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Legal developments in construction law

1. Collateral contract? Check the parts list

A supplier offers you a product, with claims as to its performance. Relying on those claims, you make arrangements for another party, a contractor or finance company perhaps, to buy the product for your project. The product fails to perform as claimed and you suffer loss but the main, sale, contract was not with you but that other party. Does the law offer any remedy?

Sometimes in similar circumstances, the courts may find there is a collateral contract between the supplier that made the performance claims and the party that arranged for another party to buy the product. In ***New York Laser Clinic Ltd v Naturastudios Ltd*** the court listed the ingredients for a collateral contract involving a party that is not one of the parties to the main contract:

- A warranty (ie a statement, not a mere representation), intended to have contractual force (a question of fact, judged objectively), was given to that third party by one of the parties to the main contract, in advance of the main contract being entered into;
- the third party provided consideration to the warranty giver;
- relying on the warranty, it caused another party to enter into the main contract with the warranty giver;
- the warranty was inaccurate, the third party suffered financial loss as a result; and there are no relevant exclusion clauses;
- it is unnecessary for the warranty giver to know that it was false, or to be negligent, let alone act fraudulently.

The warranty must be given in circumstances where it should be clear to the warranty giver that the recipient will rely upon it to cause the recipient or someone else to enter into a contract with the warranty giver, and it must be given with a view to persuading the recipient to enter into the contract, or to procure the other person to enter into the contract, with the giver. It must be more than a mere "***puff***", and so, ordinarily, it will consist of a statement (of fact or, in some circumstances, opinion) of something concrete and specific about the qualities or performance of the goods or services to be provided under the main contract.

The court also ruled that, in a case concerning a breach of collateral warranty about the quality, or anticipated performance, of the thing to be supplied, a successful claimant is entitled, at its election, to damages calculated by reference to the loss of profit it would have earned if the warranty or warranties had been true, or to losses incurred by entering into the contract, whichever is the higher. The claimant succeeded in its claim for breach of a collateral warranty and also on the alternative ground of negligent misstatement, but damages were assessed by reference to the collateral warranty claim.

New York Laser Clinic Ltd v Naturastudios Ltd [2019] EWHC 2892

2. Adjudicator's decision - good in part. Can it be saved?

A Scottish court in ***Dickie & Moore Ltd v Ronald James McLeish*** and others decided that part of the claim in a notice of adjudication (for an extension of time and loss and expense) had not crystallised before service of the notice. The adjudicator did not therefore have jurisdiction to deal with that aspect of the claim but could the remaining part of the decision be severed and enforced?

In a second hearing the court reviewed the case law, notably the criteria for severability summarised in ***Cantillon v Urvasco***, which, the court thought, did not lay down rigid rules, but rather general principles or guidance. The court considered that something which may be one "***dispute***" in terms of the Scheme and referable to an adjudicator as such, may on analysis, looking at the substance, be treated as being more than one dispute when it comes to determining whether severance is possible. It also considered that the Scheme contemplates that a "***dispute***" is a matter in respect of which the adjudicator has jurisdiction, and consequently paragraph 20(1) of the Scheme compels an adjudicator to decide matters in dispute which are within jurisdiction, and the "***decision***" which binds parties under paragraph 23(2) is the entire decision where all of it is valid, or the part of it that is valid and severable where part is invalid.

Whether or not the court's analysis of Cantillon was correct, it thought it was a mistake to think that severance ought never to be available where a decision involves a single dispute. A blanket ban on severance in single dispute cases is likely to produce disproportionate and unjust results in a not insignificant number of cases. It also considered that the critical question ought not to be whether there is a single dispute or difference, but whether it is clear that there is a core nucleus of the decision that can safely be enforced. It would further the statutory aim of supporting enforcement of adjudication decisions if the courts were more willing to order severance where there is such a core nucleus. It was satisfied that, in the case in question, there was a core nucleus of the adjudicator's decision which could safely be enforced. The apportionment between the parties of liability for the adjudicator's fees and expenses was not, however, a part of the core nucleus of the award that could safely be enforced.

https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2019csoh87.pdf?sfvrsn=0

3. Adjudication: is there a dispute if the payer says it needs more details of the claim?

To go to adjudication you need a dispute but if a claim is so "…*nebulous and ill-defined that the* ***respondent cannot sensibly respond to it*** … , neither silence by the respondent nor even an express non-admission is likely to give rise to a dispute...". But what if the paying party says it needs more information in order properly to evaluate the claim?

In ***LJH Paving Ltd v Meeres Civil Engineering Ltd*** the paying party alleged it had insufficient information to be able to assess the claim in question and that, consequently, there was no crystallised dispute. The court confirmed that it remains a question of fact in each case as to whether a dispute has crystallised. It noted, however, previous case law to the effect that it will be an 'unusual' case where a dispute has not crystallised because a claim is so "***nebulous and*** *ill-defined that the respondent cannot sensibly* ***respond to it***", and that when a contractor or a sub-contractor makes a claim, it is for the paying party to evaluate that claim promptly, and form a view as to its likely valuation, whatever points may arise as to particularisation. Efforts to acquire further particularisation should proceed in tandem with that valuation process. In an ordinary case, a paying party cannot put off paying up on a claim forever by repeatedly requesting further information and cannot suggest that there is no dispute at all because the particularisation of the claim is allegedly inadequate.

The court in ***LJH*** said that it therefore seems "***very unlikely***" in the ordinary case that it will be relevant or appropriate, in seeking to demonstrate that a dispute has not crystallised, to look at the requests for information following presentation of a claim, and draw an inference about crystallisation from the purported reasonableness of those requests and the absence of a response. It ruled that the claim in question was far from "***nebulous and*** *ill-defined*" and this (and other challenges) failed.

LJH Paving Ltd v Meeres Civil Engineering Ltd [2019] EWHC 2601

4. Launch of Legal statement on cryptoassets and smart contracts

November saw the launch of the LawTech Delivery Panel's Legal statement on cryptoassets and smart contracts. Sir Geoffrey Vos, introducing the launch, said that the objective is to provide much needed market confidence and a degree of legal certainty as regards English common law in an area that is critical to the successful development and use of cryptoassets and smart contracts in the global financial services industry and beyond.

The statement concludes that, in general terms, cryptoassets have all the legal indicia of property and are, as a matter of English legal principle to be treated as property. It also says that there can be no bailment over a virtual cryptoasset, which cannot be physically possessed; cryptoassets are not documents of title, documentary intangibles or negotiable instruments but, nonetheless, some types of security can be granted over cryptoassets.

The statement also concludes that a smart contract is capable of satisfying the basic requirements of an English law legal contract, that two or more parties have reached an agreement, intend to create a legal relationship by doing so, and have each given something of benefit. Whether the requirements are in fact met in any given case will depend on the parties' words and conduct, just as it does with any other contract. A smart contract can be identified, interpreted and enforced using ordinary and well-established legal principles and where a legal rule requires documents to be signed or in writing, such a requirement can, in principle, be met by using a private key or by a smart contract whose code element is recorded in source code.

The statement is not intended to be legal advice. The next step is for the Law Commission to consider whether any legislation is needed in this area.

See: ***https://www.judiciary.uk/announcements/the-chancellor-of-the-high-court-sir-geoffrey-vos-launches-legal-statement-on-the-status-of-cryptoassets-and-smart-contracts/*** and

https://www.judiciary.uk/wp-content/uploads/2019/11/COMBAR.lecture2019.final_.pdf

5. Government appoints MMC housebuilding champion

Prior to the election, the government appointed Mr Mark Farmer as Champion for Modern Methods of Construction in housebuilding, to:

- provide independent scrutiny and advice to the government on how to increase the use of MMC in homebuilding;
- oversee development of the '***Construction Corridor***' in the North;
- promote wider innovation in the sector; and
- act as an ambassador overseas for the UK's MMC activities in homebuilding, using international networks and trade opportunities to attract investment into the industry.

The government had previously published its response to the Housing, Communities and Local Government Select Committee report on modern methods of construction.

See: ***https://www.gov.uk/government/news/housing-minister-announces-new-champion-for-modern-housebuilding*** and

https://www.gov.uk/government/publications/modern-methods-of-construction-government-response-to-the-select-committee-report

6. New FIDIC Plant and Design-Build subcontract

FIDIC launched a new Yellow Book, Plant and Design-Build, subcontract at its International Contract Users' Conference in London. The subcontract is for use in conjunction with the FIDIC Conditions of Contract for Plant and Design-Build, First Edition 1999.

See: *http://fidic.org/node/26635*

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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