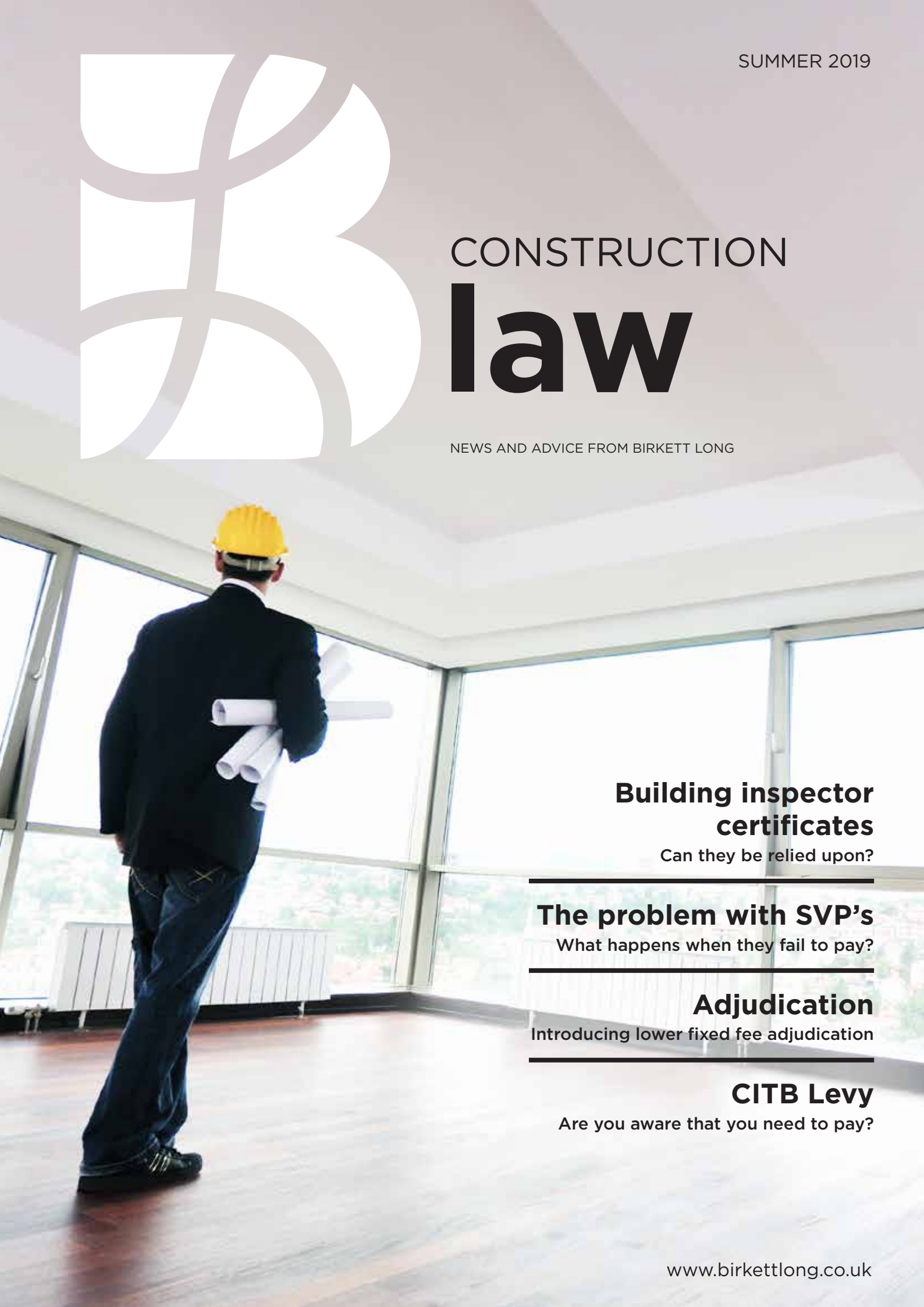
SUMMER 2019

CONSTRUCTION law

NEWS AND ADVICE FROM BIRKETT LONG



Building inspector certificates

Can they be relied upon?

The problem with SVP's

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Adjudication

Introducing lower fixed fee adjudication

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Are you aware that you need to pay?

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Are building inspectors' certificates worth the paper they are written on?

In a construction project, a Building Inspector examines the works to certify that they comply with the Building Regulations. A Final Certificate is issued confirming that they have fulfilled their duties under the Regulations. The certificate is often accepted by subsequent parties as sufficient evidence that the property has been built properly.

If it is discovered that the property hasn't been constructed properly, a party may look to take proceedings against the Inspector. The Inspector is usually employed by the builder or developer, who no longer has an interest in the property. It is the new owner that looks to make a claim.

There is no contractual relationship between the new owner and the Building Inspector and so there is no claim in contract. A collateral warranty probably won't have been provided. Since the decision in Murphy v Brentwood Borough Council, it has also been the case that there is no claim in negligence. This case involved local authority building inspectors. The point as to whether approved inspectors owe a duty of care has not yet been decided, although it is unlikely that a party would take the risk of pursuing such a claim.

Parties have considered making claims under the Defective Premises Act 1972 ("Act") and negligent and/or fraudulent misrepresentation. Recently, a claim under the Act has been considered by the High Court and Court of Appeal.

The Lessees and Management Company of Herons Court v Heronslea Limited and Others arose from the construction of a block of flats. Significant defects were found which would cost about £3 million to repair. One of the defendants was the Approved Building Inspector who had issued a Final Certificate. The certificate confirmed that he had complied with his duties under the Building Act and that the building works complied with the Building Regulations.

It was held in the High Court that an Inspector is not a person who takes on work for, or in connection with, the provision of a dwelling. Therefore, an Inspector would not have a duty under

Has the SPV failed to pay you

Development companies often set up a Special Purpose Vehicle ('SPV') when they wish to develop a property. These are usually limited liability companies. They are set up to protect a holding or investment company from claims if the project goes wrong.

Liability is limited to the assets of the SPV, which may be very small. The SPV often owns the property being developed but this will often be worthless as it will have a charge on it from funders, either the parent investment company or bankers.

If problems occur with the development, the SPV is put into liquidation. That limits the investment company's liability as claims cannot be made against it.

Sometimes the problems are no fault of the developer but, on occasion, this is done deliberately so as not to have to pay for the work carried out by contractors.

Often the contractor and its subcontractors are left unpaid for their work, whilst the parent company completes the development and takes advantage of not having to pay for the work done. There was little that could be

the Act and is not liable under that Act. This was considered by many as a surprising decision, bearing in mind the role that an Inspector undertakes in the construction of houses and checking that they have been built properly.

Leave to appeal the Herons Court decision was granted. In giving leave, Lord Justice Coulson said: "The role played by Approved Inspectors is a critical one in the UK Construction Industry. It will be important and useful for the precise nature and scope of the role to be the subject of up to date guidance."

The Judgment was eagerly awaited and it was hoped that the Court of Appeal would fully review the role and liability of an Inspector. Unfortunately, in a judgement delivered on the 14 August the Court did not take advantage of this opportunity and only dealt with the claim under the Act. It upheld the original judgement and dismissed the claim against the Inspector. It held that, as the Inspector's role was not a positive role in actually building a property, they did not fall under the terms of the Act. It will be very difficult to make claims against Inspectors. Their Final Certificates, for so long relied upon by many, must be treated with caution and cannot be relied on to confirm that a property has been built in accordance with the Building Regulations.

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Are you paying your CITB Levy?

The Construction Industry Training Board (CITB) Levy is collected to provide training to people who work in the construction industry. Many companies that operate in the industry, especially new companies that have just been set up, are unaware of this levy.

It is mandatory for all employers in the construction industry, as defined by the CITB Order 2015, to pay the levy. This now includes companies which provide self-employed labour-only operatives following the High Court decision in Hudson Contract Services Ltd v Construction Industry Training Board. So, companies that provide agency labour only staff, will have to pay this levy.

Many contractors feel aggrieved that they have to pay the levy. However, the monies are used to provide free and subsidised training to the construction workforce. Therefore, those who pay it should ensure that they take full advantage of the training by ensuring that their employees and subcontractors attend the training that is offered.

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done as the contract for payment was with the SPV that was in liquidation.

A recent High Court case (Palmer Birch (a Partnership) v Lloyd) may have highlighted a possible route to make a claim. There are a group of causes of action called 'Economic Torts'. These include 'inducing breach of contract', 'unlawful interference' and 'unlawful means conspiracy'. The issue with these causes of action though is that they are very difficult to define and there is a very fine line between claims which are successful and those that are unsuccessful. The burden of proof on the claimant is very high.

In this case the claimant was successful. The claimant was a building contractor. It contracted with a company that had a leasehold interest in a property to carry out significant refurbishment works.

The two defendants were brothers. The second defendant was the sole director of the lease holding company. The freehold of the property was owned by another company which was beneficially owned by the first defendant. The first defendant was, in effect, financing the refurbishment work.

Before completion of the contract, and whilst substantial monies were owed to the claimant, the defendants agreed to put the lease holding company into liquidation. That company had no monies and therefore could not pay any claim from the claimant. The claimant made claims against the defendants alleging that they had induced a breach of contract by the lease holding company by withdrawing funding so that it could not pay the claimant. It was also alleged that the brothers had concluded to bring about the insolvency so that the company had to repudiate its contract with the claimant.

This was a complex case, but the High Court found that both of these causes of action were proved against the defendants. The two individuals were therefore liable for the outstanding value of the work, which was over £1 million.

As a contractor, if you have been working on such a project and have not been paid it may be possible to investigate potential claims against directors, development companies and third-party funders who have taken action to close down the SPV and avoided paying for the works carried out.

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New low cost adjudication service

The Technology and Construction Solicitors Association (TeCSA) has launched a fixed costs service for low value adjudication claims. By low value, TeCSA means claims up to £100,000, excluding VAT and interest.

Often, parties are put off from referring a dispute because of the costs that have to be paid to the Adjudicator.

In a recent adjudication, where I was acting for a client in a claim for £40,000, the Adjudicator's fee was £5,000 plus VAT.

Under the TeCSA low value adjudication scheme, this fee would have been a fixed fee of £3,500. The fixed fees range from £2,000 for claims up to £10,000, to £5,000 for claims between £75,001 and £100,000.

The claims are limited to those which are financial claims such as interim payment, final payment, retentions, sums certified under a contract, damages, and loss and expense. They must also be construction contracts as defined by the Construction Act 1996.

If you have claims for payment, contact us as to advise on the best way of making your adjudication claim.

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