



Legal developments in construction law

1. Adjudication: Court of Appeal sets out the law on the effect of fraud

The Court of Appeal has previously said that only in rare circumstances should the courts interfere with the decision of an adjudicator but what about fraud? A judge refused to enforce an adjudicator's decision because he found that the respondent could properly argue that the adjudicator's decision had been procured by fraud. On appeal, the Court of Appeal identified these principles as to enforcement where there are allegations of fraud:

- if the allegations of fraud were made in the adjudication then they were considered (or will be deemed to have been considered) by the adjudicator in reaching his decision, and cannot subsequently amount to a reason not to enforce the decision;
- the same principle applies if the allegations of fraud were not made in the adjudication but could and should have been;
- if the adjudicator's decision was arguably procured by fraud (such as in *Eurocom Ltd v Siemens Plc*) or where the evidence on which the adjudicator relied is shown to be both material and arguably fraudulent then, on the assumption that the allegations of fraud could not have been raised in the adjudication itself, such allegations can be a proper ground for resisting enforcement.

In dismissing the appeal, the Court also said that, although a defendant to an adjudication enforcement claim may be well-advised to provide a pleaded defence setting out any allegations of fraud, there is no mandatory requirement to do so if the claimant is seeking summary judgment. CPR 24.4(2) provides to the contrary.

[PBS Energo A.S. v Bester Generacion UK Ltd \[2020\] EWCA Civ 404](#)

2. Lack of writing sinks another oral contract claim

A corporate finance advisory firm claimed £1million under a contract it alleged had been made orally in 2011, in a 10/11 minute telephone conversation. In ruling that, for a number of reasons, there was no contract, the court said that, where there is no contemporaneous written record and confirmation of any orally agreed terms of contract, where neither party resorted to reducing any orally agreed terms to a written form, and where the alleged agreement represents a very substantial undertaking for both parties, it is unlikely that the parties would have reached any final consensus orally, in this case during a short telephone conversation, and would have had any intention to create binding legal relations in relation to that consensus.

Alternatively, the claimant alleged that a written offer it had made had been accepted by conduct, by a voicemail invitation or request that its director attend a management presentation or site visit in Vienna. In also rejecting this argument, the court said that if such a voicemail message was to constitute an acceptance of a communicated offer, it would have expected the message to have made an express reference to the proposal. The absence of such a reference deprived the voicemail of the character of a clear and unequivocal acceptance required to result in a binding contract. And if the defendant had intended to accept the offer, it would have been more likely that the defendant would have provided or confirmed that acceptance in writing, for example by an email, but there was no such written acceptance

Moorgate Capital (Corporate Finance) Ltd v Sun European Partners LLP [2020] EWHC 593 (no link available)

3. Court of Appeal rules on payment under hybrid contracts

The Housing Grants Act does not apply to all construction works. It describes the "construction operations", to which the Act will apply, and the operations to which it will not. Parties to a hybrid contract, that includes both types of operations, consequently need to deal carefully with adjudication and payment, because the Act says that it only applies so far as it relates to construction operations. A hybrid subcontract contained a payment scheme that complied with the relevant provisions of the Act for construction operations, and mirrored those provisions for non-construction operations and, in a dispute about payment, the Court of Appeal had to decide if the wording of the Act meant that a valid payment notice was required to identify separately the sum due in respect of construction operations only.

In deciding that it was not, the Court noted that there was nothing in the subcontract that required either party to differentiate in their payment, or payless, notices between the sums notified for construction operations and non-construction operations. If the agreed terms comply with the Act, then the conventional view is that the Act is no longer of any direct relevance to the rights and

obligations of the parties and the parties were at liberty to extend the payment provisions deriving from ss. 109-111 to cover both construction operations and non-construction operations.

The Act recognised that there would be hybrid contracts but it did not provide that a hybrid contract must contain a term requiring the separate or distinct notification and breakdown of sums due in respect of construction operations only. And, as a practical consideration, the Court was in no doubt that requiring parties to a hybrid contract to deal separately with construction and non-construction operations for every interim payment application, where they have agreed one set of payment terms for both types of operation which comply with the Act, would create additional layers of complexity and cost.

C Spencer Ltd v M W High Tech Projects UK Limited [2020] EWCA Civ 331

4. Remediation and COVID-19: Government Building Safety update

The government has issued a building safety update on remediation and COVID-19. It notes that it is possible for construction work to continue in the current context, if done safely, and says that those responsible for commissioning building safety work, such as the remediation of high-rise buildings with unsafe ACM cladding, and the construction companies undertaking the work, should consider how best to proceed and/or mitigate the risks arising from such work being paused.

The government update includes a link to Version 3 of the Construction Leadership Council guidance on site operating procedures.

The government update also includes a link to the CLC's advice to industry on the temporary suspension of sites, where relevant.

See: <https://www.gov.uk/guidance/remediation-and-covid-19-building-safety-update-27-march-2020>

5. Government publishes response to 'Building a Safer Future' consultation

Following its 'Building a Safer Future' consultation, and taking into account the responses received, the government has published its proposals for a reformed building safety system covering the performance of all buildings as well as the management of fire and structural safety risks in new and existing buildings in scope. It has also published an economic assessment setting out estimates of the economic costs and benefits of the proposals.

The proposals will only apply to England, with the exception of those relating to construction products and the competence of architects, which will apply across the UK. There will be legislation for these reforms in new primary legislation, through the Building Safety Bill, and further secondary legislation, where necessary.

The government has also published the Housing Secretary's update on building safety reforms, including the May update to Approved Document B that will include increased fire safety measures in high-rise blocks of flats, providing for sprinkler systems and consistent wayfinding signage in all new high-rise blocks of flats over 11 metres tall.

See: https://www.gov.uk/government/consultations/building-a-safer-future-proposals-for-reform-of-the-building-safety-regulatory-system?utm_source=46f7fd7f-ac9f-4a57-90c85ac30e713dd5&utm_medium=email&utm_campaign=govuk-conotifications&utm_content=immediate

and

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/877755/Dear_colleague_letter_Building_Safety.pdf

6. Public procurement: Procurement Policy Notes 01/20 & 02/20

The government has issued Procurement Policy Notes 01/20 and 02/20, setting out, respectively, information and guidance for public bodies (and other contracting entities in analogous situations) on the interpretation of the public procurement regulations when responding to COVID-19, and on payment of their suppliers to ensure service continuity during and after the COVID-19 crisis. PPN 02/20 says that all contracting authorities must act now to ensure suppliers considered at risk are in a position to resume normal contract delivery once the current outbreak is over.

The guidance note 'Model Interim Payment Terms' provides a set of terms that contracting authorities can use to implement PPN 02/20 in providing contractual relief to suppliers affected by COVID-19 and the guidance note 'Payments to Suppliers for Contingent Workers' provides guidance for contracting authorities where they have contingent workers impacted by COVID-19, and is updated with the latest FAQs.

PPN 01/20 is set out at: <https://www.gov.uk/government/publications/procurement-policy-note-0120-responding-to-covid-19>;

and

PPN 02/20 and associated documents, including FAQs, are set out at: <https://www.gov.uk/government/publications/procurement-policy-note-0220-supplier-relief-due-to-covid-19>.

The Mayer Brown briefing on these measures is at: <https://www.mayerbrown.com/en/perspectives-events/publications/2020/04/how-is-the-united-kingdom-rising-to-the-procurement-challenges-of-covid19>.

7. Government updates and materials on cladding and building safety

The government has published a number of further updates and materials on cladding and building safety, including:

- the final report of the expert group on structure of guidance to the building regulations; See: <https://www.gov.uk/government/publications/final-report-of-the-expert-group-on-structure-of-guidance-to-the-building-regulations>
- the BRE final research report on the fire performance of cladding materials (non-ACM cladding): See: <https://www.gov.uk/government/publications/fire-performance-of-cladding-materials-research>
- Stakeholder update on non-ACM remediation and the Building Safety Fund: See: https://www.gov.uk/government/publications/non-acm-remediation-and-the-building-safety-fund-stakeholder-update-6-april-2020?utm_source=ac061c65-a760-48d0-bc68-4091b769b9eb&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate

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