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Legal developments in construction law

1. Setting aside a contract for lawful act duress – what is illegitimate pressure?

Tough negotiating is part of commercial life but can a threat to do something lawful constitute duress, so that a contract can be set aside? An airline gave notice to its agents of termination of their contracts for the sale of flight tickets and offered new contracts, but only on condition that the agents waived their existing claims. The claimant agent was very largely dependent on the ability to sell the airline's tickets and had no practical alternative to accepting the terms offered if it wished to remain in business. It accepted but subsequently claimed that this was a case of lawful act duress. But was it?

In rejecting the claim the Supreme Court confirmed that lawful act duress, including lawful act economic duress, exists in English law and has three elements, an illegitimate threat, sufficient causation, and the fact that the threatened party had no reasonable alternative to giving in to the threat. The issue for the Court was the illegitimacy of the threat.

It ruled that the threat's illegitimacy is determined by focusing on the justification of the demand. A demand motivated by commercial self-interest is, in general, justified. Lawful act economic duress is essentially concerned with identifying rare, exceptional, cases where a demand, motivated by commercial self-interest, is nevertheless unjustified. The pressure applied by a negotiating party will very rarely come up to the standard of illegitimate pressure or unconscionable conduct.

The boundaries of lawful act duress are not fixed and the courts should approach any extension with caution, particularly in the context of contractual negotiations between commercial entities, bearing in mind that analogous remedies, such as undue influence and unconscionable bargains, already exist in equity, and also that English law has no overriding doctrine of good faith in contracts (save in the case of so-called 'relational contracts') or any doctrine of imbalance of bargaining power. In the absence of these doctrines in English law, the majority judgment of the Court considered that the claim for lawful act economic duress would not have succeeded even if the defendant had made its demand in bad faith.

In the few cases where a remedy has been provided for lawful act duress, there are two situations. The first is where a defendant uses their knowledge of criminal activity by the claimant or a member of their close family to obtain a personal benefit from the claimant by the express or implicit threat to report the crime or initiate a prosecution. The second is where the defendant, having exposed themselves to a civil claim by the claimant, for example, for damages for breach of contract, deliberately manoeuvres the claimant into a position of vulnerability by means which the law regards as illegitimate and thereby forces the claimant to waive their claim. In both categories the defendant has behaved in a highly reprehensible way which the courts have treated as amounting to illegitimate pressure.

Pakistan International Airline Corporation v Times Travel (UK) Ltd (Rev1) [2021] UKSC 40

2. Employer's £0.97 payment notice ruled invalid

An employer under a construction contract adopted the approach of sending two purported payment notices in each payment cycle. Thus, in payment cycle 34, the payment notice stated that the net amount for payment was £0.97, after deducting retention, but the covering email said, however, that a further notice would be issued. Six days later, payment notice 34a was sent, stating a net amount for payment of £657,218.50, which the employer subsequently paid. But was the original payment notice 34 valid? Did it state the sum considered due, as required by the Housing Grants Act?

In ruling that it did not, the court said that it could not realistically be contended that payment notice 34 accurately stated the sum the employer considered to be due at the payment due date. That was evident from the fact that the covering email said that a further notice would be issued. The employer clearly envisaged that the further notice would set out a different figure, which would be the figure which the employer in fact considered to be due.

The employer clearly did not believe that the figure was just £0.97 and it was not credible to suggest that the employer did not realise that a substantially greater sum was due, when in payment notice 34a, sent only six days later, the employer said that it considered the sum due to be £657,218.50. This was an instance where the employer had adopted a practice of sending payment notices valued at £1 or £0.97 to gain time in order to make an assessment of the sum it actually believed to be due. It was not necessary to find that the employer was acting in bad faith in some way in order to conclude that this was not an appropriate course to adopt.

Nor did payment notice 34 set out the basis of the calculation because, in the absence of any accompanying material, the notice did not show how the employer had arrived at the crucial figure of the gross valuation.

Downs Road Development LLP v Laxmanbhai Construction (UK) Ltd [2021] EWHC 2441

3. Adjudicator takes 'don't look' approach to set off defence – but was that right?

A contractor seeking payment of the sum in its Final Statement, £479,957.80, obtained an adjudicator's decision in its favour. The employer disputed the decision on a number of grounds, including the claim that the adjudicator should, in calculating the sum due, have taken account of its liquidated damages of £343,237.74 and that the employer was, in any event, entitled to set off the liquidated damages claim by way of a legal set off. The adjudicator had ruled that the liquidated damages were not a part of the dispute they had been asked to decide and therefore could not be raised in set off in these circumstances. But was that correct, or did the adjudicator's conclusion involve a material breach of the rules of natural justice and, if so, what were the consequences?

In reviewing the case law, the court noted that, where a referring party seeks payment in respect of specific elements of the works, the responding party is entitled to rely on all available defences, including the valuation of other elements of the works, to establish that the referring party is not entitled to the payment claimed. It said that it is important to keep in mind the distinction between:

- considering an asserted defence and then concluding that it is not a tenable defence; and
- declining to consider an asserted defence.

The former is an exercise which the adjudicator has jurisdiction to undertake and a conclusion that the defence is not tenable, even if expressed briefly, is unlikely to involve a breach of the rules of natural justice. Conversely the latter is likely to be such a breach.

This was a case where the employer was "entitled to rely on all available defences" but the adjudicator had said, in clear language that, "it (the liquidated damages claim) is not part of the dispute I have been asked to decide" and "therefore [it] cannot be raised in these circumstances". Because the adjudicator had failed to consider this defence there was a material breach of the rules of natural justice and, subject to submissions, the decision was only enforceable to the extent of the balance of the sum due in excess of the amount of the liquidated damages claim.

CC Construction Ltd v Mincione [2021] EWHC 2502

4. New green rules for companies bidding for major government contracts

New rules have come into force that require all companies bidding for government contracts worth more than £5million a year to commit to achieving net zero emissions by 2050. In addition to this commitment, the new rules require the reporting of some Scope 3 emissions; including business travel, employee commuting, transportation, distribution and waste for the first time.

The measures apply to all central government departments as well as their executive agencies and non-departmental public bodies.

See: https://www.gov.uk/government/news/companies-bidding-for-major-government-contracts-face-green-rules

5. New Residential Property Developer Tax

Following a technical consultation on the draft legislation, details of the new Residential Property Developer Tax were announced in the Autumn Budget on 27 October.

The new 4% tax will apply to companies or groups of companies undertaking UK residential property development with annual profits in excess of £25 million. It will apply from 1 April 2022 to profits arising from residential property development recognised in accounting periods ending on or after that date. Where a company's accounting period straddles 1 April 2022 the profits of the accounting period will be time apportioned to determine amounts falling before and after the start date. Legislation will be introduced in the Finance Bill 2021-22.

The government is introducing the charge, which targets a fair contribution from the largest residential developers, to help fund its cladding remediation costs.

See: https://www.gov.uk/government/publications/residential-property-developer-tax/residential-property-developer-tax

6. Call for evidence in review of architectural regulations

The government has launched a call for evidence from those working in the architectural and built environment professions. This will focus on the role of the Architects Registration Board (ARB), and will form the first part of a wider review of architectural regulation.,

The call for evidence runs for 12 weeks, from 16 August 2021 and initial findings from the review will be provided to the Housing Secretary by spring 2022, with the outcome expected in the summer.

See: https://www.gov.uk/government/news/architects-invited-to-shape-future-of-profession

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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