FENWICK ELLIOTT

The construction & energy law specialists

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Issue 299 – May 2025

Dispatch

Adjudication: more than one contract

Lapp Industries Ltd v 1st Formations Ltd

[2025] EWHC 943 (TCC)

Lapp sought summary enforcement of an adjudicator's decision. Lapp had sent an application for interim payment in the sum of £120k. No payment or payless notice was served. During the adjudication, Formations raised a jurisdictional challenge, saying that there were numerous contracts between the parties and not a single contract as alleged. The adjudicator rejected this, saying that there was only one contract.

The contract issue had arisen because Lapp provided individual quotations for specific items of work. Lapp said this was because Formation never "*definitively finalised*" the specification. For example, Lapp submitted an initial quotation for works to the roof, decking and reception. This was accepted in writing.

Deputy Judge Williamson KC considered that these "*undisputed facts*" clearly gave rise to a construction contract. The parties were of the same mind as to scope, price and location, with the time for completion impliedly agreed to be a reasonable time. Thereafter, Lapp submitted further quotations, which were accepted. They then carried out the agreed further works, raised invoices, and were paid.

The judge further thought the following, "*it seems to me clear that the parties agreed, on an ad hoc basis, to expand the scope of the construction contract formed in June 2022, through a series of further accepted quotations. There was, therefore, a single contract (and a single dispute), albeit that this contract grew considerably in scope when compared to June 2022 engagement*".

In addition, all the work was performed at a single site, i.e. the premises, and both parties referred to the works as a "*project*". Their contractual dealings were consistent with "*an overarching contractual arrangement*" for the project as a whole, rather than a series of one-off engagements.

There were some fourteen quotations issued by Lapp. It would be surprising if there were at least fourteen separate contracts at a single site. Finally, "*The scenario here – an initial limited engagement, gradually expanded ad hoc – is not unfamiliar in the construction industry and makes far more commercial sense than the suggestion of many separate contracts*".

The judge also noted that:

> *"Any other analysis is contrived and unrealistic. These business people were not concerned with some artificial carving up of what was, for them, a single, ongoing engagement. The 'more than one contract' point would not have occurred to them, and has arisen solely in the context of a very technical argument on jurisdiction, of the kind familiar to lawyers but not, generally, to those involved in commercial negotiations."*

Contracts (Rights of Third Parties) Act 1999

HNW Lending Ltd v Lawrence

[2025] EWHC 908 (Ch)

HNW was claiming possession of a property and monies advanced to Ms Lawrence pursuant to a Loan Agreement in the sum of £1.5 million. Ms Lawrence sought to strike out the claim in that HNW has no standing to bring the claim because HNW has no enforceable rights against Ms Lawence under the Charge and the Loan Agreement. Paragraph 26.7 of the Loan Agreement, stated that:

> *"The Borrower and Lender agree that, while HNW Lending Limited is not a party to this Loan Agreement, HNW Lending Limited may take the benefit of and specifically enforce each express term of this Loan Agreement and any term implied under it pursuant to the Contracts (Rights of Third Parties) Act 1999."*

Prior to the Act coming into force, the general rule was that only a party to a contract could enforce its terms, even if the contract, if performed, would have conferred a benefit upon that party. The Act changed this and enabled third parties, in certain cases, to enforce terms in contracts made in their favour. Section 1 provides as follows:

> *"(1) Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if —*
>
> *(a) the contract expressly provides that he may, or*
>
> *(b) subject to subsection (2), the term purports to confer a benefit on him.*
>
> *(2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.*
>
> *(3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.*
>
> *(4) This section does not confer a right on a third party to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract.*
>
> *(5) For the purpose of exercising his right to enforce a term of the contract, there shall be available to the third party any remedy that would have been available to him in an action for breach of contract if he had been a party to the contract (and the rules relating to damages, injunctions, specific performance, and other relief shall apply accordingly)."*

So, the third party must be expressly identified in the contract and, so it was thought, the provision must confer a benefit on the third party. Here, the judge noted that clause 26.7 appeared to have been drafted with the 1999 Act in mind and with the intention of conferring on HNW equivalent rights to those of

the lender, enabling HNW to enforce obligations owed to and benefitting the lender.

Ms Lawrence argued that HNW did not have the right to bring a claim under the Act, as the benefit had not been expressly conferred onto them in the loan agreement. The judge disagreed, noting that section 1(1)(a) of the Act was not limited to the enforcement by a third party of a term purporting to benefit the third party, since this type of term was specifically addressed in section 1(1)(b). The intention was that the lender's agent would be able to enforce its obligations in the same way as the lender. It was sufficient that the contract expressly provided that the third party may enforce the term. That is what Clause 26.7 did in relation to all the express and implied terms of the Loan Agreement. Alternatively, Clause 26.7 was effective pursuant to section 1(1)(b) to confer on HNW the benefit of the covenants and rights of enforcement owed to the lender because that is also what Clause 26.7 purports to do. Clause 26.7 expressly provided that "*HNW Lending Limited may take the benefit of and specifically enforce each expressed term of this loan agreement and any term implied under it*".

Adopting this approach, i.e., construing Clause 26.7 as legally effective, was in line with the principle that the courts should endeavour, if possible, to give effect to the parties' contractual provisions. Indeed, there has been little caselaw about the Act, one reason being that parties have the option when entering into a contract to specifically exclude the Act in its entirely, something they regularly do.

Expert evidence

MJS Projects (March) Ltd v RPS Consulting Services Ltd

[2025] EWHC 831 (TCC)

One of the issues that came before Kelly J was how to treat the expert evidence. The dispute related to whether certain deterioration and damage to drains was caused by RPS's design. MJS brought claims for breach of contract and negligence. Kelly J noted that where a claim such as this is based on an allegedly defective design, the court is concerned with the final design and not the design process. The judge also referred to *Hudson's Building and Engineering Contracts* (14th edition) at 2-067:

> *"Designers may be liable if the design that they produce is not one that is 'buildable' having regard to ordinary competent standards of workmanship and/or if it could only be built with a high degree of supervision to ensure compliance by the Contractor."*

Here, the case turned "*largely*" on the expert evidence. Ultimately, Kelly J said that it was MJS's expert whose evidence should be treated with "*significant caution*". The judge felt that the expert did not appear to have considered adequately the applicable legal test in professional negligence cases or understand properly their duty to the court. The final report was based on a draft which had been prepared significantly earlier but it:"*did not appear to have been updated with sufficient thought to his duty to 'state the substance of all material instructions, whether written or oral, on the basis of which the report was written' as is required by CPR 35.10(3) and Practice Direction 35*".

There was no reference to the actual pleadings in this case only to the pre-action correspondence. The expert was very slow to accept that he had a duty to provide the court with a proper opinion on workmanship issues as a result of matters raised in the defence. He had not set out the nature of the oral instructions which he eventually said he had been given. He did not appear to view his consideration of poor workmanship issues as perfunctory. This was despite the fact that just one paragraph in his report dealt with poor workmanship and then only dealt with one of the numerous allegations made by the Defendant about poor workmanship.

Further, there was no consideration at all of the effect on causation of the damage said to be in existence by December 2017 if some or all of those workmanship criticisms were established. His explanation for not including the allegations of poor workmanship pleaded by the Defendant was "*in order to keep things simple*".

The expert accepted that his report would have been better if he had not "*updated a previously drafted report*". He sought to excuse criticisms made of his report and the lack of detail to being under time pressure over Christmas. When it was suggested he could have asked for more time, if needed, he said he was acting proportionately despite the fact he was not on a fixed fee or budget.

Having acknowledged that one of the criticisms of his analysis was valid, the expert told the court that he had rerun the analysis over the weekend before the trial. The fact that he had rerun the test and various parameters for the test had been amended to take into account that the criticism was not mentioned until cross-examination. It was unclear whether the legal team had been informed.

Further, when asked how the court was supposed to understand the analysis without an explanation, he said the court could "*Google*" the analysis and that would probably give a better answer than he could. The expert had also used an out-of-date technical report. The more recent version cautioned against using the analysis used by the expert without the input of a geotechnical specialist.

Finally, it was clear that the expert had little experience dealing with the type of work about which his opinion was sought. When questioned, the expert said:

> *"Part of being an expert witness is putting yourself in the shoes of an expert designer. I'm not sure if I should say this but I am almost of the view that it is a benefit that I am not the best designer as it gives me a better view of what the reasonably competent designer should do."*

Kelly J noted that, in some cases, this may enhance the value of an expert's opinion. That was not the case here:

> *"In my judgment, there is a material difference between an expert professional and a professional expert."*

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

Dispatch is a newsletter and does not provide legal advice.

Edited by **Jeremy Glover, Partner**
jglover@fenwickelliott.com
Tel: + 44 (0)20 7421 1986
Fenwick Elliott LLP
Aldwych House
71 - 91 Aldwych
London WC2B 4HN