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Legal developments in construction law

1. So what is the test for an implied obligation of good faith?

Mr Russell, a participant in a property development joint venture, left the business, principally on the terms of a deed of settlement with the other three participants. He subsequently brought proceedings against those participants, claiming that they had failed to tell him about, or give him a chance to participate in, a development project. A joint venture agreement previously entered into by the remaining participants contained limited express good faith obligations, which the court found had not been breached in respect of the project, but Mr Russell also claimed, amongst other things, that the joint venture agreement was a "*relational*" contract into which a more general duty of good faith or fair dealing should be implied.

The court noted that, rather than trying to first identify whether a contract is a "relational contract", and consequently includes a good faith obligation, the better starting point is the application of the conventional tests for the implication of contractual terms, as authoritatively restated in Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd. That is whether a reasonable reader would consider that an obligation of good faith was obviously meant, or the obligation was essential to the proper working of the contract, since it would otherwise lack commercial or practical coherence (the business efficacy test). Determining whether a term should be implied is an objective exercise, rather than one based on the parties' subjective intentions.

In the court's view, it was neither obvious, nor essential to the proper working of the contract, to imply some broader obligation of good faith. The existence of express good faith obligations indicated that, when the parties intended to impose an obligation of good faith, they did so, strongly suggesting that implying a more general good faith obligation would be inconsistent with the express terms. And the precise extent of the alleged good faith obligation was never satisfactorily explained to the court and was expressed in various different ways at different times. Any implied term must be capable of being clearly expressed.

Russell v Cartwright & Ors [2020] EWHC 41

2. Adjudication: inadvertent failure to consider an issue – is it fatal?

An adjudicator's decision did not refer to a particular issue, or the parties' submissions on it, but he arguably did decide the overarching issue, he listed the documents presented to him and stated that he had given careful consideration to all of them. Had he failed to consider the issue so that the decision was unenforceable?

The judge considered the Scottish and English case law and the textbook *Coulson on Construction Adjudication* and noted the distinction between a deliberate and an inadvertent failure to consider an issue. There appeared to the judge to be no example from the English cases cited of a challenge (whether based on a failure to exhaust jurisdiction

or a breach of natural justice) succeeding on the ground of an inadvertent, rather than deliberate, failure to consider an issue. Case law says that a court should hold that there has been a failure to exhaust jurisdiction in only the plainest of cases and the failure must be material, in the sense of having had a potentially significant effect on the overall result of the adjudication. The burden of showing this materiality must rest on the party asserting it.

Applying the law to the case, the court considered that the question of whether the adjudicator had exhausted his jurisdiction, by considering the issue, was very finely balanced, but, overall, the judge concluded that consideration of the issue was, at least to some extent, implicit in the findings that the adjudicator made and that the defender has not established that the adjudicator failed to address the point. It was clear, however, that the adjudicator had failed to give reasons, or adequate reasons, for any view reached on the issue, but the inadvertent failure was not material as it had no potentially significant effect on the outcome of the adjudication.

The court also endorsed the views of Lord Doherty on severability in ***Dickie & Moore Ltd v The Lauren McLeish Discretionary Trust*** (subject to appeal), in particular the grounds for a flexible and pragmatic approach which, in the court's opinion, properly accords with the whole nature and purposes of adjudication and the interests of justice. Applying that approach, the court would have concluded that the core nucleus of the adjudicator's decision could safely be enforced.

Field Systems Designs Ltd v MW High Tech Projects UK Ltd at:

https://www.bailii.org/scot/cases/ScotCS/2020/2020_CSOH_17.html

3. Ground investigations – does a contractor have to fill in the gaps?

PBS, a subcontractor on a project to construct a biomass energy plant discovered asbestos. In subsequent proceedings the court had to decide a number of issues, including whether a second discovery of asbestos was an "*unforeseen circumstance*". It referred to the observation by Mr Justice Coulson in ***Van Oord UK Limited v Allseas UK Limited*** that:

"Every experienced contractor knows that ground investigations can only be 100% accurate in the precise locations in which they are carried out. It is for an experienced contractor to fill in the gaps and take an informed decision as to what the likely conditions would be overall."

Mr Justice Coulson in ***Van Oord*** had, in turn, referred, as background, to the decision of the Court of Appeal in ***Obrascon Huarte Laine SA v Her Majesty's Attorney General for Gibraltar*** on a claim based on allegedly unforeseen ground conditions, and his analysis led to the conclusion that geotechnical information puts a contractor on inquiry such that they can then only complain if what emerges is unforeseeable - in the light of what they do have.

The difficulty for PBS was that it had quite a lot of information prior to the contract as to the presence of asbestos. It was not enough for PBS to point to the discovery of asbestos in more granular detail than previous reports had suggested. It must show that the asbestos discovered was unforeseeable. The reality, on the basis of the evidence relied on, was that the asbestos discovered was not a new discovery, or different from what had been indicated by the previous findings, but simply a more detailed manifestation of what was shown by the earlier materials. PBS consequently had either actual or constructive knowledge of the second asbestos, as well as the first discovery of asbestos, prior to the contract.

PBS Energo AS v Bester Generacion UK Ltd & Anor [2020] EWHC 223

4. Postponed 2021 start for changes to IR35 off-payroll working rules

The changes to the IR35 off-payroll rules were due to come into effect on 6 April 2020. This has now been delayed until April 2021 because of the coronavirus (COVID-19) pandemic.

See the government guidance at: https://www.gov.uk/guidance/april-2020-changes-to-off-payroll-working-for-clients

5. Launch of new CIC adjudication procedure for low value disputes

Following two consultations with the construction industry and other stakeholders, the Construction Industry Council has produced a Low Value Disputes Model Adjudication Procedure, intended to provide a simple, cost-effective procedure more accessible for SME's and others involved in lower value claims. Aimed at disputes involving claims for £50,000 or less where the issues are relatively uncomplicated, it also aims to allow newly qualified adjudicators to gain experience.

It has a streamlined adjudication procedure, links the adjudicator's fee to the amount claimed and includes an outline procedural timetable, and is supported by ten Participating Adjudicator Nominating Bodies.

See: http://cic.org.uk/news/article.php?s=2020-02-12-cic-publishes-new-adjudication-procedure

6. New Homes Ombudsman gets green light

Following a consultation last year, the government has confirmed the creation of a New Homes Ombudsman to deal with complaint about new homes. Its intention is that legislation will require all organisations who commission or build new homes for the purpose of selling them, to belong to the Ombudsman scheme, which will be free for the consumer and independent of industry. The government says that the Ombudsman must be adequately resourced and paid for by developers but costs to business must be fair and balanced.

Legislation will also enable the Secretary of State to approve a Code of Practice and will make provision for enforcement. The Ombudsman's powers will include awarding compensation up to a limit to be set by the Ombudsman and set out in the Code and subject to variation, to keep it up to date. The government thinks the limit should be £50,000, with any dispute above this figure being settled by the courts.

See: https://www.gov.uk/government/news/housing-secretary-clamps-down-on-shoddy-housebuilders and the link to the government response to the consultation.

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