was not inconsistent with Article 6.

DAMAGES/REMEDIES

Proper approach to the assessment of damages

The Golden Victory [2007] 1 Lloyd’s Rep. 164 (HL)

The case concerned the correct approach to assessing the damages the claimant shipowner was entitled to recover following its acceptance of the defendant charterer’s repudiation of a seven-year charterparty. In particular, should damages be assessed at the date of breach ignoring the fact that shortly after that date an event occurred – war with Iraq – that would have allowed the defendant to exercise a contractual option to terminate the charter. By a majority of 3 to two the House of Lords held that if the contract would have terminated early on the occurrence of a particular event, the chance of that event happening had to be taken into account in the assessment of the damages. This was consistent with the overriding compensatory principle that the victim of the breach should be

placed, so far as damages could do it, in the position he would have been in had the contract been performed.

Fulham Leisure Holdings Ltd v Nicholson Graham Jones [2006] EWHC 2017 (Ch); [2007] PNLR 5 (Mann J). The defendant solicitors acted for the claimants in the acquisition of shares. The court rejected the defendants' argument that as a matter of principle the loss should be measured at the date of breach and should reflect the difference between the value of the rights actually acquired and what the value would have been if the defendants had discharged their duty. Applying *County Personnel v Pulver* [1987] 1 WLR 916, the paramount principle was that damages should be compensatory rather than that any particular mechanism for assessing damages had to be used in any particular type of case. In the instant case the court found that 'cost of cure' was an arguable way of measuring the loss.

Black holes

Technotrade Limited v Larkstore [2006] BLR 345 (CA)

The case raised the issue whether the assignee could recover a loss he had incurred before the assignment was made – if not, the loss would fall into a *Lenesta Sludge*-type "black hole". The Court of Appeal held among other things that the remedy for breach of contract is not limited to the loss which could have been proved at the date when the breach first occurred and the cause of action first arose; that what was assigned was a cause of action and not merely the loss; that the assignment included the remedy in damages; that the remedy was not limited to the loss suffered at the date of the accrual of the cause of action or as at any particular time thereafter. The Court observed that the courts are willing to go far to accommodate a claim for substantial damages by an assignee against a contract breaker.

Mirant Asia v Ove Arup [2007] EWHC 918 (TCC) (HHJ Toulmin QC)

Recover by the claimant of substantial damages from the defendant for losses suffered by a third party as a result of the defendant's breaches of contract.

A company involved in a consortium project for the construction of a power station, which had entered into a contract with consultant engineers for its design, could in principle have recovered damages on behalf of a sister company against the consultants for losses incurred as a result of the consultants' contractual breaches, even though the sister company had not been a party to the contract, on the basis that it had not received the benefit of the contractual bargain. However, as liability for the sister's company's losses could not be attributed as a matter of factual causation to the consultants' breaches the claim failed. See [601]-[630].

Global claims

London Underground Ltd v Citylink Telecommunications Ltd [2007] EWHC 1749 (Ramsey J)

After reviewing *Laing v Doyle* earlier in his judgment, at [141]-[145] Ramsey J observed that if a judge or arbitrator found that the global claim as a whole failed and then sought to take the 'apportionment' approach suggested in that case, there would necessarily be no case specifically pleaded on this issue.

Critique/criticism of *John Doyle v Laing Management* [2004] BLR 295 2007 (global claims) by Jeremy Winter in *Con LJ* Vol.23. No.2 p.89.

LADs/Time at large

Multiplex Construction UK v Honeywell Control Systems [2007] BLR 195 (Jackson J).

The case includes a review of the authorities on 'acts of prevention' and 'time at large'. As the editors of the BLR point out, the fact that most modern forms expressly entitle the contractor to an extension of time where there is an 'act of prevention' renders this branch of the law largely redundant.

No damages for delay

Chattan Developments v Reigill [2007] EWHC 305; [2007] All ER (D) 155 (Ramsey J)

Applying *Temloc v Errill*, the arbitrator found that on a proper interpretation of the contract the parties had agreed to exclude the right of the employer to claim either unliquidated or liquidated damages for delay. The court dismissed an appeal under the Arbitration Act 1996 s.69.

Damages – staff costs

Aerospace Publishing v Thames Water [2007] EWCA Civ 3

Staff costs incurred in dealing with the consequences of the tort were recoverable. The extent of the diversion of staff time had to be properly established as had the fact that it had caused significant disruption to the business. See the discussion of the conflicting authorities in [79] to [85] and the court's summary of the principles to be applied in [86].

Right of rejection

JH Ritchie Ltd v Lloyd Ltd [2007] 1 Lloyd's Rep 544 (HL).

The buyer did not lose his right to reject when he entered into an agreement with the seller for the inspection and repair of the defective plant. There were implied terms of the agreement that so long as the seller performed its obligations under it, the buyer would not exercise its right to treat the sale contract as repudiated; and that when the seller returned the plant, it would provide the buyer with sufficient information to allow the buyer to make an informed election whether to affirm or reject. Because the seller failed to provide sufficient information when it sought to return the plant, the buyer was entitled to reject even though it subsequently transpired that the plant had been adequately repaired.

Contracts (Rights against Third Parties) Act 1999

Avraamides and Maitland v Colwill and Martin [2007] BLR 76 (CA).

Interpretation of s.1(3) of the Contracts (Rights against Third Parties) Act 1999. Claimants unable to enforce the particular part of the term in question because they were not expressly identified either individually or as a member of an identified class or by description.

Rescission

Halpern v Halpern [2007] 2 Lloyd's Rep 56.

Rescission is not necessarily dependent on being able to restore the parties to their previous positions. The court may be able to achieve 'practical justice' in another way.

Restitution – defence of 'change of position'

Abou-Ramah v Abacha [2007] 1 Lloyd's Rep. 115.

The judgment includes a review of the authorities on what is needed to defeat a 'change of position' defence to a claim for money had and received. Negligence was not enough and dishonesty was unnecessary. There needed to be something inequitable, something capable of embracing a failure to act in a commercially acceptable way or sharp practice of a kind that falls short of outright dishonesty.

Interest

Late Payment of Commercial Debts (Interest) Act 1998: article by John Barber in 2007 Con LJ Vol.23 No.5 p.331.

INSURANCE

Policy interpretation – extent of cover

Brit Syndicates Ltd v Grant Thornton International [2007] 1 Lloyd's Rep. 329.

Policy interpretation. Did the words of an extension to the policy mean that Grant Thornton International was only covered in respect of a claim where one of its member firms was covered? In other words, was the cover provided to GTI parasitic on there being valid cover in respect of the member? Paragraphs [35] to [38] reveal that the court selected the interpretation that it considered would yield the most sensible commercial result.

Policy interpretation – meaning of ‘civil and environmental engineering’

Encia Remediation v Canopus [2007] EWHC 916 (Comm) (Cresswell J)

Interpretation of the words business of “civil and environmental engineering” in the coverage wording in a professional indemnity policy. The judgment contains a useful summary at [169]-[175] of the principles to be applied to the task of interpreting an insurance policy.

Joint Names Insurance – joint insureds defence

The Trustees of the Tate Gallery v Duffy Construction Ltd [2007] BLR 216 (Jackson J).

The issue was whether the contractor could avoid liability for the loss and damage caused both to its own works and to other project works and the building as a result of an escape of water resulting from the negligence/breach of contract of the contractor and/or its sub-contractor. The ‘co-insured’ defence does not apply where the defendant’s actions have invalidated his insurance. Also consideration of the definition of ‘flood’ and ‘burst pipe’ in the policy.

TWF Printers v Interserve [2006] BLR 299 (CA)

The contract was on the JCT Minor Works Form. Clause 6.3B required the employer to take out joint names insurance. The Court of Appeal held that the obligation to insure ceased on practical completion so that the contractor could not avail himself of the ‘joint insureds’ defence in respect of damage resulting from his negligence post practical completion. Dyson LJ gave four reasons for this conclusion. The second and third includes points of general interest: he approved the statement in *Keating* that the architect has no authority to instruct variations post practical completion; and in construing clause 6.3B he had regard to a deleted clause – clause 6.3A.

Reasonable precautions clauses

The Trustees of the Tate Gallery v Duffy Construction Ltd (No.2) [2007] EWHC 912 (TCC) (Jackson J)

General Condition 4(a) of the policy contained a reasonable precautions clause requiring the insured to “take and cause to be taken” all reasonable precautions to prevent loss and damage. In summary, Jackson J. held that these words did not make General Condition 4(a) any more onerous than the reasonable precautions clauses considered in the authorities; that on the authorities such a clause was not breached by mere negligence and recklessness was required and that the recklessness had to be recklessness of the insured, not his employees. The judge also held that, although it was not the case here, with careful drafting it would be possible to draft a clause so that mere negligence would suffice.

Condition precedent – provision of information by insured

Shinedean v Alldown Demolition [2006] BLR 309 (CA)

The insurance contract contained a clause requiring the provision of information and assistance by the insured. The Court of Appeal held that the failure of the insured to provide the information and assistance within a reasonable time was a breach of the condition precedent to the insurer's indemnity under the policy entitling the insurer to decline to indemnify; and that under the terms of the policy it was not necessary for the insurer to show that it had suffered prejudice as a result of the failure by the insured to provide in good time the information and assistance in respect of the events giving rise to the claim.

Margate Theatre Royal v White [2006] Con LR 2

Scope of public liability insurance

All Risks Insurance – fortuitous loss or inevitable damage?

CA Blackwell (Contracts) Ltd v Gerling AG [2007] EWHC 94; [2007] 1 Lloyd's Rep IR 511.

The insured contractor suffered losses in the course of a road construction project resulting from a number of causes including heavy rain fall. The insurer refused payment under the policy inter alia on the basis (a) that the damage was inevitable and (b) that the insured was guilty of willful misconduct. HHJ Mackie QC held the losses were fortuitous and not inevitable and were covered by an all-risks policy. There may have been negligence but not recklessness sufficient to amount to willful misconduct.

Accident – did employer's liability policy or employer's motor liability policy apply?

Axa Insurance v Norwich Union [2007] EWHC 1046 (Comm) (Andrew Smith J)

A worker in an elevated bucket on a stationary vehicle was not "*carried in or upon a vehicle*" for the purposes of the RTA s.145(4A) with the result that the employer's liability policy, not the employer's motor liability policy, responded to the worker's claim against his employer.

Meaning of damage – *Pilkington v CGU applied*

Seele Austria GMBH v Tokio Marine Europe Insurance Ltd [2007] EWHC 1411 (Comm) (Field J)

The contractor sought an indemnity under a policy taken out by the developer in respect of the cost of the rectification of defective windows the contractor had installed. Applying *Pilkington UK Ltd v CGU Insurance* (CA) the judge held that under the wording of the policy there was no indemnity if there was no damage and damage meant not a defect in the works but an adverse physical effect on the physical state of the works as a result of the defect.

Non-disclosure – moral hazard

Norwich Union Insurance Ltd v Meisels [2006] EWHC 2811; [2007] 1 Lloyd's Rep IR 69 (Tugendhat J.)

The test of materiality is by reference to what would influence the judgment of a prudent insurer. This is an objective test, and the characteristics to be imputed to a prudent insurer are in substance a matter for the courts to decide. There is room for a test of proportionality, having regard to the nature of the risk and the moral hazard under consideration. There may be things which are too old, or insufficiently serious to require disclosure, whether or not there is exculpatory material. And in cases where the information would be material and disclosable if there was no exculpatory material, the degree of conviction that the exculpatory material must carry must depend on all the circumstances known to the insured [25].

Employer's liability policy and mesothelioma claims

Bolton Metropolitan Borough Council v Municipal Mutual Insurance Ltd [2006] EWCA Civ 50; [2007] 1 Lloyd's Rep IR 173 (CA).

The Court of Appeal had to determine which policy responded to the employer's liability for its employee's injury. The case also considers conditions precedent and waiver.

Fire claim – fraudulent claim

Tonkin v UK Insurance Ltd [2006] EWHC 1120 (TCC); [2007] 1 Lloyd's Reports IR 283 (HHJ Coulson QC).

The court held among other things that the measure of the indemnity fell to be calculated at the date of the fire not the date of the tenders; that the law did not recognize a claim for damages for late payment; that the insurers could raise fraud even after a judgment on liability; and that it would be absurd if an entirely insubstantial element of a large claim, which was found to be fraudulent, could taint the entirety of that claim. The authorities demonstrated a degree of latitude allowed by the courts in relation to allegations of fraud in insurance cases. Even if the claim in respect of the kitchen and underfloor heating had been dishonest and fraudulent, that fraud would not have tainted the whole claim – it was worth no more than 0.3% of the entirety of the claimants' claim, which was not "substantial" in accordance with the authorities.

Liability insurance

KR v Royal & Sun Alliance PLC [2006] EWCA Civ 1454 (CA); [2007] 1 Lloyd's Reports IR 368.

The Court of Appeal considered among other things the application of an exception in the policy in respect of deliberate acts by the corporate insured, in particular, the distinction between the doctrine of attribution (where certain acts are attributed to the company) and the doctrine of vicarious liability.

Law Commission consultation paper

On 17 July 2007 the Law Commission published its consultation paper on Insurance Contract Law.

ARBITRATION

Arbitration agreement - interpretation

Film Finance Inc v Royal Bank of Scotland [2007] 1 Lloyd's Rep 382.

When interpreting the arbitration agreement, Andrew Smith J., applying *Hamilton & C v Mackie & Sons* (1889) 5 TLR 677, held that it was necessary effectively to re-write the relevant provisions so that they led to the interpretation intended by the parties: see para [36].

Arbitration agreement – repudiation

Elekrim SA v Vivendi Universal SA [2007] 2 Lloyd's Rep. 693.

The claimant sought among other things a declaration that the defendants had collectively repudiated or renounced the arbitration agreement. Aikens J refused the declaration. The Arbitration Act 1996 s.40 did not create duties that were owed by the parties to the arbitration as implied terms which had contractual consequences – they were owed as statutory duties. The 1996 Act provided a comprehensive code for dealing with breaches of s.40.

Arbitration Act 1996 s.9 and 'Kompetenz kompetenz'

Albon v Naza Motor Trading SDN BHD (No.3) [2007] 2 Lloyd's Rep. 1 (Lightman J.)

It is necessary for the court to determine whether there is a concluded arbitration agreement before the court can order a stay under s.9. On an application under s.9 the court could and should decide

the point itself unless there was insufficient evidence to enable it to do so in which case the court could stay the proceedings for the arbitrators to determine the point. The fact that the arbitrators had jurisdiction themselves to determine the issue did not mean that the court could not do so.

Arbitration Act 1996 s.45

Taylor Woodrow v Barnes & Elliott [2006] BLR 377

In the course of an arbitration the parties by agreement applied to the court under s.45 of the Arbitration Act 1996 for the determination of an issue of law. Jackson J. held that notwithstanding the agreement, the court had a discretion whether to decide the point [56]. In the subsequent paras of the judgment he addressed the various factors relevant to the exercise of his discretion: the experience of the arbitrator; the entanglement of the issue of law with the facts; and the issue of cost. He decided to exercise his discretion to decide the point.

Arbitration Act 1996 ss.68 & 69

Kershaw Mechanical Services Ltd v Kendrick Construction Ltd [2006] EWHC 727; [2006] 4 All ER 79 (Jackson J.)

The court considered the proper approach to take when dealing with an appeal under the Arbitration Act 1996 s.69: see paras [40]-[63].

London Underground Ltd v Citylink Telecommunications Ltd [2007] EWHC 1749 (Ramsey J)

Paragraphs [20] to [66] of the judgment contain a detailed discussion of the principles to be applied when determining applications under s.68 and s.69 of the Arbitration Act 1996.

PROCEDURE

Interaction of contractual time bar/Limitation Act 1980

Oxford Architects Partnership v Cheltenham Ladies College [2007] BLR 293; [2007] PNLR 18 (Ramsey J).

The decision concerns (1) the interrelationship between a contractual time-bar and the relevant limitation period under the 1980 Act and the effect of the former on the latter; (2) the nature and extent of a designer's continuing duty to review his design; and (3) the determination of the date of damage for the purpose of deciding when a cause of action in negligence accrues.

Limitation Act 1980 – s.32(1)(b) “deliberate concealment”

The Kriti Palm [2007] 1 Lloyd's Rep 555.

The Court of Appeal considered what would amount to 'deliberate concealment' for the purposes of the Limitation Act 1980 s32(1)(b): see paras 315 to 325. “321. *It appears therefore that there must be either active and intentional concealment of a fact relevant to a cause of action, or at least the intentional concealment by omission to speak of a fact relevant to a cause of action which the defendant knew himself to be under a duty to disclose. There is no decision that anything less than a duty to disclose will suffice in the absence of active concealment.*”

Amendment after limitation has expired: same or substantially same facts

Charles Church Developments Ltd v Stent Foundations Ltd [2006] EWHC 3158; [2007] BLR 81; [2007] TCLR 2 (Jackson J.)

Permission to a claimant to amend after the expiry of the limitation period to advance a new cause of action based on substantially the same facts as had been put in issue by the defence of any defendant.

The UB Tiger [2007] 1 Lloyd's Rep 148 (CA).

The claimant applied for permission to amend. On the assumption that the amendments raised a new cause of action, the Court of Appeal gave permission to amend on the grounds that the amendments arose out of the same facts as those already pleaded. The Court held that where no new facts were relied on by the claimant and where there was no evidence of express prejudice to the defendant, it would be wrong for the court to refuse to give permission since "*it would not be right to adopt an approach which would in effect penalize the pleader*": [21]-[23].

Costs – failure to mediate

P4 Ltd v Unite Integrated Solutions plc [2007] BLR 1 (Ramsey J)

Defendant's refusal to mediate and failure to provide pre-action information deprived it of costs it would otherwise have been awarded.

Non-party disclosure

Secretary of State for Transport v Pell Frischmann Consultants Ltd [2007] BLR 46 (Jackson J).

Application against a non-party for disclosure under Supreme Court Act 1981 s.34 and CPR rule 31.17. Consideration of how the provisions should be interpreted/applied.

Expert evidence in solicitors' negligence cases

Football League v Edge Ellison [2006] EWHC 1462 (Ch); [2007] PNLR 2 (Rimer J)

The case contains a useful restatement of the admissibility of expert evidence in solicitors' negligence cases: "*The basic principle is that, with one exception, expert evidence on the duties of a solicitor is not admissible: it is a question of law for the court. It is then a question of fact for the court whether the duty, once identified, has been breached. The exception is that expert evidence is admissible to prove some 'practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage...'*" (*Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384, at 402, per Oliver J., approved in *Brown v Gould & Swayne* [1996] 1 PNLR 130, at 135 (per Simon Brown LJ) and 136/137 (per Millett LJ)).

TORT

Deceit

Petromec Inc v Petroleo Brasileiro SA Petrobras [2007] 1 Lloyd's Rep. 629.

A claim in deceit. Paras [89] to [95] contain a useful summary of the relevant legal principles in relation to the tort of deceit, including [93] the direct and/or vicarious liability of a company for deceit.

Duty of care – contractual structure

Riyad Bank v Ahli United Bank (UK) PLC [2006] EWCA Civ 780; [2007] PNLR 1 (CA).

The defendant gave advice to RB knowing that RB would pass on the advice to the claimant (which had a contract with RB but not with the defendant) who would rely on it. The judge at first instance and the Court of Appeal held that the relationship of the parties gave rise to a duty of care in principle and that the contractual structure did not negative it. Neuberger LJ suggested that the burden rests

on the defendant to establish that the contractual structure displaces the duty of care, not on the claimant to show that the duty of care survives it.

Architect's negligence

Plymouth & Southwest Co-operative Society Limited v Architecture Structure & Management Ltd [2006] EWHC 5 (HHJ Thornton QC)

The defendant architectural/QS practice was negligent in the advice it gave/failed to give about procurement strategy.

Pearson Education Limited v CharterPartnership Limited [2007] EWCA Civ 130 (CA)

Architects who negligently designed a rainwater drainage system owed a duty of care to the claimant tenants who suffered financial loss. The fact of an earlier flood of which the claimant was unaware did not place the claimant outside the range of persons to whom a duty of care was owed nor did it break the chain of causation. *Baxall Securities Ltd v Sheard Washaw Partnership* not applied. The Court of Appeal identified two principles in *Baxall* either of which could have justified the decision. The Court described both principles as “*not wholly satisfactory*” but pointed out that in any event neither of them applied in the instant case. At [45] the Court appears to approve of the criticism of *Baxall* in an article by the late Ian Duncan Wallace QC. At [46] the Court gave a strong hint that *Baxall* would probably not survive reconsideration by the House of Lords.

Letters of intent/quantum meruit

ERDC Group v Brunel University [2006] BLR 255

The case gives guidance on two points: first, whether a letter of intent gives rise to a contract; second, if not, how a quantum meruit should be assessed. On the second point, in summary HHJ Humphrey Lloyd QC said among other things (1) that where the execution of the works took longer than allowed for in the rates and prices stated in the letter of intent, something might be allowed for prolongation; (2) that where the work did not meet the relevant standard, although there could be no counterclaim or set-off, the deficit could be taken into account in valuing the work.