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Legal developments in construction law

1. Liquidators can go to adjudication but where does that leave set off?

In ***Bresco Electrical Services Limited (in liquidation) v Michael J Lonsdale (Electrical) Limited*** the Supreme Court said that a company in liquidation was entitled to commence and pursue an adjudication, and that to do so was not a futile exercise. But did the Supreme Court also decide that a company in liquidation was entitled to summary judgment to enforce the adjudicator's decision, regardless of the absence of a final determination of the other party's set-off and cross-claim?

In ***John Doyle Construction Ltd v Erith Contractors Ltd*** the Court of Appeal dismissed an appeal on three fact-specific grounds but also considered, obiter, this wider question. In doing so, it emphasised that in an insolvent liquidation scenario, set-off is automatic. It affects the substantive rights of the parties and will reduce or extinguish a debt. The claims exist for the purpose of quantification only. When it comes to proving in the insolvency or suing in court, it is only the net balance which can be proved or recovered. The insolvent company's cause of action is for the net balance only and it is impossible to waive or disapply the Insolvency Rules.

The Court's view was that an adjudicator's provisional finding, even on a single final account dispute where no other significant non-contractual or other contractual claims arise, cannot be treated as if it were a final determination of the net balance, in circumstances where the other party maintains its set-off and cross-claim. An adjudicator's decision, while binding, is not a final decision. It is open to the court (or an arbitrator) to revisit the question of set-off. In that event the adjudicator's actual reasoning has no evidential or legal weight.

It noted that there is considerable procedural flexibility in conducting a liquidation, which should be used to ascertain the net balance (one way or the other). It concluded that it is only once the net balance has been ascertained, by whatever appropriate means, that judgment should be entered.

John Doyle Construction Ltd v Erith Contractors Ltd [2021] EWCA Civ 1452

2. Scottish court says NEC3 mutual trust clause has good faith impact

Clause 10.1 of NEC3 says that the parties "*…shall act …in a spirit of mutual trust and co-operation…*". In September 2020 a Scottish court concluded that the clause did not add much, but, on appeal, the Inner House of the Scottish Court of Session said that clause 10.1 was "*…not merely an avowal of aspiration. Instead it reflects and reinforces the general principle of good faith in contract.*" It aligns with three specific propositions from case law:

- a contracting party "*will not in normal circumstances be entitled to take advantage of their own breach as against the other party*";

- a subcontractor is not obliged to obey an instruction issued in breach of contract; and
- clear language is required to place one contracting party completely at the mercy of the other.

The 2020 judgment said that a contractor's instruction to omit work from the NEC3 subcontract, which it then gave to other subcontractors, was a breach of the subcontract and a compensation event. It also decided that the fact that an instruction amounted to a breach of contract did not prevent it from being a change to the Subcontract Works Information under clause 63.10. The instruction resulted in a reduction in the Defined Cost and, consequently, a reduction in the Prices, the practical consequence being to reduce the rate payable for the subcontractor's remaining work.

The Inner House disagreed, ruling that clause 63.10 applies only to a lawful change and excludes instructions issued in breach of contract. Such instructions are invalid, because not given "in accordance with this subcontract". The House also noted that its interpretation meant that all breaches are treated equally, that it avoids the suggestion that the subcontractor was bound to obey a "breach instruction" and that NEC3 should not be a charter for contract breaking.

Van Oord UK Ltd v Dragados UK Ltd [2021] ScotCS CSIH_50

3. Might a duty of care in tort extend to avoiding or preventing damage to a developer's reputation?

Claims in tort, for breach of an alleged duty of care, can present difficult questions, particularly if the loss claimed is pure economic loss. For instance, to what, exactly, does the duty of care relate? In ***BDW Trading Ltd v URS Corporation Ltd*** the court had to grapple, on assumed facts, with duty of care preliminary issues. Developers of a number of high-rise buildings, some of which were constructed in 2005, discovered serious structural defects in some of the blocks in 2019. Although they no longer owned the buildings in 2019, they carried out remedial works and brought proceedings in tort against the designers, alleging negligent design, claiming that the designers owed the developers a duty of care, and seeking recovery not only of conventional heads of loss for the remedial work, but also of losses from damage to their reputation. The duty of care under consideration in the case arose because professional designers owe their clients duties to perform their designs exercising the reasonable care and skill to be expected of one in their profession. But to what did the duty of care relate?

In deciding preliminary issues, the court considered the case law, including two recent Supreme Court cases. In one of these, ***Manchester Building Society v Grant Thornton UK LLP***, the majority judgment of the Supreme Court identified six questions, of general application, which arise where a claimant seeks damages in the tort of negligence and which concern, in particular, consideration of the scope of a defendant's duty. In applying these questions, and, in particular, the scope of a defendant's duty (question two - what are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care?) the judge in ***BDW*** noted that the actual nature of the damage suffered is relevant to the existence and extent of any duty to avoid or prevent it.

In this case the judge considered that the designer, or a structural engineering designer generally, is not under a duty to avoid or prevent damage to the reputation of a developer. It would be incredibly difficult to quantify in advance the potential extent of such a liability, which would have a detrimental impact on a professional adviser's ability to obtain suitable professional negligence insurance and it would also mean that, depending on the commercial fortunes of the developer on other projects and in later years, the extent of the loss could be (potentially) dramatically expanded. There is no authority to support such a proposition, which would be an unwarranted extension of the scope of such a duty of care, and the losses were not in the reasonable contemplation of the parties and were too remote.

The risk of harm to the developer, against which the law did impose a duty of care on the designer, was the risk of economic loss that would be caused by construction of a structure using a negligent design, so that it was built containing structural deficiencies or defects.

Bdw Trading Ltd v URS Corporation Ltd & Anor [2021] EWHC 2796

4. Latent defects and defective design – does a cause of action in tort only arise when you know about them?

In ***BDW Trading Ltd v URS Corporation Ltd***, high rise buildings were constructed in 2005 but serious defects, allegedly due to negligent design, were not discovered until 2019. In answering preliminary issues, the court had to decide the date on which damage occurred. Was it when the building was constructed in accordance with the negligent design or was it when defects were discovered?

The court noted the approach adopted in the case law, that the date when a claimant first knows of a defect, or ought reasonably to know of the defect, is not the date when the cause of action accrues. This was clearly stated in the House of Lords judgment in ***Pirelli General Cable Works Ltd v Oscar Faber***, which remains good law.

There has to be measurable loss before the limitation period begins to run, and that measurable loss, for example in the case of a negligently designed structure that has been constructed, is the cost of making it structurally safe. That occurs when the structure is constructed in accordance with the negligent design. It could not be right to say that the developer of a building has no such loss unless and until they discover that the building they have had constructed is structurally unsafe. That proposition is not in accordance with fundamental principles in terms of accrual of causes of action in negligence. It also introduces a concept that is not accepted generally in English law, which is that a cause of action accrues upon date of knowledge.

The court therefore concluded that the cause of action in the case accrued, with all of its necessary ingredients completed, not later than the date of practical completion of each of the blocks.

Bdw Trading Ltd v URS Corporation Ltd & Anor [2021] EWHC 2796 (TCC) (22 October 2021)

5. Building Safety Bill: further draft regulations and factsheets issued

The government has published:

- six further sets of draft regulations for delegated powers proposed in the Building Safety Bill;
- 26 further factsheets.

The draft regulations are intended to provide Parliament with more detail of the government's intentions for the secondary legislation, to assist parliamentarians and others with understanding the contents of the Bill.

The factsheets provide more information about key provisions in the Bill and how they will be implemented.

The Bill has been considered in the House of Commons committee stage. Next is the report stage when the House of Commons has an opportunity to consider any further proposals for changes to the Bill.

The HSE has also published four factsheets giving details about the HSE's early position on the regulatory approach of the Building Safety Regulator. They have been prepared to help the reader of the Building Safety Bill and to inform debate but do not form part of the Bill, and have not been endorsed by Parliament.

See: Building Safety Bill: draft regulations - GOV.UK (www.gov.uk);

Building Safety Bill: factsheets - GOV.UK (www.gov.uk);

and

https://www.gov.uk/government/publications/health-and-safety-executive-factsheets

6. April 2022 start for new climate-related financial information disclosure duty on largest UK companies

The government has announced that, from 6 April 2022, over 1,300 of the largest UK-registered companies and financial institutions will have to disclose climate-related financial information on a mandatory basis – in line with recommendations from the Task Force on Climate-Related Financial Disclosures. This will include many of the UK's largest traded companies, banks and insurers, as well as private companies with over 500 employees and £500 million in turnover.

Non-mandatory guidance to support in-scope companies in their disclosure will be issued before the end of 2021, following parliamentary scrutiny of the Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2021, with the regulations coming into force for accounting periods starting on or after 6 April 2022, subject to that parliamentary scrutiny.

See: https://www.gov.uk/government/news/uk-to-enshrine-mandatory-climate-disclosures-for-largest-companies-in-law

7. Updated CLC guidance on managing COVID-19 in construction contracts

The Construction Leadership Council has issued updated guidance on managing COVID-19 in construction contracts.

See: https://www.constructionleadershipcouncil.co.uk/wp-content/uploads/2021/10/CLC-Press-Release-21-October-2021-Guidance-on-Managing-COVID-19-within-Construction-Contracts.pdf

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