MAYER·BROWN

Legal Update
February 2018

Legal developments in construction law

1. Frustration, the contract killer, and "Thriller Live" in Greece

Frustration is a contract killer, automatically releasing the parties from further liability under it. But what, exactly, amounts to frustration? A theatrical promoter, based in Greece, booked a West End show, *"Thriller Live"*, for a number of performances in Greece. But before, and after, the contract was signed, there was civil unrest and disturbance in Greece because of austerity measures and 13 performances out of 32 were cancelled. The parties agreed that the force majeure clause did not apply but the promoter company in Greece claimed the contract was frustrated.

The case law says that frustration is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended. The frustrating event should not be due to the act, election or fault of the party seeking to rely on it and must be some outside event or extraneous change of situation. The court noted that, because it alters the bargain between the parties, it only applies when the frustrating event can truly be said to take the situation outside the reasonable contemplation of the parties so as to make it just that the contract no longer applies. On the evidence, the contract was not frustrated. By the time it was signed, there were already unrest, road closures, demonstrations and violence. Both parties knew enough about the risks posed to the success of the production for it to be wrong, with the benefit of hindsight, to re-allocate those risks by releasing the defendant promoter from its contract obligations.

The promoter's managing directors had given a payment guarantee because of non payment but they claimed it was voidable for duress because the claimant had threatened to stop further performances if the guarantee letter was not signed. The claim failed. The court said that the law of duress is based upon threat and the only threat identified was the threat not to allow the performances to continue, which was the claimant's legal right, because of the payment arrears. In the circumstances of repeated payment defaults, low box office receipts, and the imminent early end to the run, it was not improper or illegitimate. A threat of action not itself unlawful can found a claim for duress, but the circumstances in which it will do so are limited and rare.

The Flying Music Company Ltd v Theater Entertainment SA & Ors [2017] EWHC 3192

2. Court can set the timing on a timeless obligation

A property developer borrowed money to fund the purchase of 26 properties. When it was time to repay the lending bank, the parties entered into an agreement. The bank was to arrange a sale of the properties and retain the proceeds and, after the sale, the debt was to be extinguished. Until then the developer had to manage the properties and send the rental income, after deducting maintenance costs, to the bank. Some years later the properties had not been sold and the assignee of the bank's rights in the agreement purported to terminate the agreement because the developer had not accounted for the rent. The key issue for the Scottish court to decide was whether there was an implied term that the properties would be marketed and sold in a reasonable time.

It ruled that such a term was implied. Following the House of Lords' comments in *Hick v Raymond & Reid* the court noted that, if a contract does not expressly, or by implication, fix a time for performance, a term is implied, as a matter of law, that performance is to be within a reasonable time. It is then a matter of construction as to what is a reasonable time, which will depend on all the circumstances. Exclusion of such a term is possible but the entire agreement clause in the contract did not exclude the implied term, which formed part of the contract.

William John Burnside v Promontoria (Chestnut) Limited 2017 CSOH 157 at: *http://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2017csoh157.pdf?sfvrsn=0*

3. Contract termination – could it also be acceptance of a repudiation?

EE, a mobile phone network operator, terminated its contract with Phones 4U, a mobile phone contract retailer, when Phones 4U went into administration. The appointment of administrators was agreed to be not a breach of contract but it did entitle EE to terminate the contract. The termination letter did not mention any breach but, if there had been a repudiatory breach and/or renunciation, as EE alleged, did the termination letter terminate for that breach so that EE could bring a claim for loss of its bargain?

In summary judgment proceedings by Phones 4U's administrator to dismiss EE's counterclaim for loss of its bargain, the court said that, for EE to bring its common law claim for damages for loss of its bargain, it had to show that the termination which created that loss had been for breach (actual or anticipatory). EE had, however, clearly only terminated under a clause that gave a right to do so that was independent of any breach. EE, which had not accused Phones 4U of any breach, had made clear it was not waiving any breach that might exist and reserved its rights, but a right merely reserved is a right not exercised. EE could still sue and pursue all available remedies for breach committed by Phones 4U before termination. What it could not do was to re-characterise the events and claim that it terminated for breach when that is not what it did. Nor could it say that it treated Phones 4U's alleged renunciation as bringing the contract to an end when that was not what actually happened.

Phones 4u Ltd v EE Ltd [2018] EWHC 49 (Comm)

4. Government gets tough on lease issues

Following a consultation, the government has announced new measures to deal with leasehold issues. The measures include:

- legislation to prevent the sale of new build leasehold houses except where necessary (such as shared ownership);
- ensuring ground rents on new long leases for houses and flats are set at zero;
- working with the Law Commission to support existing leaseholders and make purchasing a freehold or extending a lease much easier, faster and cheaper;
- providing clear support to leaseholders on the various redress routes available;
- reviewing the support and advice to leaseholders to ensure it is fit for purpose;
- ensuring freeholders have equivalent rights to leaseholders to challenge unfair service charges.

See: *https://www.gov.uk/government/news/crackdown-on-unfair-leasehold-practices--2*

5. MP's retentions bill goes forward to a second reading

On 9 January, the Private Members' Bill introduced by Peter Aldous MP, providing for retentions in construction projects to be held in a third party trust scheme, had its first reading in Parliament. The Bill now goes forward to a second reading, on 27 April. James Frith MP has tabled an early day motion, calling, among other things, for legislation on retentions.

The government consultation on retentions closed on 19 January.

See: *https://services.parliament.uk/bills/2017-19/constructionretentiondepositschemes.html* and *https://www.parliament.uk/edm/2017-19/840*

6. FIDIC 2: programmes and time

The FIDIC Red, Yellow and Silver new second editions have significantly increased the programme obligations placed on contractors (8.3 and, for the detailed test programme, 9.1). The increased detail to be shown includes, for example, logic links and earliest and latest start and finish dates for all activities, float and critical path(s) and, where a programme is revised, for each activity, actual progress to date, any delay to that progress and the effects of the delay on other activities. The supporting report for a revised programme must now include identification of any significant changes to the programme previously submitted and the Contractor's proposals to overcome the effect of any delays.

The Contractor's entitlement to an extension of time in the event of concurrent delay is to be assessed in accordance with the rules and procedures stated in the Special Provisions. If none are stated the assessment is *"...as appropriate taking due regard of all relevant circumstances"*.

Force majeure has been rebranded (and renumbered in clause 18) as *"Exceptional Events"*) and the Contractor is entitled, subject to the requirements of clause 8.6, to an extension of time in respect of delay by a private utility.

If you have any questions or require specific advice on the matters covered in this Update, please contact your usual Mayer Brown contact.