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Legal developments in construction law

1. Signing a contract can be agreement to its terms and conditions, but what if they are on a website? And what if they are onerous?

Signing a contract can be agreement to its terms and conditions, whether or not you have read them. But what if it refers to standard terms and conditions that are not provided with it, but are on a website, and, "*cunningly concealed*" is a "*hugely inflated…administration charge*" for cancellation?

A social care provider signed a mobile phone supplier's order form for the provision of a mobile network service by a third party. The contract involved providing connections for 800 mobile phones and the order form referred to standard terms and conditions, on a website, which provided for a cancellation "*administration charge*" of £225 per connection. The care provider cancelled before connection and the supplier claimed £180,000, applying the charge to each of the 800 connections. But were the standard terms successfully incorporated in the contract and, if so, were the cancellation charge clauses "*particularly onerous and unusual*" so that they had to be "*fairly and reasonably*" brought to the care provider's attention.

Where terms and conditions are not contained in the contract signed by the accepting party, but are referred to in the signed contract, the question is whether they were sufficiently brought to the attention of that party. Reference to a website in a contractual document may be a sufficient incorporation of the standard terms on the website, but, if it refers to more than one set of terms and conditions, it must be clear which apply. The court was satisfied that, on the facts, overall, enough was done to incorporate the terms and conditions.

Onerous or unusual?

Case law says that even if a party knows that standard conditions are provided, a condition which is *"particularly onerous or unusual"* will not be incorporated in the contract, unless fairly and reasonably brought to their attention. The court said that the fact that a defendant was prepared to sign a contractual document must always be a powerful factor against a conclusion that terms expressly incorporated into it were not sufficiently brought to its attention, but it also suggested that the weight to be given to that factor in an individual case will be fact-sensitive, and that adopting the sliding scale approach might be useful. That weight is likely to be very strong if there is a short form signed contract which refers to the term itself, and likely to be relatively weak if the order form is signed but the term is *"buried away"* in detailed terms and conditions, which are incorporated as a matter of law but which are neither found in the signed contract, nor provided with the signed contract.

The court ruled that the cancellation charges clause was particularly onerous. The *"administration charge"* bore no relationship to any actual or likely administration costs and, even if read as a

disguised loss of profit entitlement, the amount was out of all proportion to any reasonable estimate of its loss from a cancellation. The clause was also not fairly and reasonably brought to the defendant's attention. Among the reasons for its decision it noted that, before receiving the order form, the care provider was not told, and had no reason to expect, that it would be exposed to a very substantial contractual liability should it decide not to enter into a contract for a mobile network service. The order form did not make clear, and positively *"obfuscated"*, the nature of the contract put forward. It did not explain the essential purpose of the standard terms or give any warning that they imposed potentially substantial obligations if the care provider did not proceed, or cancelled.

It would have been feasible to include the terms as part of the order form. They could, and should, have been sent with the orders, with a prominent explanatory heading. No attempt was made to highlight the clauses imposing a considerable number of separate substantial financial obligations, but which were buried in a section, innocuously titled, and the offending clause itself was *"…cunningly concealed in the middle of a dense thicket…"* This case came very close to a misrepresentation case; on an objective analysis the clauses were positively concealed.

Blue-Sky Solutions Ltd v Be Caring Ltd [2021] EWHC 2619 (Comm)

2. Entire agreements – look no further. But what about the factual matrix?

The idea of an entire agreement is very simple. This is the only agreement; look no further. But is the plan as watertight as it seems? In a dispute about income sharing arrangements under a waste management project agreement the court had to decide if, despite an entire agreement clause, it could refer to DEFRA guidance on payment mechanism principles for residual waste treatment projects. The council involved, relying on the entire agreement and non-reliance provisions in the agreement, claimed that the guidance was irrelevant and inadmissible on the issue of interpretation of the project agreement, but was that right?

The case law indicates that entire agreement or non-reliance clauses may prevent the use of extrinsic evidence to establish additional terms and collateral agreements, or claims based on warranties or misrepresentations. Subject, however, to the wording of the clause in question, they do not exclude the use of extrinsic evidence as part of the factual matrix in ascertaining the meaning of the contract's express terms.

The court must at the same time bear in mind the advice given by the Supreme Court in ***Arnold v Britton***, that a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed.

In this case, the project agreement was not a standard term PFI contract and the guidance notes were not incorporated in it. They did, however, form part of the background facts and circumstances known or assumed by the parties at the time that the agreement was executed. They did not override express terms of the project agreement but they could be used as part of the factual matrix in construing the terms.

Buckinghamshire Council v FCC Buckinghamshire Ltd [2021] EWHC 2867 (TCC)

3. Three payment applications in one adjudication claim – how many disputes is that?

A provider of construction labour submitted three interim payment applications. No payless notices were issued, two of the applications were approved and one not challenged but no payments were made. The provider claimed the total sum due in adjudication. The defendant challenged jurisdiction, arguing that there were three separate disputes and that the adjudicator could only determine one dispute at a time. It took no further part in the adjudication but resisted enforcement of the adjudicator's decision, claiming that the adjudicator had no jurisdiction.

An adjudicator does not have jurisdiction to adjudicate more than one dispute in a single adjudication and the court referred to ***Witney Town Council v Beam Construction (Cheltenham) Ltd***, which provides guidance on what is "a dispute". In that guidance, the judge said that a dispute can comprise a single issue or any number of issues within it. What is a dispute in any given case will be a question of fact and courts should not adopt an over legalistic analysis of what the dispute between the parties is. Whether there are one or more disputes again involves a consideration of the facts and it may be that, if there is a clear link between two or more arguably separate claims or assertions, that may point to there being one dispute. A useful, if not invariable, rule of thumb is that, if disputed claim No 1 cannot be decided without deciding all or parts of disputed claim No 2, that establishes such a clear link and points to there being only one dispute.

In this latest case, in ruling that the adjudicator had jurisdiction and enforcing the award, the court said that the fact that it was technically possible to determine whether each individual invoice was due, without determining whether the other invoices were due, did not mean that those issues could not be sub-issues in the wider dispute as to whether the provider was entitled to the sum claimed. If the defendant's argument, that there were three separate disputes, was right, the parties would be put to the very significant cost and inconvenience of numerous separate adjudications to recover a single claimed balance. That would be contrary to the policy underlying the adjudication process of efficient, swift and cost-effective resolution of disputes on an interim basis.

There was a clear link between the payment applications. They were cumulative. Each application was for the full value of the work less a deduction for the value of work already invoiced and the fact that two of the applications were expressly agreed and one not challenged did not mean they must be separate disputes.

Quadro Services Ltd v Creagh Concrete Products Ltd [2021] EWHC 2637

4. Consultation on payment practices and performance regulations

The government is seeking views and evidence on the effectiveness of the reporting requirements placed on large businesses by the 2017 Payment Practices and Performance Regulations. This is, in particular, to assess the extent to which their objectives are achieved, whether their objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation.

The consultation closes on 4 February 2022.

See: Statutory review of the Reporting on Payment Practices and Performance Regulations 2017: call for evidence - GOV.UK (www.gov.uk)

5. Private Member's Bill to outlaw retentions

Lord Aberdare's Private Member's Bill to outlaw retentions, which was introduced in the House of Lords, has had its first reading there, and awaits a date for its second reading.

See: https://bills.parliament.uk/bills/3056/publications

6. Law Commission says existing law can cope with smart contracts

The Law Commission has confirmed that the existing law of England and Wales can accommodate and apply to smart legal contracts, which can take a variety of forms with varying degrees of automation, without the need for statutory law reform. It says that, in some contexts, an incremental development of the common law is all that is required to facilitate the use of smart legal contracts within the existing legal framework. It also encourages the market to anticipate and cater for potential uncertainties in the legal treatment of smart legal contracts by encouraging parties to include express terms aimed at addressing them, for instance clauses allocating risk in relation to the performance of the code, and setting out clearly the relationship between any natural language and coded components.

In undertaking its analysis, the Law Commission identified conflict of laws, the law that primarily determines where disputes should be adjudicated, and the applicable law, as an area where further work is required.

See: https://www.lawcom.gov.uk/the-law-of-england-and-wales-can-accommodate-smart-legal-contracts-concludes-law-commission/

7. Law Commission plans 2022 start for review of 1996 Arbitration Act

The Law Commission is aiming to begin work in early 2022 on a review of the 1996 Arbitration Act and to publish a consultation paper in late 2022.

See: https://www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996/

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