



Legal developments in construction law

1. Houseboat buyers tie up moor misrepresentation damages

Pre-contract discussions can be dangerous. What if a seller makes a statement that a buyer relies on in entering into a contract, but which turns out to be wrong? And does an 'entire agreement' clause make a difference? The owner of a boatyard and marina sold two houseboats, telling the respective buyers that the price included 125 year mooring rights at his marina. He also represented that the moorings were lawful and did not require planning permission but the representations, on which the buyers relied, were not true. So what remedy did the buyers have?

The court awarded the buyers damages under section 2(1) of the Misrepresentation Act 1967. It ruled that the seller did not believe, or have reasonable grounds for believing, that the moorings were lawful; and the buyers consequently suffered damage. The seller did not, however, owe a duty of care in negligence. Such a duty is usually owed by professional advisers, which the seller was not, and does not automatically arise between negotiating parties.

One of the contracts contained an 'entire agreement' clause but the court ruled that it did not make any difference, because the construction contract was clearly not the whole of the agreement. The representations and promises as to the mooring were not in either sale document but they were fundamental. And even if the clause applied, it was unfair and unreasonable.

The court also considered whether the misrepresentations had become terms of the contract. That turns on the intention of the parties, objectively ascertained from all the evidence, but in this case, although they had become terms, it did not change the outcome, because the damages for the misrepresentation and damages claims were the same. And those damages

were the purchase prices of the houseboats, because a houseboat with no long term mooring rights was, on the evidence, worthless.

<http://www.falcon-chambers.com/news/durberg-v-small-johnstone-v-djurberg>

2. Court sorts out baggage subcontract works and saves sectional delay damages

A subcontract for an airport baggage handling system provided for sectional completion. Delays occurred and the main contractor and subcontractor agreed extended dates in a settlement agreement. In a subsequent dispute about the enforceability of delay damages the subcontractor claimed that the works in two sections could not be identified with certainty and that the contract provisions as to delay damages were therefore too uncertain to be enforced. But what did the court think?

The courts are reluctant to hold a contract provision void for uncertainty, particularly where the contract has been performed, and, if it is open to the court to find an interpretation that will give effect to the parties' intentions, then it will do so. A contract provision will, however, be void for uncertainty if the court cannot reach a conclusion as to what was in the parties' minds or where it is not safe for the court to prefer one possible meaning to other equally possible meanings. In this case the court decided that, on a proper construction of the subcontract, as amended by the settlement agreement, the works in the two sections were sufficiently identifiable and certain so that the sectional completion and delay damages provisions were operable and enforceable.

Vinci Construction UK Ltd v Beumer Group UK Ltd
[2017] EWHC 2196

3. Court says no to a wind up

A winding up petition is a very serious thing. Faced with a petition issued by a subcontractor, a contractor claimed that it had arguable defences and substantial cross-claims. But was that enough to stop the petition?

The case law says that a petitioner's standing as a creditor in the Companies Court, entitled to present a petition, may be challenged by advancing, in good faith, a '*substantial*' dispute (i.e. one with a rational prospect of success) about all the petition debt (other than an amount below £750). A dispute will not, however, be put forward in good faith if the company is trying to obtain credit not allowed under the contract. A petition will not be struck out just because the company alleges that the debt is disputed but the Companies Court will not allow a winding up petition to be used to decide a substantial dispute raised on bona fide grounds. This is because presenting and advertising a petition puts pressure on a company to pay (rather than litigate) which is quite different from the effect of an ordinary action. Such proceedings are not the place for resolving genuinely disputed debt claims which the court cannot properly determine, either as to merits or as to quantum, at this stage. These petitions can also create injustice because a company may feel pressurised into paying simply to avoid the petition being advertised and the potential serious commercial consequences.

The court will, however, be alert to the risk that an unwilling debtor is raising objections in order to claim that a dispute exists which cannot be determined without cross-examination. It will therefore be prepared to consider the evidence in detail, even if this involves it in much the same exercise as presented by a summary judgment application.

The court found that there were genuine disputes, was not satisfied that the subcontractor was a creditor with standing to present the petition and struck out the petition.

Breyer Group Plc v RBK Engineering Ltd [2017] EWHC 1206

4. JCT updates Tendering Practice Note

The JCT has issued an updated 2017 version of its tendering practice note. The general guidance document reflects key developments in public sector tendering following the coming into force of The Public Contracts Regulations 2015 and updates the note generally to reflect current best practice in public and private sectors.

Model forms, intended for use in private sector procurement only, covering both pre-selection phase and tender stage, are also included. They can be used with any JCT main contract, and, with adaptation, for both subcontract and framework tendering.

See: <https://www.jctltd.co.uk/product/tendering-practice-note>

5. Government's corporate governance reform package unwrapped

The government has set out its planned corporate governance reform package and intends to bring legislative reforms into effect by June 2018. The reforms will include the world's first public register of listed companies where a fifth of investors have objected to executive annual pay packages. This scheme is to be set up this autumn and overseen by the Investment Association, a trade body representing UK investment managers.

In the coming months the government is to legislate to require:

- around 900 listed companies annually to publish and justify the pay ratio between CEOs and their average UK worker;
- all companies of a significant size to explain publicly how their directors take employees' and shareholders' interests into account;
- all large companies to make their responsible business arrangements public.

The Business Secretary is to ask the Financial Reporting Council to introduce a new requirement in the Corporate Governance Code to ensure employees'

interests are better represented at board level of listed companies. Under the Code's 'comply or explain' basis, firms would have to assign a non-executive director to represent employees, create an employee advisory council or nominate a director from the workforce. The FRC is also to be asked to work with the business community and the government to develop a voluntary set of corporate governance principles for large private companies. It intends to consult on amendments to the Code in late autumn with a view to publishing a revised code by mid-2018. The Code would then apply to the majority of companies in 2019.

The government has also announced its intention to examine the use of share buyback schemes, where companies repurchase their own shares, to ensure the method is not being used to artificially influence executive pay performance targets.

See: <https://www.gov.uk/government/news/world-leading-package-of-corporate-governance-reforms-announced-to-increase-boardroom-accountability-and-enhance-trust-in-business>

6. Government consultation on new measures to boost housing supply

The government has launched a consultation on proposed changes to the planning system to increase the supply of new homes. The proposals include a standard method for calculating local authorities' housing need, more certainty on planned housing need for neighbourhood planning groups, a statement of common ground to improve how local authorities work together to meet housing and other needs across boundaries, improving the viability assessment procedure and increased planning application fees where local planning authorities are delivering the homes needed.

Subject to the consultation and responses to the housing White Paper, the government intends to publish a draft revised National Planning Policy Framework early in 2018 and, after a short further consultation on the Framework wording, to publish a revised, updated Framework in spring 2018.

See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/644955/Planning_for_Homes_consultation_document.pdf

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