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The construction &
energy law specialists

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Solutions

Solutions is a monthly newsletter focused on advancements and innovation in technology, law and the environment.

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Welcome to Solutions!

We are delighted to bring you this first edition of our monthly newsletter dedicated to advancements and innovation in technology, law and the environment.

Any construction, energy or infrastructure project is no small feat. Each is comprised of an intricate web of decisions concerning design, procurement, construction and commissioning. These decisions all take place within a matrix of legal obligations, site conditions, environmental issues, client and contractor preferences and numerous other constraints and opportunities.

New technologies add further exciting and challenging dimensions to these projects.

Not only do innovations and advancements have the potential to enhance and drive efficiency, performance and productivity, they also have the potential to bring new complexities, risks, decisions required and interfaces to be considered and resolved. The solutions to these new issues require knowledge, lateral thinking, collaboration, leadership and perseverance.

By reporting on the latest news, legislation and legal developments we aim to support and promote the advancement of the digital transformation in the construction and energy industries.

Solutions will include a wide variety of topics in this exciting and fast-paced space.

Below are just some of the areas we look forward to covering in detail, all of which are of course inherently connected in digital construction.

- Design obligations in a digital era
- Drones
- BIM | Digital Twins
- Automation | Digitalisation
- Smart Contracts | Blockchain
- Database rights
- Virtual Reality | Augmented Reality
- Offsite manufacturing
- Sustainability | Climate Change
- Robotics
- AI | Machine Learning
- Internet of Things
- LegalTech

For this first issue of *Solutions*, we bring you a brief roundup of a few recent news events and case law over the past few months.

Dr Stacy Sinclair
Head of Technology & Innovation
Fenwick Elliott

Roundup: Recent News | Case Law

Drones Online Theory Test

From 30 November 2019, in accordance with the Air Navigation Order 2016 (as amended) and the Civil Aviation Authority, anyone wanting to fly a drone weighing more than 250g must:

- pass an online theory test to show they can do so safely and legally; and
- register for an operator ID and label any drones with that operator ID (for small unmanned aircraft (SUA) operators).

Failure to do so results in a possible fine of £1,000.

Whilst this fine may not be significant, more serious penalties can apply if other regulations are breached or if a drone is used to endanger a person, property or an aircraft. For example, article 241 of the Air Navigation Order (recklessly or negligently causing or permitting an aircraft to endanger any person or property) carries a fine and/or imprisonment for a term not exceeding two years. Criminal legislation could also apply.

For further information on the legislation relating drone legislation, see *"Drones: things to think about before taking flight"*¹.

Smart Contracts & Bitcoin

On 18 November 2019 the UK Jurisdiction Taskforce (UKJT), a taskforce under the Law Society's LawTech Delivery Panel (LTDP), published its *"Legal statement on cryptoassets and smart contracts"*².

As the construction industry looks to automate and digitalise workflows, processes, contracts and payments, it is comforting and reassuring to see the UKJT's legal statement concludes that a smart contract in principle can be identified, interpreted and enforced using ordinary and well-established legal principles.

Furthermore, the legal statement addressed those situations where a legal rule requires a document to be

"signed" or "in writing". Where a signature is needed, this requirement can be met by using a private key which is intended to authenticate a document. Where the requirement is to be "in writing", this can be met by a smart contract's code element being recorded in source code.

With regard to cryptoassets (such as Bitcoin), the legal statement confirmed cryptoassets have all of the indicia of property and therefore are to be treated in principle as "property". In the recent Commercial Court case of *AA v Persons Unknown (2019)*³, which concerned a payment made in Bitcoin in return for a decryption tool for a ransomware hack, Bryan J cited with approval the recommendation of the UKJT's legal statement. He held that cryptoassets such as Bitcoin meet the four criteria of property set out by Lord Wilberforce in *National Provincial Bank v Ainsworth (1965)*⁴. They are:

- definable;
- identifiable by third parties;
- capable in their nature of assumption by third parties; and
- have some degree of permanence.

For this and other reasons, Bryan J found that cryptoassets are property within the meaning of English law.

Regardless of whether the construction industry will embrace cryptoassets such as Bitcoin in due course, clarity in the law in technologies such as this, and indeed smart contracts, certainly will assist in the construction industry's inevitable digital use of digital technologies.

Infringement of database rights?

In November 2019 the High Court decided on a dispute between 77m Limited and Ordnance Survey Limited (the company which has been mapping Great Britain since 1791).⁵ The dispute concerned whether 77m had infringed on Ordnance Survey's database rights, if it had any such rights.

77m created a dataset called "Matrix" which consisted of geospatial coordinates and addresses in Great Britain. 77m used at least 18 datasets

from different sources to do so, some of which were publicly available and some of which they paid for. Several of these datasets came from Ordnance Survey, Her Majesty's Land Registry and the Registers of Scotland. Matrix would be a competitor of Ordnance Survey's product called AddressBase.

The address data that 77m was using originally came from Royal Mail; however, Ordnance Survey spends millions of pounds every year verifying this data.

The High Court held that Ordnance Survey did have a database right as there had been substantial investment in the verification process of the addresses that came from Royal Mail. 77m's use of the address data did infringe on Ordnance Survey's database rights and 77m did not have a license to use the data.

The use of other companies' data and databases in design and construction, or for the purpose of developing new products and processes to do so, is part and parcel of construction and energy projects. Whether a company has rights over particular datasets depends on the facts; however, this case certainly highlights the importance of understanding what licenses, both express and implied, are in place prior to embarking on the development of new innovations and advancements in technology.

Conclusion

It is exciting to see the growth and pace of the digital transformation of the construction industry taking shape. We hope the topics covered in our forthcoming issues will assist you and the industry in navigating through some of the uncharted challenges and opportunities.

If there is anything in particular you would like *Solutions* to cover, or if you just generally want to reach out, please do not hesitate to get in touch! Please feel free to contact me at anytime: ssinclair@fenwickelliott.com.

Enjoy!

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Footnotes

1. Stephanie Panzic, "*Drones: things to think about before taking flight*", <https://www.fenwickelliott.com/research-insight/annual-review/2019/drones-think-before-flight>.
2. <https://technation.io/about-us/lawtech-panel>
3. [2019] EWHC 3556 (Comm)
4. [1965] 1 AC 1175
5. *77m Limited v Ordnance Survey Limited* [2019] EWHC 3007 (Ch)