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Legal developments in construction law

1. And the law on remoteness of damage in contract is…

The British Virgin Islands government entered into two contracts with Global Water Associates Ltd for a water reclamation treatment plant, one to design and build it, and the other to manage, operate and maintain it. The second agreement ran from the date when the plant was first capable of achieving the contracted level of water processing. The government failed to provide a prepared project site for the plant which, consequently, was not built. Global Water validly terminated the design and build agreement but could it claim the profits it would have made from managing, operating and maintaining the plant during the 12 year term of the second agreement?

In ruling that it could, the Privy Council summarised the law on remoteness of damage in contract:

- in principle, the purpose of damages for breach of contract is to put the party whose rights have been breached in the same position, so far as money can do so, as if their rights had been observed;
- but the party in a breach of contract is entitled to recover only such part of the loss actually resulting as was, at the time the contract was made, reasonably contemplated as liable to result from the breach. To be recoverable, the type of loss must have been reasonably contemplated as a serious possibility (in the sense discussed elsewhere in the judgment – see below);
- what was reasonably contemplated depends upon the knowledge which the parties possessed at that time or, in any event, which the party, who later commits the breach, then possessed;
- the test to be applied is objective. One asks what the defendant must be taken to have had in their contemplation rather than only what they actually contemplated. In other words, one assumes that the defendant at the time the contract was made had thought about the consequences of their breach;
- the criterion for deciding what the defendant must be taken to have had in their contemplation as the result of a breach of their contract is a factual one.

The judgment noted, after discussing the various words used to describe the likelihood of losses resulting from a breach of contract, that the phrases and expressions used by judges do not, and should not, have the status of statute wording. It is more important to identify what judges have been trying to encapsulate in their choice of language. That is whether, as a question of fact, the contracting parties, or at least the defendant, reasonably contemplated, if they applied their minds to the possibility of breach when formulating the contract terms, that breach might cause a particular type of loss. In contractual liability, the court is not concerned solely with the percentage chance of such an event occurring, although that is not irrelevant.

Attorney General of the Virgin Islands v Global Water Associates Ltd (British Virgin Islands) [2020] UKPC 18

2. So who is the contracting party? Is it personal or a company?

A contractor for building works at a restaurant brought an adjudication claim for payment under the construction contract but just who was the other contracting party? Was it the restauranteur or his company that operated the restaurant?

In concluding that the contract was with the restauranteur in his personal capacity, the court applied the principles set out by the Court of Appeal in ***Hamid v Francis Bradshaw Partnership*** **[2013] EWCA Civ 430**, in summary that:

- extrinsic evidence is admissible to assist the resolution of an issue as to the identity of a party referred to in a deed or contract;
- the court's approach is objective. The question is what a reasonable person, furnished with the relevant information, would conclude;
- if the extrinsic evidence establishes that a party has been misdescribed in the document, the court may correct that error as a matter of construction without any need for formal rectification;
- where the issue is whether a party signed a document as principal or as agent for someone else, there is no automatic relaxation of the parol evidence rule. The person who signed is the contracting party unless

  (a) the document makes clear that they signed as agent for a sufficiently identified principal or as the officer of a sufficiently identified company (the phrase 'sufficiently identified' being intended to include cases where there is an inconsequential misdescription of the entity on behalf of whom the individual was signing) or

  (b) extrinsic evidence establishes that both parties knew they were signing as agent or company officer.

Maftoon (t/a Fm Construction Services) v Sayed & Anor [2020] EWHC 1801

3. No liability for architect for damage caused by intruder when door left unlocked during inspection

An architect inspected an unoccupied cinema, with other professionals, for about an hour. During the visit he left the door unlocked and the alarm switched off. That evening the cinema caught fire and was extensively damaged. The cinema owner, who claimed that one or more intruders had gained access through the unlocked door and started the fire, sought damages of £6.5 million. But did the architect owe a duty of care?

The court ruled that it did not, noting that the courts have rejected using a universal test to determine when a duty of care will be found to exist. The starting point is for the court to consider whether the circumstances of the case in question have been found to give rise to the existence or non-existence of a duty of care in other cases. In determining whether to extend a duty of care to novel situations, the court adopts an incremental basis, by analogy with established categories of case where a duty has been found to exist.

The court said that the general rule is that the common law does not impose liability for negligence in relation to pure omissions, including loss arising through the criminal actions of a third party. There are, however, two well recognised exceptions to this general rule (other than statutory exceptions):

- where the defendant was in a position of control over a third party and should have foreseen the likelihood of them causing damage to somebody in close proximity if they failed to take reasonable care in the exercise of that control;
- and where the defendant assumes a positive responsibility to safeguard the claimant under the *Hedley Byrne* principle, for instance in relationships in which a duty to take positive action typically arises, for instance contract, fiduciary relationships, employer and employee.

This case was a pure omissions case and the assumed facts did not give rise to the imposition of an assumption of responsibility on the basis of which a duty of care might be owed. The claim was therefore struck out.

Rushbond Plc v The J S Design Partnership LLP [2020] EWHC 1982

4. Draft Building Safety Bill, fire safety consultation and Building Regulations manual

The government has published the draft Building Safety Bill. It introduces more stringent rules for all blocks of flats that are either 18 metres or more in height, or more than six storeys tall. A Building Safety Regulator, being set up within the HSE, who will enforce the rules, will have three main functions: to oversee the safety and standard of all buildings, directly assure the safety of higher-risk buildings; and improve the competence of people responsible for managing and overseeing building work.

The government has also launched a fire safety consultation and published a new Manual to the Building Regulations which contains all Approved Documents in one place.

See: https://www.gov.uk/government/news/landmark-building-safety-law-to-keep-residents-safe

5. Government consults on planning

The government published a White Paper "Planning for the Future" setting out its proposals for reform of the planning system. The consultation on the proposals is open until 29 October 2020.

It also initiated a parallel consultation (closing on 1 October 2020) on its proposals for shorter-term changes to the existing system. These proposals cover the standard method for assessing housing for local plans, the detail of the First Homes planning proposals, the affordable housing threshold and permission in principle by application, for sites suitable for major housing-led development, rather than being restricted to just minor housing development.

See: https://www.gov.uk/guidance/planning-guidance-letters-to-chief-planning-officers

6. New standard BS EN ISO 19650-3:2020

New standard BS EN ISO 19650-3:2020 "*Organization and digitization of information about buildings and civil engineering works, including building information modelling (BIM) - Information management using building information modelling - Part 3: Operational phase of assets*", published in August, highlights the principles and requirements for maintaining information management over an asset's lifetime.

The standard is for owners and operators of built assets of all sizes and levels of complexity from individual buildings and portfolios of buildings (government and commercial) to infrastructure networks (rail, road etc), and pieces of infrastructure (bridges, flood prevention etc).

See: https://shop.bsigroup.com/ProductDetail?pid=000000000030374338&utm_source=pardot&utm_medium=Email&utm_campaign=+SM-STAN-LAU-BUILD-BSENISO19650-3-2008

7. New NEC4 Practice Note 6 on BIM Information Protocol

New NEC Practice Note 6 shows how to incorporate the May 2020 Information Protocol published by UK BIM Framework, in association with the Construction Industry Council, to support BS EN ISO 19650-2 (the delivery phase of assets), into NEC4 ECC using the secondary option X10. The guidance also applies to other NEC contracts with terminology amended to suit.

See: https://neccmsmediaprod.azureedge.net/mediacontainer/nec/media/nec/document downloads/practice-note-6-iso-bim-protocol.pdf

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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