MAYER | BROWN

May 2021

Legal developments in construction law

1. When fixing defects might not be an end of the matter – what about blight?

Defects in a construction project may be remedied and paid for but what if the project is blighted, and worth less than if it never had any defects? Can damages also be recovered for that blight? In a marathon judgment dealing with claims in respect of the construction and sale of solar energy parks, this was one of many questions that the court had to consider.

The court referred to the Court of Appeal judgment in ***Strange v Westbury Homes (Holdings) Ltd*** where the Court noted that, in principle, it is possible for a court to award damages for a residual diminution in value of property following satisfactory completion of remedial works, if it is satisfied that the residual diminution in value has been proved by cogent evidence.

Where the court awards both remedial damages and damages to reflect a residual diminution in value i.e. 'blight', it must avoid double counting and the assessment of blight damages must be conducted on the basis that full and complete remediation has occurred, in accordance with the court's conclusions as to what defects exist and what work is necessary to remedy them. In making that assessment, it is reasonable to take into account wider market factors such as the nature of the market and the attitude to risk, reputation, and the history of the assets, but the existence and quantum of any alleged blight must be proved by cogent evidence. Generalised views or assertions are inadequate.

Toucan Energy Holdings Ltd v Wirsol Energy Ltd [2021]EWHC 895 (Comm)

2. Court of Appeal revisits the strict constraints on implying contract terms

When a court implies a term in a contract, it is including something that the parties did not mention. Because it is a potential intrusion into the parties' agreement, the implication of terms is subject to strict constraints. In a dispute about payment under a design services agreement in respect of some high quality apartments in Singapore, the Court of Appeal revisited the rules.

Under the agreement the designers were to be paid one third of their fee with the balance, plus any incentive payment and commission, only due on the signing of sale and purchase agreements for the apartments (or legal completion). Completion of the apartments was delayed but, by then, following the global financial crash, there had been a significant fall in the Singapore property market. The developer claimed it had unsuccessfully attempted to sell the apartments for prices well below their originally anticipated value, and the apartments were subsequently rented out. The agreement contained a time frame for completion of the apartments but none for sale, and there was no long stop date for payment of the fee but the

designer claimed that the developer was (amongst other things) in breach of implied obligations to market and sell the apartments. In rejecting the claim and dismissing the appeal, the Court of Appeal summarised the relevant principles on implied terms.

A term will not be implied if inconsistent with an express contract term, and an implied term must, on an objective assessment of the contract, be necessary to give it business efficacy and/or on the basis of the obviousness test. These are alternative tests but it will be a rare (or unusual) case where only one is satisfied. The business efficacy test, which involves a value judgment, is only satisfied if, without the term, the contract would lack commercial or practical coherence. The obviousness test is only met when the implied term (and precisely what it is, which must be capable of clear expression) is so obvious that it goes without saying and it is vital that the officious bystander's question is formulated with the utmost care.

Implying a term is not critically dependent on proof of the parties' actual intention. If approaching the question by reference to what the parties would have agreed, one is concerned with the answer of notional reasonable people in the position of the parties at the time the contract was made.

It is wrong to approach the question with the benefit of hindsight. Nor is it enough to show that, had the parties foreseen the eventuality which in fact occurred, they would have wished to provide for it, unless it can also be shown either that there was only one contractual solution, or that one of several possible solutions would without doubt have been preferred.

The equity of a suggested implied term is an essential but not sufficient pre-condition for inclusion. A term should not be implied into a detailed commercial contract merely because it appears fair or merely because the court considers the parties would have agreed it if it had been suggested to them. The test, which is stringent, is one of necessity, not reasonableness.

The Court also noted that, where a contract does not expressly, or by necessary implication, fix a time for performance of a contractual obligation, the law usually implies that it will be performed within a reasonable time.

Yoo Design Services Ltd v Iliv Realty PTE Ltd [2021] EWCA Civ 560

3. Causation: did negligent design justify demolition of two blocks of houses?

Foundation design, by consulting engineers, of two blocks of terraced houses, was, in some respects, negligent. Their client, a construction joint venture company, decided to demolish and rebuild both blocks and claimed the full costs, including that of the rebuilding, from the engineers. The battleground in the case was consequently factual causation. The court noted that causation is a highly fact sensitive arena. It involves taking account of recognised legal principle but, having done that, it is a question of fact in each case. In this case the question to be asked, in respect of each of the two blocks, was whether the engineers' breach of contract was an effective cause of the loss suffered by the claimant.

The court also noted that a claimant carrying out either repair or reinstatement is under a duty to act reasonably, both in relation to the primary assessment of damages and in relation to the mitigation of damage. And, however reasonably a claimant acts, they can only recover in respect of loss actually caused by the defendant. If, therefore, part of a claimant's claim does not arise out of the defendant's wrongdoing, but is due to some independent cause, the plaintiff cannot recover in respect of that part.

The claimant had to demonstrate both that the demolition was required as a result of the negligent foundation design, and also that the decision to demolish was reasonable, but it failed to prove both these points. The blocks were structurally unsound, not because of anything that was defective with the foundations designed by the engineers, but because of the considerable amount of defective work, unconnected with the foundations (and therefore unconnected to any breaches by the engineers), carried out by the contractor. In addition, the foundations, as designed by the engineers, were not the foundations as constructed by subcontractors, who were given the wrong drawings.

The court did, however, make a small award of damages for a lack of connections, between pads and beams, negligently omitted by the engineers, that could have been remedied by localised remedial works, which were only partly carried out before the demolition.

Beattie Passive Norse Ltd & Anor v Canham Consulting Ltd [2021] EWHC 1116

4. Government commissions independent review of construction products testing system

The government has commissioned an independent review of the construction products testing system and has appointed Paul Morrell OBE and Anneliese Day QC to lead it. The review is to identify systemic issues with how construction products are tested, whether on a stand-alone basis or in assemblies, and how test results are used to manage the safety risks that those products pose, and recommend ways to address those issues.

The review will consider the roles of government, regulators, the United Kingdom Accreditation Service (UKAS), conformity assessment bodies, test houses and manufacturers, will seek evidence from these parties and other stakeholders and experts and will be supported by officials from the Ministry of Housing, Communities and Local Government and the Office for Product Safety and Standards. It will run in parallel, and fully co-operate, with the Grenfell Tower Inquiry but will not be apportioning responsibility for the Grenfell Tower fire.

The review panel will submit a report to the Secretary of State for Housing, Communities and Local Government in the summer of 2021 and the government will publish the report and a response to it as soon as practicable.

https://www.gov.uk/government/news/independent-experts-to-review-safety-of-construction-materials

5. New Code of Practice for external walls and cladding

The government has commissioned the British Standards Institution to draft a new code of practice for assessors when examining external walls and cladding.

The consultation on the code closed on 20 May 2021 and the BSI aims to publish the standard this autumn. Once finalised, the code will supersede aspects of the consolidated advice note on external wall systems, originally published in January 2020.

See: *https://www.gov.uk/government/news/consultation-launched-on-new-code-of-practice-for-external-walls*

6. Consultation on new Residential Property Developer Tax

The government is consulting on the design of the new Residential Property Developer Tax, ahead of its inclusion in the 2021-22 Finance Bill. The tax is one of two revenue raising measures to help pay for the government contribution to the costs of remediation of unsafe cladding.

As previously announced, the new tax is time-limited and is to apply to the largest residential property developers in relation to their income from UK residential development.

The consultation runs until 22 July 2021.

See: *https://www.gov.uk/government/consultations/residential-property-developer-tax-consultation*

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