LAWYERS TO THE CONSTRUCTION & ENGINEERING INDUSTRIES

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In Site

Corporate Manslaughter and Corporate Homicide Act 2007

The Corporate Manslaughter and Corporate Homicide Act 2007 ("the Act") received Royal Assent on 26 July 2007 and comes into force on 6 April 2008. The Act represents the culmination of a process of reform which began with the Law Commission's 1996 Report 'Legislating the Criminal Code: Involuntary Manslaughter'.

The Act creates a new offence of corporate manslaughter (or corporate homicide in Scotland). Until now, it has been possible (although in practice difficult) for a corporate body to be prosecuted for the common law offence of manslaughter by gross negligence. A gross breach by the company of a duty of care owed to the victim needed to be established and a 'directing mind' of the corporate body also had to be found guilty of the offence. Due to Crown immunity, Crown bodies could not be prosecuted for this offence.

The Act abolishes the common law offence as far as it applies to companies and other bodies covered by the Act in respect of offences committed after the commencement of the Act.

Proceedings can, however, still be brought in respect of the common law offence if the offence was committed wholly or partly before the commencement of the Act.

Section 1 of the Act provides that an organisation to which Section 1 applies is guilty of an offence if the way in which its activities are managed or organised: "*(a) causes a person's death, and (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased*".

Section 1 applies to corporations, the Government departments or other bodies listed in Schedule 1 to the Act, police forces, and partnerships, trade unions or employers' associations which are employers. Limited liability partnerships created under the Limited Liability Partnerships Act 2000 are not covered by the definition of partnerships in the Act, but as bodies corporate, they are organisations to which the offence applies.

The key aspects of the common law offence and the Act are very similar and the new offence does not impose new

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Welcome to the Winter edition.

In this edition we review the key provisions of the new Corporate Manslaughter and Corporate Homicide Act 2007, comment on the introduction of new RIBA forms, and provide our usual case update.

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duties of care where these are not currently owed. A *"relevant duty of care"* means the duties owed by the organisation under the laws of negligence set out in Section 2 (which include both the common law and statutory provisions such as the Occupiers' Liability Acts 1957 and 1984, and the Defective Premises Act 1972). Some of the duties specified in Section 2 are as follows: duties owed to employees or other persons working for the organisation, duties as the occupier of premises and duties owed in connection with the carrying out by the organisation of any construction or maintenance operations. Although Government bodies are caught by the Act, Sections 3 to 7 provide that the offence does not apply to the performance of specified public functions (public policy decisions, military operations, fire and rescue emergencies and the like).
Guidance is also given as to what constitutes a *"gross"* breach, namely that the alleged conduct falls far below what can reasonably be expected of the organisation in the circumstances.

Establishing culpability of a directing mind is no longer necessary but an organisation is only guilty of the offence *"if the way in which its activities are managed or organised by its senior management is a substantial element in the breach"*. Such management failure does not need to be the sole cause of death, but it must be a cause (subject to questions of causation). *"Senior management"* means the persons who play significant roles in making decisions about, or actually managing or organising, the whole or a substantial part of the organisation's activities.

Trial is by jury. As well as considering whether the evidence shows that the organisation failed to comply with any applicable health and safety legislation, the jury may also consider *"the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure…or to have produced tolerance of it"*.

If an organisation is convicted of the offence then fines will apply. Remedial orders (to remedy the breach and/or any more general health and safety deficiencies) and publicity orders (requiring the organisation to publicise the fact it has been convicted, particulars of the offence, the fine and remedial measures) can also be made. Convictions under the Act do not preclude conviction under other existing health and safety legislation. Individuals cannot be prosecuted under the Act. There is no offence of aiding or abetting, or procuring the commission of the offence of corporate manslaughter or corporate homicide, although individuals can (as is already the case) be prosecuted under the Health and Safety at Work Act 1974 if they expose people to health and safety risks.

The paramount importance which any organisation should give to health and safety issues has not changed by the introduction of this Act, but the consequences of failing to do so, for a broad range of organisations, certainly has.

New RIBA Standard Forms

RIBA has recently released its 2007 suite of appointment documentation ("RIBA Agreements 2007") which are intended to "*provide components of a flexible system which can be assembled to create contracts tailored to the needs of the project in hand*". The new appointments replace SFA/99, CE/99 and the like. Standard, concise and domestic forms are available for architects and other consultants. The standard forms will continue to be the most commonly used. RIBA advises that the concise form may be suitable for simple contracts, and the domestic form where the client requires work in his or her home. Each form of appointment is supported by a wide range of services schedules, a sub-consultancy agreement and a supplementary schedule for contractor's design services (for use on design and build projects). Key differences between the 1999 and 2007 forms include:

- a new definition of Relevant Cost which is used instead of Construction Cost to calculate the Basic Fee;
- provision for third party rights as well as collateral warranties; and
- giving the architect/consultant the right to terminate after giving notice of suspension if the client does not remedy a default.

The Guide to RIBA Agreements 2007 is scheduled for publication in December 2007.

Case update

Time for decision

The issue in *AC Yule & Son Ltd v. Speedwell Roofing & Cladding Ltd* (TCC, 31 May 2007) was whether the adjudicator's decision was a nullity as it was delivered outside an agreed extended period for issuing that decision.

The adjudication was brought in accordance with the Scheme for Construction Contracts ("the Scheme") and the adjudicator's decision was originally due on 20 March 2007. The parties agreed to extend this to 3 April 2007 and the adjudicator delivered his decision (in favour of Yule) on 4 April 2007. Speedwell contended that the decision was a nullity as it was delivered outside the extended period. A significant amount of information was exchanged between the parties and copied to the adjudicator throughout the adjudication. On 27 March the adjudicator gave Speedwell until 30 March to respond to the latest documents provided by Yule and asked for a further short extension from 3 April to 5 April to reach his decision. Yule agreed to the further extension. Speedwell made no response in relation to the extension.

Further exchanges of information and documents took place between the parties and the adjudicator up to 3 April and on 4 April the adjudicator sent an email to the parties in which he said that he would provide his decision that day. Neither party responded and, importantly for the Judge in this matter, Speedwell did not respond to say his decision was out of time. In his decision, issued on 4 April, the adjudicator said that "*the parties agreed to extend the date of the issue of my decision … to 5 April 2007*". It was not until 14 May that Speedwell indicated that it considered the adjudicator's decision to be a nullity on the basis that it had been provided after the expressly agreed extension of time to 3 April.

There is a clear obligation on both parties to respond to an adjudicator's request for an extension of time. Silence may amount to acquiescence

Speedwell's argument that the decision was a nullity was rejected for the following reasons:

- There is a clear obligation on both parties to respond plainly and promptly to an adjudicator's request. A party which does not respond runs a very clear risk that its silence will be taken to amount to acquiescence to the requested extension. In the Judge's view Speedwell, by its silence, accepted the adjudicator's request for an extension to 5 April.
- Speedwell took part in a process of exchanging documents and information up to and including 3 April that made it impossible for the adjudicator to reach his decision on that day. Speedwell therefore did more than merely acquiesce to the extension by silence, by conducting itself in a way wholly consistent with it having agreed the further extension.
- Speedwell was in any event estopped by its silence and/or conduct from denying that the adjudicator's decision of 4 April was invalid and/or reached out of time.

Withholding on termination

The case of *Pierce Design International Ltd v. Mark Johnston & Another* (TCC, 17 July 2007) considers the extent of the application of the House of Lords' decision in *Melville Dundas Limited (In Receivership) and Others v. George Wimpey (UK) Limited and Another* [2007]. *Melville Dundas* decided that the JCT conditions of contract allow an employer to withhold an interim payment in the event of a contractor's insolvency without serving a withholding notice.

The House of Lords' decision in *Melville Dundas* has been applied by the lower courts for the first time

In the present case, the defendants failed to make certain interim payments to the claimant and subsequently determined the contract alleging incomplete and defective works. The claimant sought summary judgment of the unpaid sums on the basis that, as no withholding notices had been issued, the sums were payable. The defendants sought to rely on clause 27.6.5.1 of the contract, which provided that where the contractor's appointment was terminated:
"...the provisions of this Contract which require any further payment or any

release or further release of retention to the Contractor shall not apply provided that clause 27.6.5.1 shall not be construed so as to prevent the enforcement by the Contractor of any rights under this Contract in respect of amounts properly due to be paid by the Employer to the Contractor which the Employer has unreasonably not paid and which … have accrued 28 days or more before the date of determination of the employment of the Contractor."

The first issue in this case was whether that clause falls outside section 111 of the Construction Act (which requires withholding notices to be issued) because it allows an employer not to pay a sum due, despite the absence of a withholding notice. This issue in turn depended on whether the *Melville Dundas* decision applied beyond its facts i.e, beyond the insolvency of the contractor and/or the impossibility of serving a withholding notice. The Judge noted that *"t]here is a fear that, taken to its logical conclusion, the decision [in Melville Dundas] might allow an employer to refuse to pay the sums due under the contract, and then determine the contractor's employment at the last moment, thereby providing him with a defence to any claim for those sums, irrespective of the fact that there had been no withholding notices"*. As the House of Lords had however considered and decided (albeit by a majority) that clause 27.6.5.1 was not at odds with section 111 of the Act, the Judge concluded that he was bound by that decision and that he was not *"attracted to an argument which seeks to suggest that, on one set of facts, a clause in a standard form contract complies with the 1996 Act whilst, on another set of facts, it does not".*

Having decided this, the second issue in this case was whether the proviso in the clause should be operated. On the issue of whether the employer had *"unreasonably not paid"* the amount, he rejected the defendants' argument that in assessing whether or not it was reasonable to withhold payment, the Court had to consider what was reasonable at the time of the trial, rather than the date the interim payment was due. If the Court had to decide what was reasonable at the time of the trial the proviso would never apply, because it would always be reasonable for the employer to set off sums owing as a result of determination.

Instead, the Judge held that the Court merely needed to consider whether or not a withholding notice had been served. If a withholding notice had been served, then it would be reasonable to withhold payment. Otherwise, any withholding would be unreasonable. That was the position here. As such, the proviso prevented the defendants from withholding payment under clause 27.6.5.1 and payment was due to the claimant. Summary judgment was awarded to the claimant.

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