MAYER | BROWN

February 2020

Legal developments in construction law

1. Relational contract means implied duty of good faith? It's not as simple as that

A defendant claimed that termination of its contracts was invalid because the termination clause was qualified by implied terms. In rejecting the claim, the court said that the starting point in determining the meaning and effect of the contracts was the language used by the parties because they had control over it and must have been focussing on the issue covered by the disputed clauses when agreeing the wording. That was of particular importance with the joint operating agreements in question because they were sophisticated and complex agreements drafted by skilled and specialist professionals and were to be interpreted principally by textual analysis unless a provision lacked clarity or was apparently illogical or incoherent. In the court's view it was clear that the clauses were intended to confer an unqualified right of termination.

The defendant argued that the termination clause involved the exercise of a discretion that was subject, in accordance with the case law discussed in ***Braganza v. BP Shipping Limited***, to an implied term making its exercise subject to concepts of good faith and genuineness, and the absence of arbitrariness, capriciousness, perversity and irrationality. The court considered that, while this is an incrementally developing area of law, current case law makes clear that the ***Braganza*** doctrine has no application to unqualified termination provisions within expertly drawn complex commercial agreements between sophisticated commercial parties such as those in the case. The doctrine does not apply to a case where the discretion involves a simple decision whether or not to exercise an absolute contractual right. The discretion that will usually entail the implied term will involve making an assessment or choosing from a range of options, taking into account the interests of both parties.

The defendant also claimed that its contracts were '*relational contracts*', identified in ***Yam Seng PTE Ltd v International Trade Corporation Ltd*** as those which govern long term relationships to which the parties make a substantial commitment, and which might include, for instance, some joint venture agreements, franchise agreements and long-term distributorship agreements. It said that resulted in the implication of a duty of good faith, which qualified the otherwise unqualified right of termination. In also rejecting this claim, the court noted that implying a duty of good faith will only be possible where the language of the contract, viewed against its context, permits it. It is not a reflection of a special rule of interpretation for this category of contract. The power to terminate was absolute and unqualified and, consequently, a term that qualified what the parties had agreed could not be implied and it was unnecessary to make the contract work.

Taqa Bratani Ltd & Ors v Rockrose UKCS8 LLC [2020] EWHC 58

2. Court says contractor cannot escape arbitration clause in subcontractor's quotation

Construction contracts may be set out in a number of different documents and contain different sets of standard terms. In just such a case, the first issue for the court was whether the words in a subcontractor order: "[b]*ased on Quotation Q17729 Rev B dated 11/04/2016…*" were wide enough to incorporate the subcontractor's terms, which included an arbitration clause, into the contract. The court ruled that, on their natural and ordinary meaning, the words meant based on the quotation as a whole, including the subcontractor's terms, and should not be given too narrow or legalistic a construction. This was a contract negotiated and drawn up by two construction companies and not prepared by lawyers. A reasonable person with all the background knowledge available to the parties would have understood the wording as intending the quotation to form part of the contract.

The subcontractor also claimed that the court could have regard to the deletion of certain wording in the order. After considering the law as to the circumstances in which the court may have regard to a deletion, as set out, in particular, by the Court of Appeal in ***Narandas-Girdhar v Bradstock***, the court noted that if the fact of deletion shows what it is the parties agreed that they did not agree, and there is ambiguity in the words that remain, then the deleted provision may be an aid to construction, although one that must be used with care. In this case, however, the ambiguity was not in the wording but in a precedence provision, and even if the court could consider the deletion, it did not help to determine the true meaning of the contract.

In pursuing adjudication and enforcement proceedings, the contractor had repeatedly relied on the dispute resolution clause in the subcontractor's terms, which provided for arbitration. Did that reliance now prevent the contractor from denying that it was bound by the arbitration clause, because of the doctrine of approbation and reprobation? This doctrine prevents a party from electing to take and pursue inconsistent stances, for instance, "*blow hot and cold*" as to whether an adjudicator's decision is valid. In ruling that the contractor was so prevented, the court summarised certain principles from the case law. The approbating party must have made their choice clearly and unequivocally, it is usual, but not necessary, for them to have taken a benefit from the choice, for instance under a will, and their subsequent conduct must be inconsistent with their earlier choice. The doctrine is essentially about preventing inconsistent conduct and ensuring a just outcome.

MPB v LGK [2020] EWHC 90

3. Contract chain – can it block a tort duty of care?

The managing agents for a property were responsible for M & E and building services and engaged the defendant to carry out maintenance visits to the property's emergency lighting system. A fire caused damage to the property and to machinery and equipment of three tenants. The freeholder and the tenants brought a claim against the defendant in tort, alleging that the fire was caused by its failure to carry out the contracted maintenance visits and, consequently, to identify that batteries which were the alleged cause of the fire in the lighting system, needed replacing. The agents had been engaged by two of the claimants (amongst others) but the defendant had no contract with any of the claimants and the claim was therefore made in tort. Did the defendant, however, owe the claimants a duty of care in tort in respect of its omission? And was the contractual chain significant?

The case law establishes that a person's negligent act that causes physical damage will normally be actionable. The damage causes economic loss, sometimes indirect. Where a novel situation arises, the court should approach the development of the law incrementally, by reference to analogous decided cases, applying the threefold Caparo test of foreseeability, proximity and fairness, justice and reasonableness. There is a difference (though not determinative) in the law's approach to omissions and to positive acts of negligence. A duty to act, in the case of an omission, is more easily found where the alleged tortfeasor is found to have assumed a responsibility to act, which will normally involve some form of relationship between the claimant and the tortfeasor.

A relevant factor in deciding whether there is a duty of care is the existence, or not, of a contractual chain. In ***Henderson v Merrett Syndicates Ltd*** Lord Goff took the example of an ordinary building contract chain and said that there is generally no assumption of responsibility by subcontractors and suppliers to the building owner, as the parties have so structured their relationship that it is inconsistent with any such assumption. In this case, although not a typical building contract chain, there was a very carefully constructed chain of contracts (leases, managing agent's appointment and maintenance contract), precisely the situation referred to by Lord Goff.

The allegation made was of a negligent failure by the defendant to honour its contractual obligation to the agents to attend site or to remind them that such visits were due, a novel case to be approached as an incremental extension of the scope of the law. The court found it impossible to discern any factual basis on which it could be said that the defendant assumed any responsibility to any of the claimants to make the visits or to issue reminders, or that any of the claimants relied on them to do so and, as noted, the parties had so structured their relationship that it was inconsistent with an assumption of responsibility. The claim was therefore struck out.

John Innes Foundation & Ors v Vertiv Infrastructure Ltd [2020] EWHC 19

4. Government sets out new building safety measures

The government has announced a number of new building safety measures, which include:

- establishing the Building Safety Regulator within the Health and Safety Executive, to give effective oversight of the design, construction and occupation of high-risk buildings. The HSE is to begin to establish the new regulator in shadow form immediately, ahead of it being fully established, following legislation. It will raise building safety and performance standards, including overseeing a new, more stringent regime for higher-risk buildings. Dame Judith Hackitt will chair a Board to oversee the transition;
- to speed up remediation of buildings with ACM cladding, appointing a construction expert to review remediation timescales and identify what can be done to improve pace in the private sector;
- to ensure cost is not a barrier to remediation, examining options to mitigate costs for individuals or provide alternative financing routes;
- launching a consultation into the current combustible cladding ban, including proposasls to lower the 18 metre height threshold to at least 11 metres;
- setting out, this month, detailed proposals on how the government will deliver the technical review of fire guidance;
- clarifying, in the forthcoming Fire Safety Bill being introduced to Parliament and set out in more detail in the government's response to the Public Inquiry Phase 1 recommendations, the Regulatory Reform (Fire Safety) Order 2005 requiring residential building owners to fully consider and mitigate the risks of any external wall systems and front doors to individual flats. The changes will make it easier to enforce where building owners have not remediated unsafe ACM by complementing the powers under the Housing Act.

The Housing Secretary, Robert Jenrick, has also said that unless swift progress, to make buildings safe, is seen in the coming weeks, he will publicly name building owners where action to remediate unsafe ACM cladding has not started.

https://www.gov.uk/government/news/new-measures-to-improve-building-safety-standards

5. Independent Expert Advisory Panel issues updated advice

The government appointed independent expert advisory panel has clarified, consolidated and updated advice to building owners on actions they should take to ensure their buildings are safe, with a focus on external wall systems.

It makes clear that ACM cladding (and other metal composite material cladding) with an unmodified polyethylene filler (category 3) presents a significant fire hazard on residential buildings at any height with any form of insulation and action to remediate unsafe wall systems and remove unsafe cladding should be taken as soon as possible. In addition to further advice as to remedial action to be taken, it advises that the risk of external fire spread should be considered as part of the fire risk assessment for all residential buildings, irrespective of height.

The assessment should take into account height, materials, vulnerability of residents, location of escape routes, and the complexity of the building. The explicit remediation advice provided in the IEAP note should be used to support the fire risk assessment and remedial actions may be required in buildings below 18m where there is a risk to the health and safety of residents, other building users, people in the proximity of the building, or firefighters.

It covers the safety of external wall systems (including spandrel panels and balconies), smoke control systems, fire doors and what short-term measures should be put in place should a significant safety issue be identified.

It reports that members of the Association of Composite Door Manufacturers have committed, where reasonable, to work with building owners to review Fire-Resistant Composite Doorsets that have been supplied by them and to remediate any installed doorsets which failed Ministry of Housing, Communities and Local Government tests. Building owners should contact the relevant manufacturer directly.

https://www.gov.uk/government/publications/building-safety-advice-for-building-owners-including-fire-doors

6. Government updates FAQs on Building (Amendment) Regulations 2018

The government has updated its most frequently asked questions following the ban on combustible materials in external walls in Building (Amendment) Regulations 2018.

New questions 11,12,& 13 have been added.

https://www.gov.uk/government/publications/building-amendment-regulations-2018-frequently-asked-questions

If you have any questions or require specific advice on the matters covered in this Update, please contact your usual Mayer Brown contact.