Legal developments in construction law

1. Sign of the times?

Some documents need signatures and the Law Commission says that electronic signatures can be used to execute documents. So is a signature block at the end of an email good enough, even if it is "*automatically*" added? A solicitor confirmed terms of settlement reached between clients with an email that finished: "*Many thanks*" followed by a signature block with his name, position in the firm, (Solicitor and Director) "*For and on behalf of...*" his firm and then his contact details. When the solicitor subsequently claimed that settlement had not been reached, the court had to decide if the email had been "*signed*", as required by the 1989 Law of Property (Miscellaneous Provisions) Act.

The court referred to the test identified in ***Mehta v J Pereira Fernandes SA*** and adopted by the Law Commission in its Report, whether the name was applied with authenticating intent.

The party challenging the signature's validity emphasised the fact that the footer was created "automatically", i.e., added to every email sent by the solicitor, but it was common ground that the rule that a footer of this type should be added to every email involved the conscious action at some stage of a person entering the relevant information and settings in Microsoft Outlook. And the solicitor knew that his name was added to the email. The manual typing of "Many thanks" at the end of the email strongly suggested that he was relying on the automatic footer to sign off his name.

In these circumstances, it was difficult to distinguish between a name added under a general rule that the sender's name and details should be added at the end, from an alternative practice that each time an email is sent the sender manually adds those details. And the recipient of the email has no way of knowing (as far as the court was aware) whether the details at the end of an email are added under an automatic rule or by the sender manually. Looked at objectively, the presence of the name indicated a clear intention to associate oneself with the email – to authenticate it or to sign it. The court consequently decided that the solicitor had signed the email on behalf of his client.

Neocleous & Anor v Rees [2019] EWHC 2462 (Ch)

2. Collateral warranty rights - all I have is yours…but no more?

Collateral warranties reach the key construction project players that other contracts do not. They give purchasers, tenants and funds, and others with an interest in the project, a contractual relationship with those involved in the design and construction, where otherwise there is none. The rights given reflect the rights of the employer under the building contract and the appointments of the consultants and avoid the "*black hole*" of no remedy faced by a tenant, purchaser or fund or other party with a defective property but no contract with the party responsible.

A Scottish case has highlighted the purpose and nature of collateral warranty rights and their potential limits. The court noted that contract wording must be considered in such a way as to give effect to the contract's primary objectives rather than giving undue influence to minor provisions or niceties of wording. The fundamental purpose of the collateral warranty in question was to place the beneficiary and the contractor in an equivalent position to the original developer and the contractor, not to extend the obligations of the contractor to the beneficiary of the warranty beyond those in favour of the original developer. Details of the wording used should not obscure that basic objective.

It said the notion of equivalence is central. The warranty's purpose is not to provide purchasers, tenants and security holders with rights greater than those of the original employer; that would make no commercial sense. Equivalence accordingly requires not merely that the beneficiary of the warranty should have the same rights of action as the original employer; it also requires that those rights should be subject to the same qualifications, limitations and defences as were available, in this case, to the contractor in respect of the original building contract.

Because of the importance of time-bar provisions to contractors and designers, the court considered that a collateral warranty should normally be subject to the same time bar as applied to the original building contract, i.e. a time bar that takes effect on the same date although it was, of course, possible for the parties to a collateral warranty to agree on a different time bar. Which meant that the collateral warranty was intended to give the contractor the same defences against a beneficiary as it would have against the employer and, therefore, the same limitation period.

British Overseas Bank Nominees Ltd v Stewart Milne Group Ltd at: https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2019csih47.pdf?sfvrsn=0

3. Court sees a way past a Bresco block on a liquidator adjudication claim

In ***Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd*** the Court of Appeal ruled that an adjudication award in favour of a party in liquidation facing a separate cross-claim would not be enforced, because ordering enforcement would be futile. It also noted, however, that in "*exceptional*" circumstances, a company in insolvent liquidation (and facing a cross-claim) might be able to succeed in enforcing an adjudication award. In ***Meadowside Building Developments Ltd v 12-18 Hill Street Management Company Ltd*** the Technology and Construction Court had to consider what those circumstances might be.

It said that this exception arises where the court's legitimate concerns as to the utility of an adjudication, the preservation of the responding party's right to security for its cross-claim and the reduction or elimination of costs risk on the responding party successfully overturning the adjudicator's decision are all met by relevant safeguards. In its view, a case is likely to be an exception to the ordinary position in circumstances where:

- the adjudication determines the final net position between the parties under the relevant contract; and
- satisfactory security is provided in respect of any sum awarded in the adjudication and successfully enforced, and any adverse costs order against (or agreed by) the company in liquidation in favour of the responding party, in respect of any unsuccessful enforcement application and subsequent litigation/arbitration seeking to overturn the adjudication decision.

What is satisfactory as security is a question on the facts in the ordinary way and it may be provided incrementally (as on, e.g., any security for costs application). A combination of the liquidator undertaking to the court to ring fence the sum enforced, a third party guarantee or bond and ATE insurance may be appropriate. And any agreement to provide funding or security which permits the company in liquidation to avoid the ordinary consequences of ***Bresco*** cannot amount to an abuse of process.

Meadowside Building Developments Ltd v 12-18 Hill Street Management Company Ltd [2019] EWHC 2651

4. Grenfell phase 1 report rules on Building Regulation requirement B4(1)

In the Phase 1 report of the Grenfell Tower inquiry Sir Martin Moore-Bick has expressed his conclusion on the compliance of the tower's external façade with the Building Regulations. Sir Martin accepted that the construction of the Regulations is ultimately a question of law and said there is compelling evidence that requirement B4(1) was not met in this case. Although, in another context, there might be room for argument about the precise scope of the word "adequately", the functional requirements of the Regulations inevitably contemplate that the exterior must resist the spread of fire to some significant degree appropriate to the height, use and position of the building.

He also accepted that the cladding of the external walls constituted "building work" within the meaning of regulation 3 of the Regulations, because it involved a "material alteration" of the building which resulted in its ceasing to comply with requirement B4(1). In particular, before the fire, the exterior walls of the building, constructed of concrete, complied fully with that requirement, since concrete does not support combustion, but that changed fundamentally when the cladding system was added during the main refurbishment.

A separate question for investigation in Phase 2 was how those responsible for the design and construction of the cladding system and the work associated with it, such as the replacement of the windows and infill panels, satisfied themselves that on completion of the work the building would meet requirement B4(1).

See, at page 583 in volume 4 of the full report: https://assets.grenfelltowerinquiry.org.uk/GTI - Phase 1 full report - volume 4.pdf

5. Incoterms 2020 set for 1 January start

Incoterms have undergone their 10 year review and the 2020 edition was published this autumn. They will come into force on 1 January 2020 but contracting parties can now specify their use, or continue to specify use of Incoterms 2010 after that date.

See: https://iccwbo.org/media-wall/news-speeches/icc-releases-incoterms-2020/

6. New council for PropTech sector

A new expert advisory council has been launched to support technological innovation in the property sector. It is intended to advise ministers on how to support and grow the sector further and to make the property market work better for everyone, whether homebuyers or developers.

See: https://www.gov.uk/government/news/proptech-dragons-form-new-expert-property-innovation-council

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