

## JONES V. KANEY: THE END OF EXPERT IMMUNITY

In a landmark ruling the Supreme court has lifted the blanket immunity from liability in negligence previously enjoyed by expert witnesses for more than 400 years. This is significant for anyone who provides expert evidence as their clients will now be able to issue claims for professional negligence in relevant cases.

The facts in Jones v. Kaney centred around a personal injury claim. The psychologist expert witness in the case signed a joint statement which said that the claimant for whom she was acting had exaggerated the injury sustained. As a result of this, the claimant issued a claim for professional negligence and the expert attempted to have the claim struck out on the basis that expert witnesses were immune from such action.

As reported in our Spring 2010 edition, at first instance the claim was struck out on the grounds of immunity, as the judge had been bound by a previous Court of Appeal decision. A 5/2 majority of the Supreme Court abolished the principle of immunity for expert witnesses in Court proceedings. The leading judgment found that any exception to the principle that every wrong should have a remedy should be justified only if it was found to be in the public interest.

Policy arguments raised by the defendant included the concern that experts may be reluctant to give evidence contrary to the person they are acting for. However the Court found that this risk was one factor to consider among many when deciding to give expert evidence. In addition the expert advanced the argument that there would be a flood of satellite litigation as a result of the abolition. These arguments were rejected, and the situation was likened to the removal of immunity from barristers in 2000 which did not have similar effects on the legal profession.

The decision is still very new so the effects will not be felt immediately. The first obvious change is likely to be

The Supreme Court



an increase in personal indemnity premiums. However, given that to bring a claim against an expert, the unhappy litigant would need to instruct a second expert to stand up against the first and find that the evidence was such that no reasonable expert could have reached that conclusion, it seems unlikely that there will be a sudden rush of claims of negligence against experts. This was part of the Court's reasoning. So provided experts act reasonably, in theory there is nothing to fear.

**It would be sensible, however, for experts to consider protecting themselves as much as possible by considering the following:**

- Be cautious in meetings with opposing expert and when agreeing joint statements.
- Be very careful to explain to a client any proposed departure from an earlier opinion before signing a joint statement or making concessions on the client's behalf.
- Considering obtaining "bespoke" case sensitive insurance and in any event informing insurers of exactly what is being undertaken.
- Agreeing contractual limits/exclusions to exposure in particular for significant projects, whilst taking into account the effect of the Unfair Contract Terms Act 1977.

## IN THIS ISSUE



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Gullands' specialists  
explain the practical  
implications of  
the legislation.



### Corporate Manslaughter

Understand how the law  
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the penalties when there  
is a breach.

# CONSTRUCTION



In our Autumn 2009 and Spring 2010 editions, we previewed the legislation which finally came into force on 1 October 2011. The Local Democracy, Economic Development and Construction (LDEDC) Act 2009 makes changes to the Construction Act 1996 and the Scheme for Construction Contracts has also been amended. As a result JCT have published 2011 editions of its contracts. The NEC published the September 2011 amendments which revised both the payment and adjudication provisions of its suite of NEC3 Contracts, and the RIBA published amendments to the payment terms of its suite of appointments including the RIBA Standard Agreement 2010: Architect.

It is vital that all employers, contractors and sub-contractors are familiar with the main changes to the Construction Act and the changes to the Standard JCT and NEC Contracts and that they also review and revise any existing terms and conditions or bespoke contracts they use to ensure that they are compliant. Construction professionals administering contracts such as building surveyors, quantity surveyors and architects will also need to be familiar with changes.

The changes to the law are not retrospective so the new law only applies to contracts entered into on or after 01 October 2011.

Main changes can be categorised into three areas:

1. Construction contracts do not need to be in writing.
2. The changes to the adjudication procedure and
3. The changes to payment provisions.

We now look at some of the likely effects of the changes.

## Contract not in writing

Adjudicators are now likely to need to consider whether any contract came into existence (offer, acceptance, consideration and intention to create legal relations). Previously the adjudicator started off with some certainty as to what the terms of the contract were. Adjudicators, already working under very tight timetables, may now have to ensure that sufficient opportunity is given to the parties to test factual evidence. There are likely to be new jurisdictional challenges on the grounds of there being no contract, the wrong party was proceeded against, when the oral contract was concluded and possibly a resurgence in natural justice arguments. Enforcing an adjudicator's decision in the Technology & Construction Court (TCC) is also likely to change as procedures dealing with substantial disputes of fact will need to be followed more often rather than using CPR Part 7 proceedings.

Adjudication had become known as a speedy way of settling disputes in construction contracts on a provisional interim basis, but we feel that with the abolition of the requirement for construction contracts to be in writing the procedure will now involve more detailed consideration of evidence, witness statements, documents and case law both within the adjudication process itself and in the enforcement process.

## Adjudication Procedure

There are changes to the timetable, so that the revised Scheme requires an adjudicator to notify the parties of the date upon which the Referral Notice was received and the periods are to be calculated from that date.

# CONTRACT CHANGES

An adjudicator's power to correct an accidental error is already well established, but now there is a requirement for a contract to include a written slip rule provision. If the contract does not make such provision then the changed Scheme will apply and the procedure will be that the adjudicator may correct his decision on his own initiative or on the application of a party and that corrections are to be made within five days of delivery of the decision to each party, with any correction to form part of the decision.

These changes seem sensible as does a further procedural change namely that relating to adjudication costs. The problem had arisen, only partially dealt with by the Courts, in a case known as Tolent whereby a contract could require the referring party to bear both parties' legal and expert costs if it referred a dispute to adjudication. Now the amended Act prohibits agreement as to adjudication costs, subject to two narrow exceptions (a) the parties can agree a term which confers power on the adjudicator to allocate his fees and expenses as between the parties, provided the term is set out in writing and is contained in the construction contract and (b) the parties can agree terms which concern the allocation of the adjudicator's fees and expenses or the parties' costs relating to the adjudication provided that (i) the agreement is in writing; (ii) is agreed after the Notice of Intention to Refer the dispute has been given.

It is important to remember that there is a distinction between the allocation of adjudicator's "fees and expenses" and the costs incurred ie legal/expert/consultant costs.

## Payment Provisions

The amendments here are very significant and we only have space to comment on a few of them.

### Payment Notices

For contracts entered into prior 01 October 2011, in the absence of the parties having negotiated terms there was no provision under the Act which gave the party to whom money was owed from taking the initiative by issuing payment notices. Now, provisions require any construction contract to include (i) a provision requiring either a payer (or architect/contract administrator) or the payee to issue a payment notice not later than five days after the payment fell due and (ii) introduce a statutory entitlement to the party to whom payment is to be made to issue a payment notice in the event that the payer fails to do so (where required to under the contract). The onus now is on payees – normally sub-contractors or contractors under a main contract. The new changes do not entitle a payee to a second bite of the cherry. If the contract already permits the payee to issue a payment notice (and it has done so) no further entitlement arises.

Payees, and in particular sub-contractors, will need to act quickly to use this regime to their own advantage.

### Pay Less Notices

Under the previous payment regime, in the absence of a third party certification the payer could still challenge the sum due even in the absence of a withholding notice eg the defence of abatement or argue that the sum claimed was not due. The position now is probably less open to challenge than before. The payer has to issue a Pay Less Notice. However, it will be important for payers, employers or main contractors, to set out the basis of the calculation of the figure – in other words, to show workings. At a recent Adjudication Society debate on the 11 October 2011, some panel members considered that this change could have the biggest effect under the new payment regime and, together with oral contracts being considered by adjudicators, was the biggest change altogether.

### Suspending performance for non-payment

Under the previous law, suspension of performance was regarded as something of a nuclear option. Contractors or sub-contractors suspending entirely would be highly detrimental to a relationship and would often lead to a determination of the contract and arguments about repudiatory breach. However, under the changes a contractor/sub-contractor may choose to suspend work only in relation to a particular part of the works. This allows the party not being paid to be selective but to make their point. There could be an increase in suspending performance as it could lead to a speedier remedy than adjudication even. Furthermore, there is another change which provides that the party in default is liable to pay a reasonable amount for the costs and expenses incurred by the contractor or sub-contractor for stopping work. This will be an incentive to the defaulting party to bring their payments up to date to avoid potential further liability. There could be an increase in adjudications arguing about the cost of expenses. What is recoverable would depend upon what the contract says but case law is likely to be required to set out the parameters. Consultants such as an architect or quantity surveyor who is contract administrator, can also suspend their performance and for example stop supervising. However, they will have to consider their professional responsibilities. Governing bodies may for example look unfavourably if a member suspends performance for being owed £1,500 when the consequences could run into huge sums of money.



# CORPORATE MANSLAUGHTER

February 2011 saw the first company to be charged and found guilty of corporate manslaughter under the Corporate Manslaughter and Corporate Homicide Act 2007. In August 2011 Lion Steel Ltd became the second Company to be charged under the Act. In this case three of the Company directors were also charged separately with gross negligence manslaughter after an employee fell through a roof

Cotswold was fined £385,000 to be paid over 10 years for causing the death of an employee who was taking out soil samples in an unsupported pit which collapsed. The company appealed the decision in the Court of Appeal where the conviction and fine were both upheld, although the company's liquidation was inevitable.

The successful prosecution of Cotswold Geotechnical (Holdings) Limited, a relatively small organisation demonstrates the importance of having a health and safety procedures and policies in place. In addition to unlimited fines in the case of conviction, the Court may also impose a remedial or publicity order on the company.

This checklist sets out the factors which can lead to your business being prosecuted for corporate manslaughter and the penalties for breaching the legislation.

## What are the offences?

Your business will be guilty of a corporate manslaughter offence if all of the following apply:

- The way in which your business' activities are managed or organised causes a person's death.
- The person's death is the result of a gross breach of a relevant duty of care owed to that person.
- The way in which your business' activities are managed or organised is a substantial element of the breach.

## Who does the offence apply to?

- Corporate manslaughter legislation applies to all businesses operating in the UK.

## What constitutes a gross breach?

- "Gross breach" means conduct that falls far below what can reasonably be expected of your business in the circumstances.
- A jury must take a number of factors into account when deciding whether your business is guilty of corporate manslaughter:
  - whether your business was in breach of health and safety legislation;
  - how serious the management failure was; and
  - how much of a risk there was of death occurring.
- The jury must also take into account a number of other factors, including:
  - any health and safety guidance relating to the breach; and
  - whether there were any attitudes, policies, systems or accepted practices in your business that were likely to have encouraged a management failure.



## What types of duty of care are covered?

- The legislation deals primarily with health and safety matters, but is not limited to these.
- The types of duty of care covered include a duty owed by a business to employees, a duty owed as an occupier of premises and a duty owed in connection with:
  - the supply of goods or services;
  - carrying out any construction or maintenance operations; or
  - carrying out any other activity on a commercial basis.

## What are the penalties for breaching the legislation?

### Financial penalties

- A conviction for corporate manslaughter could lead to the imposition of an unlimited fine on your business. According to the sentencing guidelines, a convicted business should receive a fine that will rarely be less than £500,000 and may be in the millions of pounds.
- Fines can be increased if there is evidence your business could have foreseen the accident and where breaches of rules were widespread within your business.

### Remedial orders

The Court can impose a remedial order requiring your business to address specific failings involved in the offence.

### Reputational damage

The Court can impose a publicity order forcing your business to advertise that it has been convicted of corporate manslaughter.

### Insurance

Insurance cover will not be available to your business if it has been convicted of a corporate manslaughter offence. However, if you mount a successful defence, cover may be available for any legal costs your business has incurred. Make sure you check your position with your insurers.

## CONTACT

If you would like any additional information on any of the subjects discussed in this newsletter please do not hesitate to contact us.



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This update is for guidance only. Legal advice should be obtained for specific issues.