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Legal developments in construction law

1. "Estimate" – what might that mean? Fixed price quotation or something else?

The principles of contract interpretation have been clearly set out by the Supreme Court. Applying those principles to a document, however, may not be straightforward. It is more than a matter of dictionaries and grammar. When interpreting a written contract, the court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement, having regard to the meaning of the relevant words in their documentary, factual and commercial context.

In deciding whether a contract was a fixed price contract, on the basis that the price was an agreed fixed price, based on a fixed price quotation, or a contract for a reasonable price, based on an estimate, the court's reference to a previous judgment provides a reminder of the possible legal effect of references to "*estimate*", "*quotation*" or "*tender*". The last two words would usually be understood as a firm offer to undertake works for the specified price stated in the quotation or tender. The status of an "*estimate*", however, might vary according to the circumstances.

It might simply be a preliminary indication of the contractor's opinion of the likely cost of undertaking works that was not, on an objective construction, intended as an offer capable of being accepted so as to result in a contract. Alternatively, it might be an offer to undertake works on the basis of a reasonable cost estimated to be in the region of the figure specified, but subject to measurement and valuation in due course, either on a cost plus or some other basis. Or it might be regarded as equivalent in all respects to a fixed price quotation, where the use of the word "*estimate*" does not, on an objective construction, differ in any material way from the effect of the use of the word "*quotation*".

Applying those principles in this latest case, the court was satisfied that, on a proper construction of the documents and exchanges, it was a fixed price contract.

The Sky's the Limit Transformations Ltd v Mirza [2022] EWHC 29

2. And the dispute to go to adjudication starts when?

To start an adjudication there needs to be a dispute that has 'crystallised'. If there is no crystallised dispute at that point, an adjudicator will have no jurisdiction and the award cannot be enforced. But how much, or how little, does it take to produce a dispute? In ***Bravejoin Company Ltd v Prosperity Moseley Street Ltd***, the court provided a helpful review of the case law.

Six invoices were rendered by Bravejoin to Prosperity, which issued a payment notice and, in respect of two of the invoices, pay less notices. Did non-payment and that response show that Prosperity was disputing liability to pay, at least in the sense of not accepting its liability to pay?

In deciding, on the facts, that there clearly was a dispute, the court referred to the cases, including the analysis of Mr Justice Jackson in ***AMEC Civil Engineering Ltd v Secretary of State for Transport***, as subsequently adopted in the Court of Appeal, where he noted that the word 'dispute' should be given its normal meaning. It does not have some special or unusual meaning conferred upon it by lawyers and the circumstances from which it may emerge that a claim is not admitted are Protean. For example, there may be an express rejection or the respondent may prevaricate, thus giving rise to the inference that they do not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference. The period of time for which a respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case.

In another judgment it was noted that Mr Justice Jackson's analysis explained the general view that, for crystallisation to occur, no more than the service of a claim by the claiming party, and subsequent inactivity, for a further short period, by the responding party, may be enough.

Bravejoin Company Ltd v Prosperity Moseley Street Ltd [2021] EWHC 3598

3. How to identify a contracting party

A homeowner left with what was said to be a 'scarcely habitable' home, because of incomplete and defective construction works, brought proceedings against six defendants. The court had to decide, as a preliminary issue, which of the six might have entered into the oral contract for the works, but how should they do that?

Noting that the approach should be objective, the court referred to the guidance in ***Estor Ltd v Multifit (UK) Ltd***, that it must be legitimate to consider what the parties said to each other and what they did in the period leading up to the acceptance in order to determine who the contracting party was intended to be. The court needs to consider the facts known to both parties and what was said orally or in writing between them.

The fact that one individual went to, or left, a meeting, believing privately that the contract was to be with a particular party, would be of little or no weight or assistance in determining who the contract was with, unless there was reliable evidence that that belief was expressed to others at the meeting. If there was evidence that representatives of each party had met before the contract was signed and had said to each other that the contract was to be between X and Y, that would be admissible and relevant in determining who the parties to the contract were to be.

If, however, the evidence about what was said and done was not as clear as that, one needs to construe or infer objectively what reasonable parties would have assumed would be the position based on what was said or done. Thus, if one party said that payments would be made by X, that might be evidence pointing, objectively, although not necessarily conclusively, to X being one of the parties. Similarly, if X and Y in their discussions and correspondence prior to the creation of the contract only talked about X and Y in the context of their discussions, that might be a factor which objectively pointed to those two parties being parties to the contract.

An agent can contract on behalf of an undisclosed principal, so that a contract may be formed with a party of whom the other party was not previously aware but, for that to occur, it must be clear that the agent is acting as such, even if they do not identify their principal. Where, as in ***Hamid v Bradshaw***, the issue is whether a person signing a document did so as agent for a company, that person will be regarded as the contracting party unless they qualify their signature or otherwise make it plain that the contract did not bind them personally.

In the court's judgment, that principle was also applicable to the case where a contract had been concluded orally by an individual who claimed subsequently to have been acting as the agent of a company. The court concluded that the objective evidence did not support the proposition that the second defendant, an individual, held himself out as contracting on behalf of one of the defendant companies.

Lumley v (1) Foster & Co Group Ltd & Ors [2022] EWHC 54

4. Government seeks cash and data from cladding and insulation manufacturers

The Secretary of State for Levelling Up, Housing and Communities, Michael Gove, has written to the Chief Executive of the Construction Products Association, seeking a clear commitment from the cladding and insulation sector to make financial contributions this year and in subsequent years to fund remediation of unsafe cladding, as the government has already asked developers to do. The letter says that the sector's total contribution must represent a significant portion of the total remediation costs caused by the dangerous products sold by some of the CPA's members, and notes that the current estimated cost to remediate unsafe cladding on 11-18m and over 18m buildings is £4bn and £5.1bn respectively.

Any deal must also include a commitment to provide comprehensive information on all buildings over 11m which have historic fire-safety defects to which these companies have supplied products or services.

Mr Gove expects a public funding commitment from the sector by early March and says that he is prepared to do whatever it takes to deliver the government's objective, including using the regulatory framework to limit any culpable company from operating and selling products in this country in the future, and that he will pursue those individuals and firms liable for building defects who are unwilling to do the right thing now.

https://www.gov.uk/government/publications/letter-from-the-dluhc-secretary-of-state-to-the-construction-products-association

5. Government sets out key points in commitments sought from residential developers

The Director-General – Safer and Greener Buildings in the Department for Levelling Up, Housing and Communities has written to residential property developers, providing more detail on the government's approach to an agreement on building safety and next steps.

The letter says that the Department will be taking steps to codify the commitments that developers will be asked to make, centred on the two fundamental propositions of the government's approach, that developers must commit to remediating those buildings which they themselves played a role in developing or refurbishing and that they must provide financial contributions towards a fund which will cover the costs of all other 11-18m buildings with critical life cladding safety defects.

The Department intends to seek these commitments from all developers in the scope of the negotiations, and that, when agreed, they will be legally binding. It envisages that these commitments must include a number of listed key points, and attaches a key features document setting out a proposed method for codifying the commitments.

It says it is open to discussions on how best to develop these commitments and adds that those who agree to fulfil the commitments will continue to enjoy the benefits of the government's services and support on financing, procurement, planning, building control, housing investment, and industry development and leadership. Those who are unwilling to meet these criteria will not. The Secretary of State has made clear he is willing to explore further steps to ensure the only participants in this market are those who have committed to resolving the crisis.

See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1052494/Letter_to_Developers.pdf

6. Consultation on delivery of biodiversity net gain in housing and commercial development

The government is seeking the views of developers, planning authorities, environmental professionals, landowners and other interested parties on how biodiversity net gain should be delivered when building new housing or commercial development. Although some developers, planning authorities and practitioners have already been following a Biodiversity Net Gain approach voluntarily, or in line with local planning policy, a standardised, mandatory approach is proposed. Biodiversity Net Gain will become mandatory two years after the Environment Act receives Royal Assent.

The consultation closes on 5 April 2022.

See: https://www.gov.uk/government/news/protecting-and-enhancing-the-environment-to-be-at-the-heart-of-new-housing-and-infrastructure-developments

7. Parliamentary committee inquiry into government building safety plans

The Parliamentary Levelling Up, Housing and Communities Committee has launched a new inquiry into building safety and issues relating to funding and remediation. The inquiry will examine the announcements made by Secretary of State Michael Gove in his statement to the House of Commons on 10 January 2022.

The Committee chair says that it wants to:

- examine the effectiveness and impact of the Government's planned measures to make developers and industry pay;
- scrutinise whether Mr Gove's approach goes far enough;
- examine the funding arrangement to be agreed with industry; and
- examine the risk to the Department's budget, particularly around social housing, if it is not able to secure sufficient funds from industry.

The inquiry's public evidence sessions will conclude before Mr Gove's planned report to the House of Commons before Easter.

See: Building safety inquiry begins - Levelling Up Committee takes evidence - Committees - UK Parliament

8. CLC Site Operating Procedures- Version 9

In response to the Omicron variant, the Construction Leadership Council has republished the Site Operating Procedures to provide up to date guidance for sites. Version 9 incorporates the following key changes:

- revised introduction to recognise that working with COVID-19 is now 'business as usual' for the industry;
- appropriate language to reflect the current situation on site, for example 'managing' rather than 'restricting' numbers of workers;
- removing out of date references to when to go to work, shielding etc.

See: https://www.constructionleadershipcouncil.co.uk/news/site-operating-procedures-version-9/

9. Building Safety Bill progress

The Building Safety Bill had its second reading (a general debate on all aspects of the Bill) in the House of Lords on 2 February, to be followed by the Committee stage (a line by line examination of the Bill) with a start date of 21 February.

See (for House of Lords briefing): https://lordslibrary.parliament.uk/research-briefings/lln-2022-0005/

10. Government announces further measures on cladding

The Secretary of State for Levelling Up, Housing and Communities, Michael Gove, has announced further measures on cladding. The Department for Levelling Up, Housing and Communities remains in ongoing discussions with industry leaders but for those in industry 'not doing the right thing', the government will be able to block planning permission and building control sign-off on developments, effectively preventing them from building and selling new homes. The government will also be able to apply the new building safety levy to more developments, with scope for higher rates for those who do not participate in finding a workable solution, and courts will be given new powers to stop developers using shadowy shell companies.

Other measures announced include Cost Contribution Orders against manufacturers successfully prosecuted under construction products regulations, requiring them to pay their fair share on buildings requiring remediation, and amendments to the Building Safety Bill will allow building owners and landlords to take legal action against manufacturers who used defective products on homes that has since been found unfit for habitation. The power will go back 30 years and allow recovery where costs have been paid out.

New clauses will also provide that no leaseholder living in their own home, or sub-letting in a building over 11m, pays for the removal of dangerous cladding. These latest provisions will also go further than the package outlined in January by protecting leaseholders on non-cladding costs. Under the plans, developers that still own a building over 11m that they built or refurbished – or

landlords linked to an original developer – will be required to pay in full to fix historic building safety issues in their property. Building owners who are not linked to the developer but can afford to pay in full will also be required to provide the money to do so.

The proposed government amendments are on the Parliament website for debate in the House of Lords during the Committee Stage of the Building Safety Bill, beginning on 21 February.

See, for further details: https://www.gov.uk/government/news/government-to-protect-leaseholders-with-new-laws-to-make-industry-pay-for-building-safety

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