MAYER | BROWN

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Legal developments in construction law

1. Do public bodies owe a duty of care?

In the exercise of its statutory duties, the Environment Agency provided comments, approval and consent to proposed diversion works for a culvert, including the design of the culvert and trash screen. It was also, however, involved, in the hydraulic modelling used in the design of the works. When refuse became trapped against the bars of the trash screen, the culvert was blocked and flooded neighbouring houses, whose owners and occupiers brought proceedings against the Agency and others. The Agency claimed that it did not owe a duty of care and asked the court to strike out the claim against it. But was it right?

The court summarised the relevant principles derived from the case law:

- public authorities do not owe a duty of care at common law to private individuals or bodies, simply by exercising their statutory powers or duties;
- comparable cases concerning planning authorities and other public bodies indicate that the absence of a duty of care extends to advice given as part of the exercise of their statutory powers and duties;
- a common law duty to protect from harm may arise in circumstances where the principles applicable to private individuals or bodies would impose such a duty;
- such circumstances may include conduct undertaken by public authorities in the exercise of their statutory powers or duties that gives rise to an assumption of responsibility, as explained in ***Spring v Guardian Assurance plc***.

In dismissing the Agency's application to strike out the claim against it, the court said that the Agency's pleaded involvement in the hydraulic modelling used in the design of the diversion works arguably went beyond its statutory duties and powers, so as to impose a common law duty of care to the claimants. On the pleaded facts, it was unlikely that the Agency's clearance of debris from the culvert amounted to an assumption of responsibility for its maintenance but, without all relevant evidence, the court could not exclude the possibility that its conduct gave rise to a duty of care.

Anchor Hanover Group & Ors v Arcadis Consulting (UK) Ltd & Ors [2021] EWHC 543

2. Exclusion of 'fundamental, deliberate and wilful' breaches of contract – special treatment required?

An engineering contractor claimed that a consultant had "fundamentally, deliberately, and wilfully breached" its obligations under their agreement. The consultant denied any such breaches but said that, in any event, the claim was subject to the exclusions and restrictions in the agreement. The contractor contended that those exclusions and restrictions did not apply to fundamental, deliberate and wilful breaches. Are such breaches treated differently or do the normal rules of construction apply?

The contractor placed some reliance on the case of ***Internet Broadcasting Corporation Ltd v MAR LLC***, where the deputy judge considered that there was a strong presumption against an exclusion clause operating to preclude liability for a deliberate repudiatory breach of contract and that the presumption could only be rebutted by strong language. The contractor ultimately relied on the construction of the particular clauses in the agreement but maintained that, for a contractual term to be effective to exclude liability for a deliberate breach (at least for one of the gravity it alleged), then the use of express language to that effect was necessary.

The court did not agree with the contractor and ruled that the correct approach was as set out in the House of Lords' decision in ***Photo Production Ltd v Securicor Transport Ltd*** and as summarised in ***Astrazeneca UK Ltd v Albemarle International Corporation***. Exemption clauses, including those purporting to exclude or limit liability for deliberate and repudiatory breaches, are to be construed by reference to the normal principles of contractual construction, without the imposition of a presumption, and without requiring any particular form of words or level of language to achieve the effect of excluding liability.

It said that there is no presumption against the exclusion of liability and no requirement for any particular form of words or level of language, regardless of the nature of the breach and whether it is deliberate or repudiatory, but subject to the important proviso that an exclusion or limitation of liability will not be read as operating to reduce a party's obligations to the level of a mere declaration of intent. As with any other contractual provision, if the language of an exclusion clause is properly capable of only one meaning then effect must be given to it. If more than one meaning is properly possible then the court is to engage in an iterative process of construction.

Mott Macdonald Ltd v Trant Engineering Ltd [2021] EWHC 754

3. Does a subcontractor's consultant owe the main contractor a tort duty of care?

A subcontractor engaged an independent consultant to check, for a modest fee, the design of a slipform rig. The subcontractor went into administration, the main contractor terminated the sub-contract and appointed a replacement sub-contractor, who investigated the works carried out and the slipform rig. They decided that both were defective and that, in some respects, the rig was unsafe and should not be used. The main contractor replaced the rig and brought proceedings against the subcontractor, the designer of the rig and the consultant. The consultant went into liquidation but the proceedings continued against its insurers. The consultant had no contract with the main contractor but did it owe it a duty of care in tort in respect of the design check certificates it had provided to the subcontractor, and which, with notes and comments removed from one certificate by the subcontractor, had been passed on to the main contractor?

In deciding the first of two preliminary issues, and noting that the cases state that the existence of a duty of care cannot be dealt with in the abstract, the court said the issue should not be approached by considering whether the consultant owed any duty but by reference to whether it had a duty of care related to the kind of loss that the main contractor had suffered, and was seeking to recover.

After examining the case law, the court ruled that there had been no assumption of responsibility by the consultant, for a number of reasons, including the fact that the construction project had a large number of participants and a detailed main and subcontract structure from which the relationship between the sub-contractor and the consultant was entirely separate. To find an assumption of responsibility by the consultant to the main contractor would "short circuit" that structure. The relationship between the consultant and the main contractor did not have the indicia of a contract, save for consideration.

Objectively, construction professionals would expect the framework of carefully organised contractual obligations to govern their legal relations with one another. This was a novel situation and even if the three-fold test for a duty of care was adopted, it would not be just, reasonable, or fair to impose a duty of care of the type contended for. The outcome was sensible and just. It resulted in the consultant being held not liable, for a potentially unlimited liability on a major and very complex construction project, the details of which were never provided to it. It was inconceivable that a reasonable business person (an objective test) would have considered that the consultant was voluntarily assuming an unlimited responsibility towards the main contractor, or to any other party, on a highly complex construction project, other than the subcontractor with whom the consultant was in direct contract.

And if a duty of care to the main contractor were to be imposed upon a design checker, this would have potentially serious consequences. If, in litigation, the main contractor could bring in other entities directly, including a design checker, with whom it has never had direct contractual relations, this would complicate the recovery process enormously and have significant consequences in terms of increased insurance premiums.

Multiplex Construction Europe Ltd v Bathgate Realisations Civil Engineering Ltd & Ors [2021] EWHC 590

4. New JCT Dispute Adjudication Board option for D & B and Major Project contracts

The JCT is launching its new Dispute Adjudication Board documentation for use with its 2016 Design and Build and Major Project Construction contracts. It was thought that these contract forms, which are both suitable for large, longer-term, projects, would be the most appropriate for DABs, as the establishment of a DAB will generate costs that must be proportionate to the nature and size of the project.

The new rules are based on the Chartered Institute of Arbitrators' Dispute Board rules, amended for use with a JCT form on a UK project, and consistent with the parties' statutory right to refer disputes to adjudication under the Construction Act. The documentation consists of the JCT/CIArb Dispute Adjudication Board Rules, a JCT Model Dispute Adjudication Board Tripartite Agreement, enabling provisions for each of the two JCT contracts and Guidance Notes, and can be pre-ordered for despatch from 4 May 2021.

See: *https://corporate.jctltd.co.uk/dispute-adjudication-board-documentation-2021-dab-2021/*

5. Common Assessment Standard for pre-qualification goes live

The Common Assessment Standard, the new industry-wide pre-qualification system, is now live. A new data-sharing solution now enables contractors and clients to obtain key pre-qualification data from any of three Recognised Assessment Bodies, Achilles, CHAS or Constructionline, and supply chain companies will need certification from only one of those bodies to tender for work with contractors and clients that have adopted the Standard.

The Standard is an industry-agreed question set with two levels of certification, desktop and site-based, and companies can apply to any Recognised Assessment Body for the level appropriate to their trade, size and client requirements. Created by Build UK, with CECA's support, it is endorsed by the Construction Leadership Council, which is seeking its adoption throughout government construction procurement, including the Construction Playbook.

See: *https://builduk.org/priorities/increasing-productivity/pre-qualification/*

6. Planning changes on the way

The government has published responses to two planning consultations.

New homes through change of use, public service infrastructure development and faster planning

The government is introducing a new permitted development right, effective from 1 August 2021, to create new homes through change of use from commercial business and service uses (Use Class E). It is subject to a limit of 1,500 sq.m. of floor space changing use, will apply to buildings that have been in commercial, business and service uses for two years and have been vacant for at least three continuous months, and will be subject to prior approval by the local planning authority on specific planning matters.

The permitted development right for public service infrastructure (schools, colleges, universities, hospitals and prisons) is to be amended to allow for development and a faster application process for new major public service infrastructure is to be introduced, with 1 August 2021 the target date for implementation.

See: *https://www.gov.uk/government/consultations/supporting-housing-delivery-and-public-service-infrastructure*

Method for assessing local housing need

The government has also published its response to the first proposal in its August 2020 consultation 'Changes to the current planning system'. It is not proceeding with the specific changes to the standard method that were consulted on. Instead it will proceed with a reformed standard method.

See: *https://www.gov.uk/government/consultations/changes-to-the-current-planning-system*

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