MAYER·BROWN

Legal Update
July 2016

Legal developments in construction law

1. Bank has no duty of care to hidden claimant

Identifying a duty of care in tort is not easy. The Court of Appeal has said that there is currently no single test for this duty but it is customary to enquire whether:

- the defendant assumed responsibility to the claimant;
- loss was a foreseeable consequence of the defendant's actions or inactions, the parties' relationship was sufficiently proximate and it is fair just and reasonable to impose a duty of care; and
- the addition to existing categories of duty is incremental rather than indefinable.

These enquiries usually lead to the same answer and can be used as cross-checks on one another.

A bank was asked to provide a financial reference in respect of a customer. The request came from Burlington, a company acting for a casino operator, but the true purpose of the reference (for a gambling club) was not revealed. The casino operator used Burlington to ask for references so as "to preserve confidentiality for customers". The reference provided said the customer was trustworthy up to £1.6 million per week but the customer never had any funds in his account and when the casino operator was left with losses because the customer had issued it with counterfeit cheques it sued the bank, claiming that the bank owed it a duty of care in giving the reference.

The Court of Appeal said there was no duty of care. It was difficult, if not impossible, to describe the bank and the casino operator as having "a special relationship" when the bank did not know of the casino operator's existence and only knew that the reference was being requested on behalf of Burlington. And it was not fair, just and reasonable to impose liability on the bank because the casino operator's standard practice was to ask for references in Burlington's name instead of its own, concealing its own interest to preserve customers' confidentiality. If the casino operator wished to remain anonymous it was hardly just and reasonable for it to assert that a duty of care was owed to it when it deliberately concealed its existence. For the same reasons there was not the necessary proximate relationship.

Playboy Club London Limited & Ors v Banca Nazionale Del Lavoro Spa [2016] EWCA Civ 457

2. Court of Appeal confirms anti-variation clauses do not do what it says on the tin

Rock, a licensee of managed premises, fell into arrears with the licence fee. MWB, the company managing the premises, locked Rock out of the premises and purported to terminate the agreement. Rock claimed, however, that there had been an oral agreement to reschedule the licence payments so as to clear the arrears, but the original licence agreement said that all variations had to be in writing and signed by the parties. And beside other arguments, MWB claimed that, even if there had been an agreement to reschedule the payments, there was no consideration to support it.

The Court of Appeal, confirming the Court's earlier comments in Globe Motors v TRW Lucas Varity, said that the anti-variation clause did not prevent the parties from agreeing a variation orally. The first instance judge had found that they had but was there consideration for that agreement?

Yes, said the Court. Although the House of Lords had ruled that there was no consideration where parties had agreed that a debt could be paid in instalments, in this case MWB gained a practical benefit, in particular because Rock would continue to occupy the property so that it did not stand empty for some time

at further loss to MWB. This went beyond the advantage of receiving a prompt payment of part of the arrears and a promise to pay the balance and any deferred licence fees over the coming months. This practical benefit amounted to good consideration, making the oral variation agreement enforceable.

MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2016] EWCA Civ 553

3. On the continuing importance of finalising a contract.

Certainty is a great thing but construction projects are often carried out without an executed contract in place. If there is a dispute that ends up in legal proceedings, the court may then have to analyse what the parties have said, which may be unclear, making the best sense of it that they can. In ***Goldsworthy v Harrison*** builders carried out works for the Harrisons, who were residential occupiers. The Harrisons envisaged using the JCT Minor Works contract form but a contract using that form was only sent out for signature over a year after the works had started. The builders declined to sign but subsequently went to adjudication and obtained an award on the basis that the Minor Works form, and, therefore, adjudication applied. Adjudication would not otherwise have applied to the Harrisons because they were residential occupiers. The builders then asked the court to enforce the award but the Harrisons claimed that the Minor Works form did not apply.

The court noted that whether there is a binding contract and, if so, its terms, depends on what they have agreed. This requires consideration of communications between them, by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed all the terms which they or the law regards as essential to create a contract. It is possible that they might agree to be contractually bound by agreed terms even though they defer other important matters to be agreed later and contracts may come into existence, not as a result of offer and acceptance, but during and as a result of performance. It can consequently be appropriate to look at the parties' conduct in order to determine whether and how a contract was made.

In all the circumstances, without fuller evidence from both sides, the judge found it impossible to say that there was not a triable issue as to whether the parties agreed, with contractual effect to the application of the Minor Works terms (with appropriate gaps). The application to enforce the adjudicator's award by summary judgment therefore failed.

Goldsworthy & Ors (t/a Goldsworthy Builders) v Harrison & Anor [2016] EWHC 1589

4. Insurance Act 2015 bites – at last

The 2015 Insurance Act will apply to insurance contracts, and variations to insurance contracts, made on or after 12 August 2016 and which are subject to the law of England, Wales, Scotland or Northern Ireland.

The Act makes a number of significant changes to the law, in particular in relation to disclosure, remedies for non-disclosure and '*basis of the contract*' clauses.

See: http://www.lmalloyds.com/Act2015

5. IPA updates for Project Initiation Routemap

The Infrastructure and Projects Authority has added new content to the Project Initiation Routemap, which is being expanded to cover all construction projects and longer-term transformation projects. There are two new modules, on risk management and asset management, to complement the five existing modules. The risk management module is intended to help project leaders to identify and mitigate factors that can prevent a project from meeting its objectives. The asset management module is intended to help projects secure best value by ensuring they focus on managing assets across their whole lives.

See: https://www.gov.uk/government/news/improving-major-project-delivery-project-initiation-routemap and

https://www.gov.uk/government/publications/improving-infrastructure-delivery-project-initiation-routemap

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