AGGREGATE

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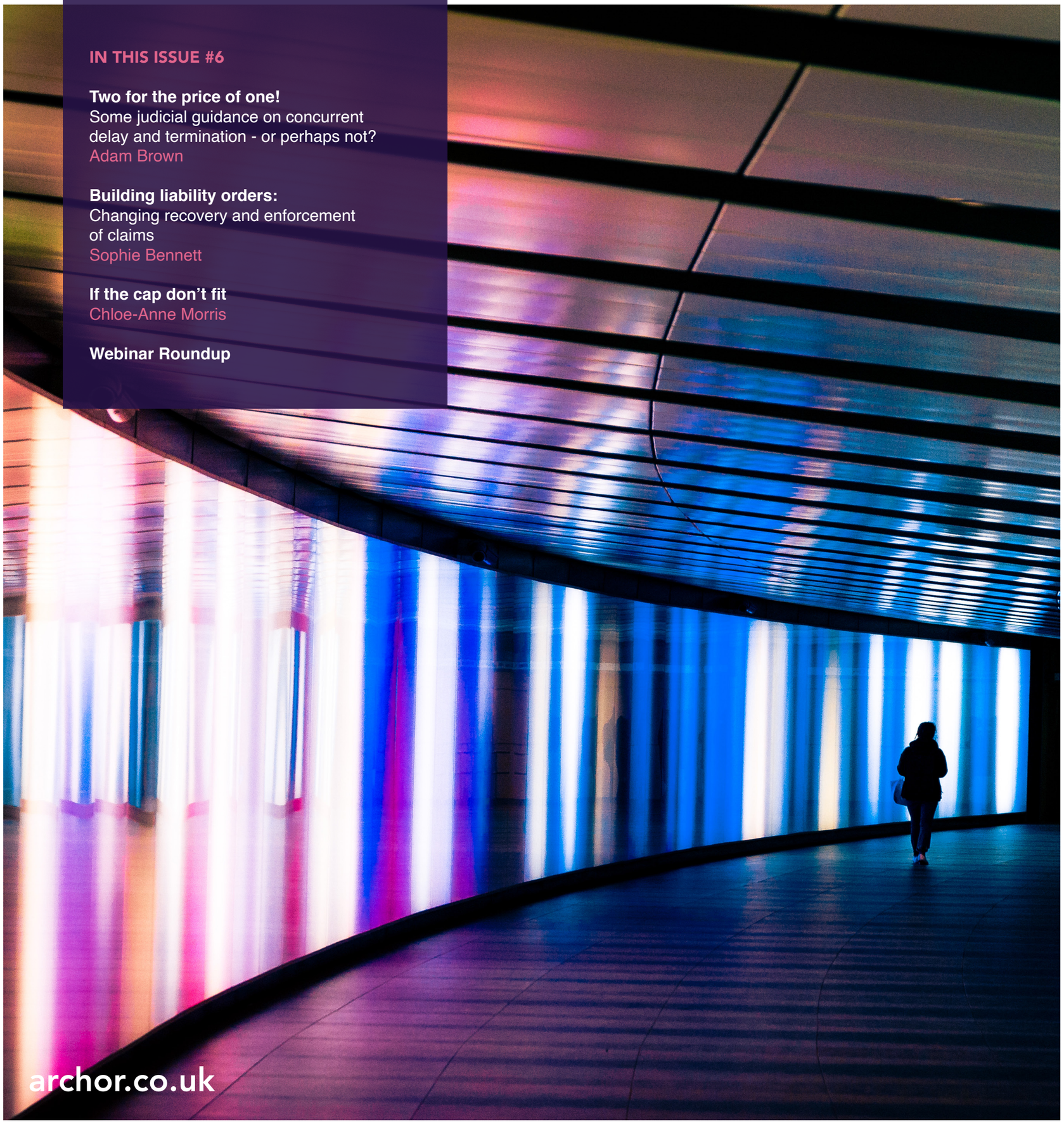

IN THIS ISSUE #6

Welcome to the latest edition of **Archor's Aggregate** newsletter and the last of the year.

Last week's very cold snap looks to be behind us, with the picture postcard snowy scenes a distant memory by the time Christmas arrives. Christmas is a time for family and friends – and, for those in the construction sector, the annual shutdown. The construction industry does many things well, but the custom of two weeks off at Christmas is certainly up there with the best of its innovations.

Of course, a well-earned break from on-site activities doesn't mean there's no time for anything construction related. In fact, what better excuse is there than to use the free time to catch up on some construction law? Aggregate is here to give you precisely that.

In the main article in this edition, Adam Brown – who recently joined Archor as a Senior Associate, specialising in disputes – looks at the recent Thomas Barnes case that has generated a lot of column inches already. Two much-vexed issues came up in that case – concurrent delay and termination – which Adam tackles in his piece.

We also take a look at Building Liability Orders – a new device introduced by the Building Safety Act aimed at giving owners of unsafe buildings a route to recovery. Controversially, they create the potential for sister and parent companies to assume liability for building safety issues, so it's well worth considering Sophie Bennett's article to understand what they're about. Finally, Chloe-Anne Morris looks at caps on liability, which are increasingly being asked for, particularly as a result of changes in the PI insurance market.

We hope you enjoy this edition, and as ever, if you have any ideas for future articles or other feedback, do please get in touch.

Oli, Editor-in-Chief

TWO FOR THE PRICE OF **ONE!**

SOME JUDICIAL GUIDANCE ON CONCURRENT DELAY AND TERMINATION – OR PERHAPS NOT?

The TCC recently handed down its judgment in *Thomas Barnes & Sons plc (in administration) v Blackburn with Darwen Borough Council [2022] EWHC 2598 (TCC)*. The 278-paragraph judgment covers a lot of ground and is well worth a read in full. However, this article focuses on two thorny issues that take centre stage in the judgment and which are often the cause of construction disputes: concurrent delay, and termination.

Background

The dispute arose out of an amended JCT contract under which the Council employed Thomas Barnes to construct Blackburn Bus Station. Although the bus station was ultimately shortlisted for a design award (we endorse the Court's recommendation to Google the reasons why!), Its construction was the subject of significant cost increases and delay overruns, which ultimately led to the Council purporting to terminate Thomas Barnes' employment under the contract and proceeding to have the work completed by a replacement contractor.

Thomas Barnes fell into in administration in 2015 and alleged that the Council's wrongful termination was a key factor in this. The administrators therefore advanced a claim against the Council for monies said to be due on a proper valuation of the works done (including a claim for loss and expense as a result of the delays for which the Council was alleged to be responsible) and damages for wrongful termination (which were said to represent its lost profit on the remaining works). The sum claimed at trial was £1,788,953.76, although the judgment notes that this was considerably less than was originally pleaded.

In response, the Council disputed the claim in full and alleged that, because the Council was entitled to charge Thomas Barnes the extra amount it had to pay to have the works completed, Thomas Barnes actually owed it £1,865,975.00. However, the Council did not advance a counterclaim for this sum given Thomas Barnes' financial situation, which meant that there was no realistic prospect of recovery.

Concurrent Delay

(i) Schools of thought

As a reminder, concurrent delay generally refers to a period of project overrun which is caused by two (or more) simultaneous events, one being an employer risk event and the other a contractor risk event.

There are three broad schools of thought as to how concurrent delay should be addressed:

1) The "dominant cause" approach – the traditional approach which requires the two delay events to be of equal causative potency for there to be concurrent delay. In the event that there are two delay events impacting the critical path but one is more dominant than the other, the less dominant one is excluded from the delay analysis.

2) The "reverse but for test" approach – this approach asks whether the employer event would have delayed completion in the absence of a contractor delay event, in which case it is deemed to be an effective cause of delay and there is no need to consider whether it is of equal causative potency with the other contractor delay event.

3) The "first-in-time" approach – this approach considers when the delay events occur and says that if an existing employer event has caused delay, any subsequent contractor delay event is treated as not being causative unless it increases the existing employer delay.

Support for the "first-in-time" approach can be found in two recent Commercial Court decisions *(Adyard Aby Dhabi v. SD Marine Services and Saga Cruises v. Fincantieri SPA)* as well as in the SCL Delay and Disruption Protocol. However, it has been criticised in other decisions, most notably in the Scottish case of *City Inn Limited v Shepherd Construction Limited* where the court considered it to be "unnecessarily restrictive which would militate against… [making] a judgment on the basis of fairness and a common-sense view of causation".

(ii) Application in this case

The contractual date for completion was 19 January 2015, although the Council granted an extension of time to 13 April 2015 during the course of the works.

At trial, Thomas Barnes claimed that it was entitled to a further extension of time to 8 November 2015. It said that the Council was responsible for the design of the structural steelwork and that follow-on works after the erection of the structural steelwork that were on the critical path were delayed because of a steel frame deflection issue to the roof beams in the hub area which required remedial works.

The Council's case was that the initial delays to the commencement of the steel frame and to the removal of deflected steel in the hub area justified an extension of time up to 13 April 2015 only (i.e. what it had already awarded) and that, at the same time that the hub steel deflection issue remained unresolved, the critical path was delayed by a separate delay in the relation to the roof coverings which it alleged was Thomas Barnes' responsibility.

1) The TCC therefore noted that there was a dispute between the parties relating to the criticality of the roof covering works and that it would need to consider whether the hub steel deflection issue and the roof coverings issue were concurrent causes of delay. Taking each of those points in turn:

2) The TCC favoured the Council's expert who opined that the baseline programme showed the roof coverings on the critical path and meant that the roof cladding, the concourse glazing and the majority of the internal finishes could not be progressed until those roof coverings were in place. It was critical of Thomas Barnes' expert who made only passing reference to other potential causes of delay to the hub building in his analysis and therefore (erroneously) opined that there was no need to consider the importance of the roof coverings.

The TCC found that the hub steel deflection issue and the roof coverings issue were concurrent over the relevant period of delay. That is because completion of the remedial works to the hub structural steelwork was essential to allow the concrete topping to be poured and the hub steel frame system to be installed without which the hub finishes could not be meaningfully started, but completion of the roof coverings was also essential for the hub finishes to be meaningfully started. It was not sufficient therefore for Thomas Barnes to say that the roof coverings were irrelevant because the remedial works to the hub structural steelwork were continuing both before and after that period of delay.

Interestingly, the parties agreed at trial that a key quote from Keating on Construction Contracts, a leading text book, was settled law. This states:

"In respect of claims under the contract:

i) depending upon the precise wording of the contract a contractor is probably entitled to an extension of time if the event relied upon was an effective cause of delay even if there was another concurrent cause of the same delay in respect of which the contractor was contractually responsible; and

ii) depending upon the precise wording of the contract a contractor is only entitled to recover loss and expense where it satisfies the "but for" test. Thus, even if the event relied upon was the dominant cause of the loss, the contractor will fail if there was another cause of that loss for which the contractor was contractually responsible."

Applying this, the TCC found that Thomas Barnes was entitled to an extension of time of 119 days as a result of the hub steel deflection issue but that, because it was concurrent with the roof coverings issue, it was only entitled to recover loss and expense for 27 days (i.e. the delay period less the period of concurrent delay). This had a significant impact on Thomas Barnes' delay-related claim for loss and expense.

The judgment therefore appears to lend its support to the "reverse but for test" approach and casts further doubt on the application of the "first-in-time" approach that has garnered recent favour from the Commercial Court and the SCL Protocol. However, because the TCC simply adopted what the parties in the case considered to be settled law as per Keating, it did not directly address what it considered to be the correct approach when assessing concurrent delay claims under English law. So although this case led to an interesting discussion of the correct position, it does not equate to proper judicial guidance.

Termination

Termination is the option of last resort and the courts continue to make clear that the consequences of getting it wrong can be severe. In particular, an invalid termination notice by one of the parties may itself constitute a repudiatory breach and entitle the other to accept that breach, terminate the employment under the contract and seek the recovery of their associated losses. Here, had the TCC found that the Council had issued an invalid termination notice, Thomas Barnes might have been entitled to its lost profit on the remainder of the works.

In this case, the Council's solicitors sought to issue a termination notice on various grounds that included Thomas Barnes allegedly failing to proceed regularly and diligently with the works and substantially suspending the carrying out of the works. The notice expressly relied on a contractual right to terminate as well as its rights under common law. However, the issue for the Council was that the notice was initially sent by email, which was not a permitted method of service for notices under clause 1.7.4 of the JCT contract, and Thomas Barnes was removed from the site the very same day. The notice was subsequently sent by post but, pursuant to the contract, deemed service took effect two business days later by which time Thomas Barnes had already been removed.

However, despite Thomas Barnes' removal from site two business days before the purported termination notice could take effect under the contract, the TCC held that this did not prejudice Thomas Barnes and did not amount to a repudiatory breach by the Council. In coming to this decision, the TCC found that there was no adverse impact on Thomas Barnes because it had already ceased all meaningful activity on site and the grounds for termination were justified such that Thomas Barnes could have been removed from site two business days later in any event.

As such, the TCC found that the Council would have been permitted to contractually terminate Thomas Barnes' employment under the contract as at the date of deemed service of the notice, and also to terminate under common law for Thomas Barnes' repudiatory breach for delay as at the date on which Thomas Barnes was removed from site. The court appeared to be influenced by the fact that the notice expressly stated those two alternative grounds for termination, and that clause 8.3.1 of the contract reserved the Council's rights in addition to its contractual rights to terminate.

All of this meant that, while the Council had not validly terminated Thomas Barnes' employment under the contractual provisions, the Council had been entitled to do so under common law as a result of it accepting Thomas Barnes' repudiatory breaches and, in turn, the Council was entitled to recover and set off the costs it had incurred engaging a replacement contractor to complete the works. As these costs undoubtedly exceeded any entitlement to loss and expense, the TCC concluded that Thomas Barnes' claim failed and it was not necessary to consider quantum any further.

Take Aways

The judgment in this case has perhaps introduced even greater uncertainty as to how concurrent delay should be approached for the purposes of assessing a contractor's entitlement to an extension of time. Prior to the judgment, the most recent trend was to make an assessment adopting the "first-in-time" approach but it would now appear that this has fallen out of favour. Proper judicial guidance, ideally from the Court of Appeal to address the competing authorities, is needed now more than ever.

As for termination, although the Council got away with it on this occasion, it is still the case that a party should follow the termination provisions in their contracts to the letter when terminating, or else it risks the termination being invalid and opening itself up a damages claim for wrongful termination. This judgment is a valuable lesson on the importance of carefully drafting and serving a termination notice – had the Council got it right from the outset, it's possible this claim might never have been brought.

Adam Brown
Senior Associate

BUILDING LIABILITY ORDERS

Changing **recovery** and **enforcement** of claims

Sophie Bennett
Trainee Solicitor

Alright, let's start with the basics: what on earth is a BLO, or Building Liability Order?

BLOs came into existence on 28 June 2022, courtesy of the Building Safety Act 2022. They essentially allow the court to pierce the corporate veil to extend liabilities of one body corporate (company, limited partnership etc) to any associated corporate bodies on a joint-and-several basis, including corporate bodies that are insolvent or have been dissolved.

The main aim of this is to prevent SPVs and JVs from dissolving at the end of a development and thereby avoiding liability for any claims that may crop up after dissolution because they no longer exist as a company. BLOs mean that these common corporate structures for property development might not be as valuable as they once were.

Piercing the corporate veil sounds… fantastical. What does that mean?

Limited companies (and some other corporate entities) are their own legal entity, so directors and managers and all the people of the company have their personal assets protected in the event a claim is brought against the company (there are a few exclusions but we won't go into that here). This 'veil' of corporate personality is a legal device aimed to facilitate business and protect individuals.

Therefore, if a claim is brought against a company, any damages are recovered from the company's assets, not the personal assets of the people running it, or the people who caused or contributed to the claim. Likewise, if a company is not associated to a claim, it cannot be pursued for court for damages. So for example, I wouldn't be able to sue unrelated Company A for Company B's negligence, even if they had the same parent company.
'Piercing' that protection means that the courts go after the root cause – they will look past the 'corporate veil'. However, it is traditionally very difficult – it generally requires fraud for an individual director or shareholder to be held liable for the actions of a company. And there is good reason for that – if it was easy to 'pierce' the veil, it simply wouldn't be worth having in the first place.

Building Liability Orders utilise this idea to allow the courts to pursue previously 'protected' parties – like dissolved entities, insolvent companies, and perhaps most significantly, sister and parent companies.

Who can be claimed against?

'Associates' are defined as:

A body corporate that controls or is controlled by the body corporate that undertook the works – for example, a parent company; or

Two companies controlled by the same company. This may therefore include a sister company within a group structure.

Oh…no. So, am I at risk of these kinds of claims?

Currently, only the following liabilities fall under the remit of Building Liability Orders:

- Claims under the Defective Premises Act 1972 (the 'DPA').
- Claims under Section 38 of the Building Act 1984 – although that isn't yet in force.
- Any claims resulting from a 'building safety risk'. This has been defined as a 'risk to the safety of people in or about the building arising from the spread of fire or structural failure'.

So if the claim brought against you doesn't fall under one of these categories, the courts can't issue a BLO. However, given the current focus on building quality and historic fire safety issues, the scope of items 1 and 3 above is potentially wide.

As a reminder, the DPA requires the construction of dwellings to be carried out in a 'workmanlike' or 'professional' manner with the proper materials, and requires the completed dwelling to be fit for habitation. The Building Safety Act extended this somewhat, notably allowing claims for harm caused by non-compliance with Building Regulations. So, if you're an SPV, you build a wonky dwelling with asbestos, and then dissolve the SPV, theoretically a BLO could be issued to pursue you and related companies. This also covers work done to an existing dwelling.

It is also worth noting that it is just not the company or person that commissioned the original work that can claim, but also any other person with a legal or equitable interest, such as leaseholders – the DPA gets round the need for a direct contractual relationship (which would probably be required, for example, for claims under item 3 above). The Building Safety Act also amends the limitation periods for the liabilities mentioned above. Claims under the DPA used to have a limitation period of 6 years – this has now been increased to 15 years for new claims relating to refurbishment, and 30 years for the construction of dwellings. These time periods also extend retrospectively, meaning buildings constructed as long ago as 1992 might be subject to claims.

This all sounds worrying. Is this fair?

Many have argued that BLOs are unfairly wide and risk undermining the purpose of separate corporate personality. Complicated corporate structures are built precisely to limit risk, and the absence of that protection may limit investment and in turn harm the economy. You could argue the flip side of that, however: it's not unreasonable to require buildings to be built safely, and if BLOs put off anyone, it will be those developers who consider they are at risk of not complying with the BPA etc. That, surely, is not a bad thing?

In addition, the court can only issue a BLO where it is considered just and equitable. This will probably be decided on a case-by-case basis and there is no prescriptive test. As BLOs are a new creation, we don't yet have any judicial guidance on how they will approach the test – but where parties have acted reasonably, or an in reality completely unrelated party is pursued on a technicality, it seems unlikely that it will be 'just and equitable' to issue a BLO.

What should I do?

BLOs undoubtedly extend the scope of potential liability. Because they apply retrospectively – subject to the 'just and equitable' test, they have also brought into play many historic projects that parties thought limitation had passed on.

As to what can be done, the simple answer is not a lot. Developers and others involved in the construction and refurbishment of properties should already be doing their utmost to ensure buildings are built safely – it is only those that don't that really need to be concerned about BLOs. Where legacy projects are concerned, where projects were perhaps built to different standards, parties should however be alive to the prospect of BLOs and consider how they might mitigate any potential exposure.

IF THE **CAP** DON'T **FIT?**

I know the normal saying is 'if the shoe don't
It is typical to set as a minimum, a cap on liability set to the same level as the professional indemnity insurance – so the two different clauses align. However, pushing for too aggressive caps can backfire.Firstly, a client is unlikely to accept such terms – often driven by its funder. Secondly, and more importantly from a legal perspective, a cap on liability set at a level too low may fall foul of the "reasonableness test" under the Unfair Contract Terms Act 1977 (UCTA).

Although decided nearly 10 years ago, the leading case on where a consultant's liability was capped too aggressively is Trustees of ***Ampleforth Abbey Trust v. Turner & Townsend Management Ltd [2012]***. Turner & Townsend set a cap in its appointment at the level of its fees - circa £115k. Within the same appointment it had an obligation to maintain professional indemnity insurance in the sum of £10 million. The Court decided that the cap was unreasonable, primarily as the requirement to maintain professional indemnity insurance of £10 million was seen as illusory. The result was that the clause was struck out and left the consultant with no cap whatsoever. It may be more able to justify a cap much lower than a PI level if it is an aggregate policy, as it could be argued that policy is there to cover a range of projects. With an each and every form of PI policy, such an argument fails.

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However, as with all legal principles, there is always another side to the story. The Court is loathed to interfere with contractual agreements between commercial parties. As Clarke J said in ***Balmoral v. Borealis [2006]***, "commercial parties habitually make agreements amongst themselves that allocate risk; and the Court should not lightly treat such agreements as unreasonable".

Another case, ***Allen Fabrications Ltd v. ASD Ltd***, in the same year as Ampleforth made exactly the same point. While not directly related to PI clauses, where the relationship between the parties does not suggest an inequality of bargaining power, more aggressive limitation clauses may be acceptable.

So what is the answer, where there are some cases saying parties can agree 'aggressive' commercial terms, yet others saying it has to be seen, particularly with consultants, in the light of other provisions and specifically levels of PI insurance?

The answer is to make sure the cap fits. Don't insist on a cap that is wholly unreasonable, particularly in light of the size of the project and any professional indemnity insurance requirements. And look to cap specific losses (such as loss of profit, indirect or consequential losses). Each project has to be considered on its own merits – there is no one size fits all approach, but with a bit of thought caps on liability can be successfully negotiated and enforced.

Chloe -Anne Morris
Paralegal

WEBINAR ROUNDUP

We've had thousands of subscribers to our webinars this year – five in total, and more done alongside other organisations. All our webinars are available on our **YouTube channel** for you to peruse at your leisure, and if you have any questions while you're watching them we're happy to field questions – send them to the presenters or social@archor.co.uk.

Construction law questions you were too afraid to ask…

Our first webinar of the year looked at some 'obvious' construction issues which are actually not that straightforward. Ruth, Hanna and Hayley went through eleven topics covering a range of common issues.

'It's dull but you asked for it' – collateral warranties

Andrew, famed for being a very dull man, gave the people what they want in April along with Sarah – a webinar about what we thought was a very dull topic. But it was one of our most popular to date, proving that we clearly know nothing about what is actually interesting.

Assignment and Novation explained

Spurred on by the unexpected success of the warranties webinar, Andrew and Sarah returned in May with another 'dull' topic – how assignment and novation work in practice.

Bonds, guarantees and other security

After the summer, the final part of the grandly titled 'dull trilogy' hit your screens – not quite Lord of the Rings, but something like it. Andrew and Jess looked at forms of construction security – a constantly hot topic.

NEC – what do the courts think?

Our final webinar of the year took a look at the increasingly popular NEC suite of contracts through the eyes of the court. Often thought not to generate as many disputes, Carolyn and Oli picked ten cases as proof that there is plenty of case law guidance out there.