



Legal developments in construction law

1. Hong Kong appeal court says subcontractor cannot change contractual basis for claim after notice period expired

A subcontract for diaphragm walls required the subcontractor to provide specified claim details within 28 days of its notice of claim, as "...a condition precedent to any entitlement...". One category of those details was the contractual basis of a claim. The subcontractor provided claim details within the 28 days, making its claim on the contractual basis of a clause dealing with variations. The subcontractor's alternative claim, which it later pursued in arbitration was, however, a "like rights" claim (based on the main contractor's entitlement under the relevant provisions of the main contract) under a different clause, with different payment consequences, the contractual basis of which was not mentioned in any of the claim documents within the 28 days. Could the subcontractor make this claim in the arbitration on a new legal basis, based on notices given by reference to a different legal basis?

The Hong Kong Court of Appeal said it could not. The wording of the applicable clause was clear and unambiguous, there was no justification for giving it a narrow construction or strained interpretation and there were two commercial purposes for identifying the contractual basis within the stipulated period, apart from providing the factual basis for the claim so that the main contractor could investigate in time. One was finality, and the other

was that, in a chain contract situation, the contractor would wish to know whether the subcontractor's claim would need to be passed up the line. If the claim was based on other matters, such as alleged breach of the subcontract by the main contractor, it would not need to be passed up.

https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=131354&currpage=T

2. Three magic words prevent binding contract from coming into existence

The words "*subject to contract*" have been used in property sales for many years, to prevent a binding contract from coming into existence until there is a formal contract or that condition is removed, either by express agreement or because such an agreement is necessarily to be implied. Once negotiations have begun "*subject to contract*", ordinarily that condition applies all the way through the negotiations. The principle is not, however, confined to property sales.

In negotiations to settle litigation, one party alleged that a binding contract had been made, but the alleged offer and acceptance were each headed "*without prejudice and subject to contract*", and a subsequent letter from that party's solicitor, similarly headed, contemplated that a consent order would be needed to embody the compromise. (The Court of Appeal noted that, in the context of negotiations to settle litigation which are expressly made "*subject to contract*", a consent

order is the equivalent of the formal contract). There was no performance of the alleged contract; all that had happened was the exchange of correspondence.

A purported Part 36 offer had also been made but the Court stressed that a Part 36 offer is not like an offer in the ordinary law of contract. It is, in effect, a free-standing offer that can be accepted even after the offeree has put forward a different proposal. That is why it is an ordinary occurrence in litigation that without prejudice negotiations often take place in parallel with the making of a Part 36 offer.

In ruling that no contract had come into existence, the Court of Appeal said that the cases showed that, where negotiations are carried out "*subject to contract*", the mere fact that the parties are of one mind is not enough. There must be a formal contract, or a clear factual basis for inferring that the parties must have intended to expunge the qualification. In this case there was neither.

Joanne Properties Ltd v Moneything Capital Ltd & Anor [2020] EWCA Civ 1541 (19 November 2020)

3. Security failure lands airport authority with liability for third party's plane theft

An aeroplane was stolen from the airport in Nassau. The company that owned the plane claimed that it was owed a duty of care by the Bahamas Airport Authority, which the Bahamas court of first instance found was solely responsible, under its statutory duty, for ensuring the protection of aeroplanes parked in the airport. Case law says that where it is plain that no liability for the tort of breach of statutory duty has been created, there can be no common law duty of care in respect of a claimed breach of a statutory obligation. But did that apply in this case and was the Authority liable for the act of a third party?

The Privy Council said that the statutory background provided by the legislation setting up the Authority did no more than provide the framework within which the relationship of proximity between the Authority and the plane's owner was established. The Authority's "broad public duty" was to provide airport security and the owner's claim in negligence was not based on a failure to provide security but on deficiencies in the way it was conducted. There was therefore ample

material on which the original judge and the Bahamas Court of Appeal could conclude that each of the three elements of the threefold test for a duty of care (foreseeability, proximity, and, in all the circumstances, is it fair, just and reasonable to impose such a duty) was satisfied.

The Authority had created the risk of danger that the third party might cause harm to the claimant by reason of the defects in the system of security at the airport and it had assumed a relevant responsibility towards the respondent by being the sole agency which had the means to provide adequate protection for the plane. And it was entirely fair, just and reasonable to hold the Authority liable for the plane's loss. It was uniquely placed to provide the necessary protections, it had excluded the plane owner from undertaking this task and must have been well aware that it fell to it alone to make sure that the aircraft within its property were safe. The mere fact that the aeroplane was stolen showed that the security system was deficient.

The Airport Authority v Western Air Ltd (The Bahamas)[2020] UKPC 29

4. IR35 changes start on 6 April 2021

The reforms to the off-payroll working rules (IR35), postponed from April 2020, will take effect in April 2021. The changes will apply to all payments made for services provided on or after 6 April 2021.

See: <https://www.gov.uk/government/publications/off-payroll-working-rules-communication-resources#history>

and this Mayer Brown update:

<https://www.mayerbrown.com/en/perspectives-events/blogs/2020/09/ir35-reforms-update-make-sure-you-are-ready-for-6-april-2021>

5. EWS1 no longer needed for buildings without cladding

The government, the Royal Institution of Chartered Surveyors, UK Finance and the Building Societies Association have agreed that owners of flats in buildings without cladding will no longer need an EWS1 form to sell or re-mortgage their property. While building owners are already legally required to undertake fire risk assessments on all blocks of flats, following the government issue of [supplementary guidance](#), the RICS is to work with

lenders, valuers and fire safety bodies to develop new advice for surveyors, to enable surveyors to take a more proportionate approach and reduce the number of buildings requiring an EWS1 assessment.

The government has also announced nearly £700,000 to train more assessors and is exploring ways to address ongoing concerns around the availability of professional indemnity insurance.

See: <https://www.gov.uk/government/news/government-steps-in-to-help-homeowners-caught-up-in-ews1-process>

6. NEC4 June 2017 Edition: second set of published amendments

Schedules of the amendments for each contract, on the NEC contract website, detail all the amendments except for minor typographical changes. New contracts are now printed with the amendments included and updated versions of the User Guides have also been produced.

See: <https://www.neccontract.com/About-NEC/News-and-Media/NEC4-October-2020-Amendments>

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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