Construction PI Newsletter

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EWS1s: An added complication to the surge in cladding claims

The introduction of EWS1 external wall safety certificates by RICS, BSA and UK finance has not been without complication. The certificate requires completion by a member of one of various professional bodies specified by HM Government, by which the consultant must certify that, where a building has cladding, either the cladding material and insulation in the external wall system meet the criteria of limited combustibility with cavity barriers installed in appropriate locations (Option A), or certify that any combustible materials used in the external building system either pose a negligible risk of fire or require remediation (Option B). Whilst intended to unlock the housing market, this has in fact had the opposite effect, with the forms being short, lacking the ability to include bespoke information / caveat such information and concerns regarding the scope of liability that attaches to such sign off. Concerns around the forms / a refusal to sign the certificates have in fact contributed to stagnation of parts of the flat sale market.

There are, of course, substantial potential professional indemnity insurance implications in signing EWS1 that a certifying consultant should consider.

Liability to the recipient of the EWS1 in negligence may attach should the certificate be certified incorrectly. Crucially, there is no financial limit on that potential liability so the implications could be far reaching. This is particularly problematic given the nature of the certification and a lack of clarity as to the extent consultants should satisfy themselves as to the buildings external compliance. We understand that Insurers are, understandably, adopting a cautious approach to such work, with some expressly excluding cover for the signing of EWS1s.

As a result, consultants have grown apprehensive of conducting EWS1 certifications and lenders continue to refuse mortgages in instances where a certificate has not been completed. HM Government's response to this situation continues to develop. It is funding a scheme operated by RICS to train an additional 1,200 assessors this year and, according to recent government press releases, has committed to working towards a state-backed indemnity scheme for qualified professionals unable to obtain professional indemnity insurance. The details of this scheme are likely to be provided in the coming weeks. In the meantime, we advise consultants and professional indemnity insurers to discuss this matter transparently, both in terms of existing and new professional indemnity policies, to avoid any commercial disputes in the future.

Industry Snapshot

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The Construction Leadership Council confirmed on 12 February 2021 that construction output fell by 2.9% in the month on month all work series in December 2020. This is the first monthly decline in growth since the record fall in April 2020 and output is now c. 3.5% below the pre-coronavirus 2020 level. Does this represent the beginning of the downturn that we all feared?

With growth down, we anticipate an increased appetite for disputes / litigation in the construction industry, with companies trying to minimise impact on their bottom line / maintain liquidity. The view that there will be more disputes in 2021 is a view shared by the CLC who issued, in January 2021, their predictions that dispute levels will increase.

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Winding up petitions: a litigation strategy that still works?

1. Traditional effect of winding up petitions

A winding up petition is a way by which an unpaid creditor can petition the courts to force an insolvent company into compulsory liquidation for the continued non-payment of debts. It therefore represents a powerful and very tactical tool in a creditor's arsenal, as they traditionally introduce a genuine threat of formal insolvency; often being described as the "*nuclear option*" in debt recovery, whilst allowing a creditor to avoid the cost of issuing a formal claim at that time.

2. Effect of CIGA20

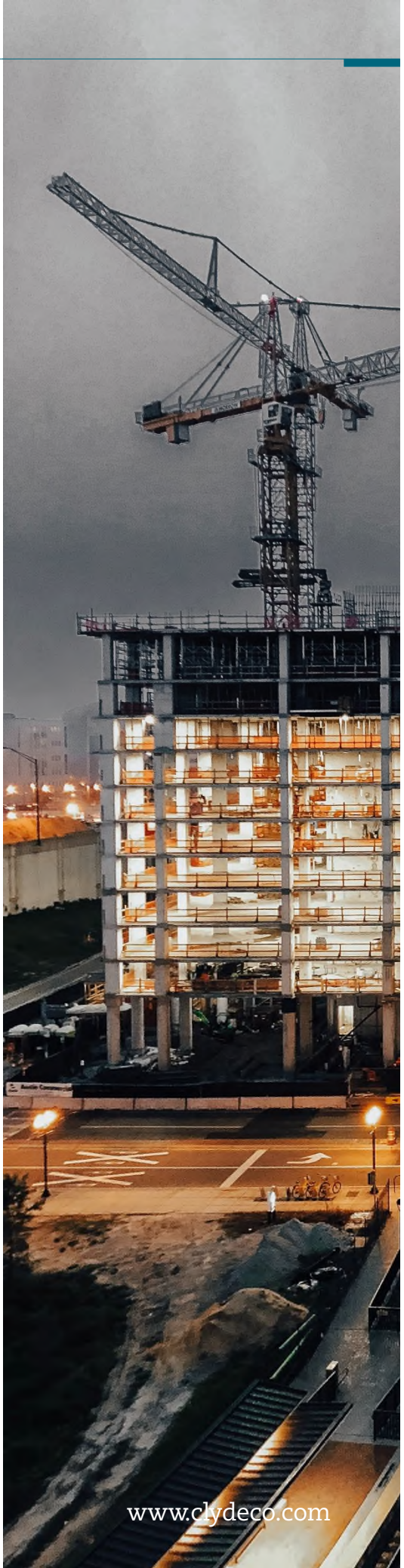
The Corporate Insolvency and Governance Act 2020 ("CIGA20") was introduced to provide relief to companies in financial distress as a result of the Covid-19 pandemic, and the resulting economic crisis. It effectively temporarily restrains a creditor's use of winding up petitions. To succeed, a creditor must now demonstrate reasonable grounds to believe that: (i) COVID-19 has not had a financial impact on the company; or (ii) that the grounds on which the petition is presented would have applied even if Covid-19 had not had an effect on the company. It also prevents winding up petitions from being presented on the basis of an unpaid statutory demand, rendering their use somewhat futile. Whilst these temporary measures were originally due to expire on 30 September 2020, the resurgence in Covid-19 cases means that they have been extended until at least 31 March 2021, and a yet further extension has already been tabled by the Government at the time of writing.

It nonetheless seems to us that it will be extremely difficult to demonstrate that companies involved in the construction industry have not been impacted by the pandemic, and as such, CIGA20 will likely apply to any attempt by a creditor to recover fees.

3. What should creditors do?

Creditors are left to employ more traditional forms of commercial and legal pressure, most immediately in the form of costly and time consuming litigation and/or ADR.

Even then, a debtor's non-payment of an award could ultimately leave the creditor far worse off, with the debt now merely taking the form of a costly court order. In the context of construction projects, often involving a chain of actors each dependent on payment from those upstream, CIGA20 has no doubt left many sub-contractors with little-to-no options by way of debt recovery, further exacerbating their own strained solvency.



With CIGA20's (albeit continually extended) protection remaining in the form of temporary measures, many in the construction industry may eventually find themselves in hot-water, meaning that the true extent of the Supreme Court's decision in *Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25 is yet to be seen.

4. Effect of *Bresco v Lonsdale*: allowing adjudication notwithstanding insolvency

At a high level, the decision concerned an adjudication brought by a sub-contractor in liquidation (Bresco) against another contractor (Lonsdale) for unpaid fees. Lonsdale cross-claimed sums due from Bresco, and accordingly objected to the adjudication since the dispute allegedly fell within the confines of insolvency set-off, thereby precluding adjudication. Lonsdale further claimed that, in any event, an adjudicator's decision would not be enforced until the liquidator calculated the net balance, rendering an adjudication futile.

The Supreme Court was clear in its determination that adjudication was not incompatible with the insolvency regime and that there was no bar preventing an insolvent claimant's statutory and contractual rights to commence / pursue adjudication.

In reality, given the number of insolvencies currently kept in abeyance by the CIGA20 measures, it will be interesting to see the true extent of the Supreme Court's decision once these temporary measures expire.

Experts' duties and conflicts of interest - the Court of Appeal judgment in *Secretariat PTE Ltd & Ors v A Company* [2021] EWCA Civ 6

This recent Court of Appeal decision, upholding an injunction against global construction experts, gives important guidance on the duties owed by expert witnesses to their clients, in particular in relation to conflicts of interest – and may have even wider implications.

Summary

The proceedings were brought by Company A, the developer of a petrochemical plant, against 3 entities in the global Secretariat group, which provides litigation support and expert services for construction disputes.

Company A engaged a Secretariat company based in Singapore ("SCL") to provide expert services in relation to arbitration proceedings brought by a sub-contractor (Arbitration 1) concerning delays on the project. The retainer terms (issued after SCL had confirmed a group-wide conflicts check had come back clear) included a clause confirming that SCL had no conflicts of interest and would maintain that position for the duration of its engagement.

Subsequently, a third party commenced separate arbitration proceedings against Company A concerning delays on the same project (Arbitration 2). The third party asked a Secretariat company

based in the UK ("SIUL") to provide expert services to it in connection with Arbitration 2. Company A objected to this engagement and said it created a conflict of interest. However SIUL accepted the instruction anyway. When Company A became aware that SIUL had done so and was acting *against* it in Arbitration 2 even while SCL acted *for* it in Arbitration 1, it sought an injunction.

An interim injunction was granted and then extended by a Judge in the TCC, preventing SIUL (and also SCL and another Secretariat company) from acting in Arbitration 2. She found that SCL - and on the facts the whole Secretariat group - owed a fiduciary duty of loyalty to Company A arising out of its engagement in Arbitration 1, which had been breached by SIUL accepting the subsequent engagement *against* it in in Arbitration 2. This was the first time in the English jurisdiction that an expert had been found to owe a fiduciary duty to its client.

Court of Appeal

The Secretariat companies appealed but the injunction was upheld, albeit on different grounds. The key points of interest in the Court of Appeal's judgment are as follows:

- The Court held it was not necessary to make a finding as to fiduciary duties, as this case could be decided on the basis of the express conflicts clause in the retainer. However, Lord Justice Coulson (giving the leading judgment) left open the possibility, saying that depending on the terms of the retainer, independent experts (or providers of litigation support services) *may* owe their client a duty of loyalty akin to a fiduciary duty, notwithstanding their overriding duty to the Court.
- The express conflicts clause was contained in a retainer letter between SCL and Company A, but it was construed as being given on behalf of all the group entities. This was because the conflicts search was run across the whole Secretariat group (to Company A's knowledge) and Secretariat presented itself in numerous ways as a single global enterprise with regional offices. Also the consequences of construing it as limited to a single entity were "commercially unrealistic".
- Coulson LJ rejected the suggestion that there was any valid distinction to be made between a "testifying"/expert witness and a "roving"/advisory expert, save to comment that delay and quantum experts typically had a very wide advisory role and that was more likely to risk creating a conflict.
- The conflict here arose because the two instructions were in respect of the "*same or similar disputes on the same project*" and where the overlaps - of parties, role, project and subject matter - were "*all-pervasive*". The Judgment makes clear that it should not be taken as saying that the same expert cannot act both *for* and *against* the same client - and indeed it is "inevitable" with large multinational companies that this is sometimes the case – but the conflict arises because of the degree of overlap between the two instructions here.

Implications for experts (and the wider construction industry)

- The increasing globalisation and consolidation of firms offering expert services across multiple jurisdictions – particularly for construction disputes – means that this decision will likely have a significant impact on the manner in which these services are structured and marketed.
- In particular, there is a clear risk that a retainer commitment to avoid conflicts of interest given by one entity in an expert group will be interpreted to bind all the companies in the group. Firms can seek to amend their terms expressly to limit the commitment to the contracting entity – but query whether clients will be willing to accept this.
- The judgment left the door open (particularly in the absence of express contractual provision) to a finding that an expert owes a fiduciary duty of loyalty to its client – and perhaps by extension that so do construction professionals acting in a non-expert capacity (where there is no overriding duty to the Court in potential counterweight). So this could well be an issue that comes before the Court again.

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