MAYER | BROWN

July 2021

Legal developments in construction law

1. Failure to complete in a reasonable time – could that be a repudiation?

A contract for works to modernise a 1970s house in Cheshire had no contract administrator. There were a number of variations and the works were delayed but there was no extension of time mechanism in the contract. Among other issues, the court had to decide the parties' competing claims as to repudiation. The builder said that the homeowner's refusal to confirm that it was allowed access was repudiatory, and that it accepted this repudiatory breach. The homeowner claimed, however, that the builder was in repudiatory breach of its obligation to complete the works within a reasonable time, having effectively given up on the works, and that she accepted the repudiation.

Because of the variations causing delay, and the absence of an extension of time mechanism, the contract date for completion was replaced by an obligation to complete in a reasonable time. The judge noted that what is a reasonable time must be assessed objectively by reference to all the circumstances of the case, and the homeowner had to establish what that would be, disregarding delays caused by her own failures. She could not, however, contend that the time for completion was of the essence of the contract, so that a failure to complete by the specified date enabled her, without more, to treat the contract as discharged. The contract did provide for liquidated damages but, because of the variations and no extension of time mechanism, time became "at large" and the homeowner could only claim for general damages for any delay that could be proved. So, had the builder repudiated the contract by failing to complete in a reasonable time?

The textbook Keating on Construction Contracts says that delay by the contractor, where time is not of the essence of the contract, does not amount to a repudiation unless it shows that it will not, or cannot, carry out the contract, or that the delay deprives the innocent party of substantially the whole benefit of the contract. It adds that, in most cases, it is desirable to give notice that continuing the delay will be treated as repudiation, before purporting to accept the repudiation by dismissing the contractor. On the employer's part, it is, in general, a repudiation if the employer wrongfully by its own acts, and without lawful excuse, renders completion impossible.

The court ruled that the builder had not been in repudiatory breach of contract. There had been culpable delay and defective works, but these matters were not so serious as to show that the builder would not, or could not, finish off the contract or that the delay or defects, or their combined effect, deprived the homeowner of substantially the whole benefit of the contract. The homeowner's failure, however, either to permit the builder to return to site or to confirm that she was willing to do so, was undoubtedly a repudiatory breach which the builder was entitled to, and did, accept. And even if the builder had been in repudiatory breach, the homeowner did not clearly and unequivocally convey to the builder that she was treating the contract as at an end.

Cartwright Pond Ltd v Wild [2021] EWHC 1600

2. Incorporating terms and conditions – have you done enough?

An interior design company contracted to provide goods and interior design services for a serviced apartment hotel in Scotland. The English court had to decide whether the company's terms and conditions had been expressly incorporated in the contract. What rules should it apply?

The court referred to the principles set out in the textbook, *Chitty on Contract*, and noted that the third principle, the question whether the party tendering the document has done all that was reasonably sufficient to give the other party notice of the conditions, has most often been considered by the courts. It is a question of fact in each case, in answering which the tribunal must look at all the circumstances and the situation of the parties, but it is for the court, as a matter of law, to decide whether there is evidence for holding that the notice is reasonably sufficient.

Cases where the notice has been insufficient have been those where the conditions were printed on the back of the document, without any reference, on its face, such as "[f]*or conditions, see back*", where, on documents sent by fax, reference was made to conditions stated on the back, but those conditions were not in fact stated on the back or otherwise communicated, or where the conditions were obliterated by a printed stamp. It is not necessary that the conditions themselves should be set out in the document tendered: they may be incorporated by reference, provided that reasonable notice of them has been given. Reference to standard terms to be found on a website may be sufficient to incorporate the terms.

On the facts, the court ruled that the company's terms had been incorporated into the contract.

Phoenix Interior Design Ltd v Henley Homes Plc & Anor [2021] EWHC 1573

3. Damages for defective premises - how do the courts work it out?

A claimant that is successful in establishing liability also has to prove its loss. But what if defects have not been remedied or the losses claimed are disproportionate? In ***Phoenix Interior Design Ltd v Henley Homes Plc*** it was suggested that all the furniture supplied for a serviced apartment hotel should be replaced, but was that reasonable, when the hotel had had use of the goods for almost four years?

In rejecting that suggestion, the court referred to the general principles set out in ***Harrison v Shepherd Homes Ltd*** in respect of an award of damages for defective premises. There will generally be an award of the cost of reinstatement provided that reinstatement is reasonable, but reinstatement will be unreasonable if the cost would be out of all proportion to the benefit to be obtained. The question of reasonableness has to be answered in relation to the particular contract.

It is not necessary, for recovery of the reinstatement cost, to show that the claimant will reinstate the property, but the intention to reinstate may be relevant to reasonableness. If reinstatement is unreasonable, the measure of damages will generally be diminution in value, but if there is no diminution in value, then the court may award damages for loss of amenity.

The general rule, subject to exceptions, is that a claimant cannot recover damages for breach for injured feelings but one exception is that, where the object of the contract is to afford pleasure, relaxation, peace of mind or freedom from molestation, such damages are recoverable:

In cases not falling within that exception, damages may be recovered for physical inconvenience and discomfort caused by the breach and mental suffering directly related to physical inconvenience and discomfort; the cause of that inconvenience or discomfort must be a sensory (sight, touch, hearing, smell etc) experience but any damages under either of these exceptions are, however, modest.

The court in ***Harrison*** also noted that there may be circumstances where recovery under more than one head is appropriate.

Phoenix Interior Design Ltd v Henley Homes Plc & Anor [2021] EWHC 1573

4. Building Safety Bill set to shake up the building regulatory system

The government has launched the Building Safety Bill, which sets out a new regulatory regime for high-rise residential and other in-scope buildings, based on Dame Judith Hackitt's review, following the Grenfell tragedy. The Bill, which has had its first reading in the House of Commons, will, as currently drafted:

- establish the Building Safety Regulator within the HSE to provide oversight for all buildings and to introduce a more stringent regime for higher-risk buildings during design, construction, and refurbishment;
- introduce amendments to the Defective Premises Act 1972 to allow claims to be brought for historical defects that make a dwelling unfit for habitation, extending the limitation period from 6 years to 15 on a retrospective basis;
- extend the Act to cover all work on residential property that makes a dwelling unfit for habitation;
- introduce a stronger and clearer framework for the regulation of construction products and 'pave the way' for a National Regulator for Construction Products to be established in the Office for Product Safety and Standards; and
- introduce wider improvements including changes to the Architects Act 1997, the Regulatory Reform (Fire Safety) Order 2005 (the Fire Safety Order) and the Housing Act 1996, and provisions to establish a New Homes Ombudsman.

See: https://www.gov.uk/government/news/new-regulator-at-heart-of-building-safety-overhaul

and

https://www.gov.uk/government/collections/building-safety-bill

5. Extra time for Defective Premises Act claims

As currently drafted, the Building Safety Bill will extend the period for bringing a claim under the Defective Premises Act 1972, where a dwelling is unfit for habitation, from 6 to 15 years and the change will apply retrospectively, to work already carried out. The Bill will also amend the Act so that it applies to refurbishment works, with the same 15 year extended limitation period, but this change will only apply prospectively.

In addition, the government is to bring section 38 of the Building Act 1984 (making a breach of the building regulations causing damage actionable) into force, again with the extended 15 year limitation period, and the section will also only apply prospectively.

The government's timeline anticipates Royal Assent being given to the Bill 9-12 months from its introduction this July, i.e. April/July 2022, and its outline transition plan says that the expansion of the Defective Premises Act 1972 to include refurbishments, the extension to the limitation period for the existing duty, and section 38 of the Building Act 1984, will all come into force two months after the Royal Assent.

See: https://www.gov.uk/government/collections/building-safety-bill

6. New watchdog for workers' rights

The government has announced the creation of a new body that will be responsible for tackling modern slavery, enforcing the minimum wage and protecting agency workers, issues currently dealt with by three separate agencies. The Gangmasters and Labour Abuse Authority, the Employment Agency Standards Inspectorate and HMRC's National Minimum Wage Enforcement are to be combined to create a single enforcement body, which will be established through primary legislation, when parliamentary time allows.

See: https://www.gov.uk/government/news/government-to-protect-workers-rights-and-clamp-down-on-workplace-abuse-with-powerful-new-body

7. Government sets 2050 net zero commitment for major government contracts: PPN 06/21

By September, prospective suppliers bidding for government contracts above £5million a year must have committed to the government's target of net zero by 2050, and published a carbon reduction plan. Firms which fail to do so will be excluded from bidding for the contract.

A carbon reduction plan sets out where an organisation's emissions come from and the environmental management measures it has in place. Some large companies already self-report parts of their carbon emissions, known as Scope 1 (direct) and Scope 2 (indirect owned) emissions. The new rules will go further, requiring the reporting of some Scope 3 emissions, including business travel, employee commuting, transportation, distribution and waste. Scope 3 emissions represent a significant proportion of an organisation's carbon footprint.

Details are set out in Procurement Policy Note 06/21, that applies to applies to all central government departments, their executive agencies and non-departmental public bodies ('In Scope Organisations'), and which must apply the PPN provisions to relevant procurements advertised on or after 30 September 2021.

See:https://www.gov.uk/government/news/firms-must-commit-to-net-zero-to-win-major-government-contracts

https://www.gov.uk/government/publications/procurement-policy-note-0621-taking-account-of-carbon-reduction-plans-in-the-procurement-of-major-government-contracts

and

Bidders for large UK public procurement contracts must commit to net zero by 2050 | Perspectives & Events | Mayer Brown

8. New guidance to factor wider benefits into procurement of public spending: PPN 05/21

The government's Procurement Policy Note 05/21 sets out information and guidance for contracting authorities (which includes central government departments, executive agencies, non-departmental public bodies, local authorities, NHS bodies and the wider public sector) on the National Procurement Policy Statement, which will require contracting authorities to have regard to national strategic priorities for public procurement.

The PPN states that contracting authorities should familiarise themselves with the Statement and consider these national priority outcomes with any additional local priorities in their procurement activities:

- creating new businesses, new jobs and new skills;
- tackling climate change and reducing waste, and
- improving supplier diversity, innovation and resilience.

The Government intends to bring forward legislation, when Parliamentary time allows, to ensure that:

- all contracting authorities are required to have regard to the Statement when undertaking procurements;
- contracting authorities with an annual spend of £200m or more are required from April 2022 to publish procurement pipelines and to bench-mark their procurement capability;
- contracting authorities with an annual spend of £100m or more are required from April 2023 to publish procurement pipelines and to bench-mark their procurement capability

See: https://www.gov.uk/government/news/procurement-teams-must-consider-wider-benefits-of-public-spending

and

Procurement Policy Note 05/21: National Procurement Policy Statement - GOV.UK (www.gov.uk)

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

Mayer Brown is a distinctively global law firm, uniquely positioned to advise the world's leading companies and financial institutions on their most complex deals and disputes. With extensive reach across four continents, we are the only integrated law firm in the world with approximately 200 lawyers in each of the world's three largest financial centers—New York, London and Hong Kong—the backbone of the global economy. We have deep experience in high-stakes litigation and complex transactions across industry sectors, including our signature strength, the global financial services industry. Our diverse teams of lawyers are recognized by our clients as strategic partners with deep commercial instincts and a commitment to creatively anticipating their needs and delivering excellence in everything we do. Our "one-firm" culture—seamless and integrated across all practices and regions—ensures that our clients receive the best of our knowledge and experience.

Please visit mayerbrown.com for comprehensive contact information for all Mayer Brown offices.

Americas | Asia | Europe | Middle East

mayerbrown.com