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Legal developments in construction law

1. Consideration: is giving up a doubtful, or undecided, point good enough?

A settlement agreement between two dealers in Islamic antiquities provided that, if the principal sum was not paid in full by a specified date, a daily rate of $1000 dollars must be paid *"as a penalty"*, irrespective of any part payments. The principal sum was not paid in full by the specified date and substantial interest accrued under the penalty clause. Subsequently, as the court found, there was a variation agreement under which the receiving party agreed to accept a fixed sum of $800,000 in full and final settlement of the paying party's far greater liability under the settlement agreement. The Court of Appeal then had to decide if the paying party had provided good consideration for the variation agreement by giving up its argument that the $1,000 a day clause was a penalty. That argument had failed before the High Court Master but could it, at the date of the variation agreement, have been good consideration?

The Court noted that threatening a claim or defence in which a person has no confidence at all is quite different from intimating a claim or defence that raises a point which they recognise raises a doubtful or undecided point, but also believe in and intend to pursue in court, if necessary. This case fell squarely into the second category. The paying party raised their concerns about the $1,000 a day clause, intimated the penalty defence and plainly intended to raise it in any proceedings brought by the receiving party. By entering into the variation agreement, they agreed they would no longer be able to raise that defence and the debt would be consolidated at the $800,000. The question of the validity of the consideration for the variation agreement must be judged at the time that it was made. The suggestion that the $1,000 a day clause was a penalty was made when there was considerable uncertainty in the law, and before the Supreme Court's judgment in ***Cavendish Square Holding BV v Makdessi*** and ***ParkingEye Ltd v Beavis***.

Another countervailing public policy to be taken into account was that of holding people to their commercial bargains, which provides a limitation on the public policy of discouraging parties from threatening unreasonable claims or defences. There cannot be any sensible public policy against encouraging parties to raise claims or defences that they reasonably believe may succeed, even if they eventually turn out to fail.

Simantob v Shavleyan [2019] EWCA Civ 1105

2. Court resolves Adjudication Notice trading name identity crisis

A scaffolding company issued a Notice of Adjudication against "*MCR Property Group*", but that was just a trading name that could, in theory, have been a reference to a large number of legal entities. Did that mean that, in the adjudication that followed, the adjudicator did not have jurisdiction?

The court said that, in considering whether the Notice of Adjudication identified the correct responding party, it must objectively assess the notice, construed as a whole against its contractual setting, and consider how it would have informed a reasonable recipient, concentrating on the substance rather than form. A previous case showed that there is nothing inherently fatal about the commencement, pursuance and issue of a decision of an adjudication in the trading name of a legal entity, where the decision is subsequently enforced in the courts against the true legal identity. And a misdescription of a party in a Notice of Adjudication does not, of itself, affect the validity of the Notice, although it may be different if there is a genuine lack of clarity as to the proper parties.

In this case, on a proper construction of the Notice of Adjudication, there could not possibly have been any lack of clarity to the reasonable recipient as to the identity of the legal entity intended to be the responding party. Although in theory, use of the trading name could have been a reference to one of a large number of legal entities, when the Notice was construed as a whole, that possible ambiguity did not exist in reality:

MG Scaffolding (Oxford) Ltd v Palmloch Ltd [2019] EWHC 1787

3. Court of Appeal says approved inspectors owe no duty under Defective Premises Act

Under section 1(1) of the 1972 Defective Premises Act a person "*taking on work for or in connection with the provision of a dwelling*" owes a duty to see that the work which they take on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed. But does that include an approved inspector performing their statutory function under the 1984 Building Act, which involves inspection and certification in order to ensure compliance with building regulations?

The Court of Appeal has ruled that, giving section 1(1) its natural and ordinary meaning, an approved inspector performing statutory functions does not fall within the section. They have no statutory power to influence the design or construction of a building in any way, other than to stipulate that it must comply with the law. In certifying, or refusing to certify, plans and works, the inspector is not engaged in the positive role of the provision or creation of the relevant building, but performs the essentially negative regulatory role of checking for compliance against prescribed criteria.

The Court found powerful support in the House of Lords decision in ***Murphy v Brentwood District Council*** [1991] 1 AC 398, noting that the decision strongly suggests that a local authority inspector owes no duty under section 1(1) and that no distinction can properly be drawn between the position of a local authority inspector and an approved inspector.

Herons Court, the Lessees And Management Company of v Heronslea Ltd & Ors [2019] EWCA Civ 1423

Future issues

4. Build UK sets out its retention plans

Build UK has developed a roadmap setting out key milestones for implementation by the construction industry to deliver zero cash retentions between now and 2023. As part of this initiative, its members have agreed a number of 'minimum standards' on retentions but Build UK says that they should not be viewed as best practice and in those sectors where the minimum standard is already not to accept cash retentions, for example in the piling and lift sectors, this should be maintained.

The guide details the drafting amendments required to the JCT Design & Build 2016 Contract and Sub-Contract and NEC4 Contract and Subcontract (ECS) to give effect to the minimum standards.

See: https://builduk.org/wp-content/uploads/2019/06/Minimum-Standards-on-Retention-Build-UK-June-2019.pdf

5. Government consults on redress scheme for purchasers of new build homes

The government has conducted a technical consultation seeking views on the detail of proposed legislation for a New Homes Ombudsman. It expects the ombudsman to be free to the consumer and funded by industry, independent from the organisations the ombudsman will investigate, fair in dealing with disputes, have effective powers to hold developers to account and be open and transparent and have public accountability through regular reporting.

The government considers that the fastest way to improve redress for purchasers of new build homes is to work with industry and consumers to implement a single accessible redress scheme. It reports that has been working closely with industry and consumers towards putting in place a voluntary code of practice for new homes as soon as possible, before it brings forward legislation. It says that good progress has been made towards a unified code of practice but it wants to see better redress faster so that consumers can benefit from free, fair and effective redress as soon as possible.

See: https://www.gov.uk/government/consultations/redress-for-purchasers-of-new-build-homes-and-the-new-homes-ombudsman

6. 1 September start for government procurement policy on suppliers' payment approaches

In July the government published Procurement Policy Note 04/19, which sets out how payment approaches can be taken into account in the procurement of major government contracts. The note applies to all central government departments, their executive agencies and non departmental public bodies, which must apply this Procurement Policy on all procurements above £5m per annum, advertised on or after 1 September 2019.

The accompanying guidance explains how to include an assessment of a supplier's payment systems to demonstrate it has a reliable supply chain and when it would be appropriate to exclude those suppliers that cannot demonstrate they have effective systems in place. It also gives examples of exceptional circumstances where it might not be relevant or proportionate to apply the Note.

See: https://www.gov.uk/government/news/tough-new-rules-on-prompt-payment-come-into-force and https://www.gov.uk/government/publications/procurement-policy-note-0419-taking-account-of-a-suppliers-approach-to-payment-in-the-procurement-of-major-contracts--2

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

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