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Legal developments in construction law

1. Court rules on adjudication decision effect on final account process

An adjudication decision on a JCT Trade Contract dealt with an interim valuation of completed works, including variations, and liability for contra charges and liquidated damages. But was the decision (and, if so, to what extent) binding on the parties in the ongoing final account process and any further adjudication, pending final resolution of the adjudicated matters, by legal proceedings or settlement?

Extension of time claim

Although an adjudication decision is temporarily binding on the parties, in the absence of any contrary agreement it does not affect their underlying contractual rights and obligations, or displace the agreed contractual procedures for determining those rights and obligations. An adjudicator has no jurisdiction to determine matters which are the same, or substantially the same, in a subsequent adjudication and, once a disputed extension of time claim has been determined in adjudication, the same dispute cannot be referred to a subsequent adjudication. The adjudication decision did not, and could not, however, override the Trade Contract mechanism requiring a subsequent assessment of the Completion Period by the Construction Manager following practical completion, with the potential to produce a different result (in terms of any liability of the Trade Contractor for liquidated damages and finance charges).

Final Trade Contract Sum

Although the adjudicator did not determine the Final Trade Contract Sum, it did not necessarily follow that the Adjudication Decision could not bind the Construction Manager, in respect of specific matters determined by the adjudicator, in ascertaining the Final Trade Contract Sum. Unlike the review of the Completion Period, calculation of the Final Trade Contract Sum did not require the Construction Manager to remeasure the works. The Trade Contract provided that effect should be given, in calculating the Final Trade Contract Sum, to agreed variations and their valuation, including consequent direct loss and/or expense, and it did not provide for these matters to be re-opened at the final account stage. If, and to the extent that, the adjudication decision had determined any contractual entitlement to a variation or its value, the determination was binding (pending any final resolution by litigation or settlement) on the parties for the purpose of the Final Trade Contract Sum.

And a determination by the adjudicator on a discrete issue decided in the adjudication decision was binding on the parties, pending any final resolution by litigation or settlement. A careful analysis was required to ascertain whether any claim to be advanced was subject to a binding decision by the adjudicator. Regard must be had to the basis of the claim made, whether it amounted to a new cause of action and whether it was permitted under the contract.

Essential Living (Greenwich) Ltd v Elements (Europe) Ltd [2022] EWHC 1400

2. Can a collateral warranty be a Construction Act 'construction contract'?

For the first time, the Court of Appeal has considered whether a collateral warranty can ever be a 'construction contract' as defined by s.104(1) of the Construction Act? The answer, by 2 to 1, was Yes.

Lord Justice Coulson said that the short answer was that that it will always depend on the wording of the warranty in question. To determine the nature of any contract, the express words and the substantive rights conferred must be construed in their proper context. A warranty providing a simple fixed promise or guarantee in respect of a past state of affairs may not be a contract for the carrying out of 'construction operations' under s.104(1). A warranty that the contractor was carrying out and would continue to carry out construction operations (to a specified standard) may, however, be a contract for the carrying out of 'construction operations' under s.104(1) because, unlike a product guarantee, it is a promise which regulates (at least in part) the ongoing carrying out of construction operations.

In summarising the longer route to the answer Coulson LJ said that:

- the s.104(1) wording ("*an agreement…for…the carrying out of construction operations*") is a broad expression;
- traditional views about what comprises a building contract or a collateral warranty are of limited value but the importance of collateral warranties to the ultimate owners/occupiers is a relevant background factor;
- the broad approach to s.104(1) is supported by s.104(5) and by one of the 1996 Act's purposes, to provide an effective dispute resolution system; the same factual disputes about the carrying out of the same construction operations can be dealt with by the same adjudicator, even where there are two different contracts;
- there is no reason to limit the words of s.104(1) to refer only to the primary building contract and, provided the contract or warranty in question (which does not need to have detailed payment provisions) complies with the s.109 payment provisions, it can be a construction contract for the purposes of s.104(1);
- a collateral warranty may, therefore, be capable of being a construction contract for the purposes of s.104(1). What may be critical is whether the warranty is in respect of the ongoing carrying out of construction operations or is in respect of a past and static state of affairs;
- the reasoning of Mr Justice Akenhead, at paragraph 27 in *Parkwood Leisure Ltd v Laing O'Rourke Wales and West Ltd* [2013] EWHC 2665 (TCC), in also deciding whether a collateral warranty could be a 'construction contract', remains good law.

Coulson LJ then considered the other two issues on the appeal, whether the terms of the collateral warranty in question made it a 'construction contract' under s.104(1) and, if it did, whether the date on which it was executed made any difference. It was a warranty of both past and future performance of the construction operations and, as an ongoing promise for the future (which differentiated it from a product guarantee), he considered it "*an agreement for the carrying out of construction operations*" and, therefore, a 'construction contract'. He noted that it did not include the verbs '*acknowledges*' or '*undertakes*', which were present in the Parkwood warranty, but considered that their absence made no material difference.

And because the warranty contained future-facing obligations, as to future performance, and was retrospective in effect, the date of execution was ultimately irrelevant and, if it did matter, there would be considerable uncertainty and it would encourage contractors not to sign collateral warranties until after they had finished as many construction operations as they could, so that, whatever the warranty wording, they could avoid being the subject of a claim in adjudication.

Abbey Healthcare (Mill Hill) Ltd v Simply Construct (UK) Llp [2022] EWCA Civ 823

3. Assignee of a funder's warranty – are its repair costs too remote to recover?

A funder's warranty was assigned twice and the ultimate beneficiary, the leaseholder of a development, made a claim under the warranty against the design and build contractor in respect of cladding and other defects in the development. The first issue the court had to decide was whether the claimant's loss was too remote.

After reviewing the case law, the judge noted, in the context of this case, that:

- remoteness is to be assessed by reference to the reasonable contemplation of the parties (or at least the contractor) when concluding the warranty;
- the question was whether loss of the kind claimed was contemplated at that time as "*a serious possibility*";
- that included whether it was a serious possibility that the original party/assignor (the funder) would suffer loss of that kind;

The warranty made express provision for assignment by the funder of the benefit of the warranty, there was no restriction on those to whom it could be assigned and the contractor knew that losses might be claimed by an assignee who was not a substitute funder and/or who had suffered types of loss other those which a substitute funder might suffer.

It was within the reasonable contemplation of the contractor when entering into the warranty that loss might be suffered by an assignee and it was a serious possibility that that loss might be the cost of repairs to the development by an assignee, for instance another landlord or the borrower.

And even if only the position of the assignor, the funder, was considered, a claim by the funder for the cost of repairs was within the reasonable contemplation as being a "serious possibility" arising from breach of the warranty. When the warranty was entered into, it was the natural and foreseeable consequence of a breach that, if the borrower defaulted, the funder would take possession and carry out repairs.

The loss claimed was therefore not too remote.

Orchard Plaza Management Company Ltd v Balfour Beatty Regional Construction Ltd [2022] EWHC 1490

4. A clause to avoid black holes on assignment – did it work?

A funder's warranty contained a clause that prevented the contractor who provided the warranty from presenting a 'no loss' defence against an assignee (in this case the leaseholder of the development). The clause said that the contractor could not rely on three distinct reasons for arguing that the assignee could not recover its loss:

- because it was only an assignee and not the original party/the funder; or
- because the loss was only suffered by it, and not the original beneficiary, the funder; or
- the assignee's loss was 'different' from the loss that would have been suffered by the funder.

The second issue for the court in this case was whether, even if the claimant's loss was otherwise too remote, the warranty clause prevented the contractor from relying on that argument.

The 'no loss' principle is that an assignee cannot recover more from the debtor than the assignor could have recovered, had there been no assignment, the rationale being that the debtor should not be put in any worse position by reason of the assignment.

The court's analysis of the effect of the 'no loss' clause, as a matter of construction, was that:

- it expressly reversed the 'no loss' principle and said that the assignee could recover loss of a kind which the assignor could or would not have suffered;
- it could not be claimed that, despite the clause, the assignee still could not recover that loss because, at the time of the warranty, the kind of loss suffered was not in the reasonable contemplation of the contractor;
- if remoteness (reasonable contemplation of the kind of loss) survived the clause, it would wholly undermine the last part of the clause because it would apply in every case where the assignee's loss was "different in kind". If the kind of loss suffered by the assignee would never have been suffered by the assignor (the basis for applying the last part of the clause), then it would or could not have been within the reasonable contemplation of the contractor.

Even if the loss claimed by the leaseholder was otherwise (even arguably) too remote, the contractor was prevented by the warranty clause from making that argument. The contractor's second remoteness defence therefore also failed.

Orchard Plaza Management Company Ltd v Balfour Beatty Regional Construction Ltd [2022] EWHC 1490

5. Updated Building Regulations Manual and searchable Approved Documents index

Following Dame Judith Hackitt's recommendation, an enhanced Manual to the Building Regulations and a fully searchable PDF of all Approved Documents have been issued.

This new edition of the manual has been split into two volumes: an accessible overview and a more detailed set of guidance.

See: https://www.gov.uk/guidance/building-regulations-and-approved-documents-index

6. Government policy paper on transparency in public procurement

The government has published a policy paper outlining its proposals to improve the transparency of UK public contracts and spending in greater detail.

The proposed reforms are based on a new procurement 'noticing' regime, covering the full lifecycle of public procurement, from planning to contract expiry. The new notices are outlined in the 2022 Procurement Bill and further detail on their content is to be set out in secondary legislation. The government says it has already begun building these new notices in the Find a Tender service (FTS), the central public procurement platform.

See: Transforming Public Procurement - our transparency ambition - GOV.UK (www.gov.uk)

7. Building Safety Act: leaseholder protection and approved inspectors insurance regulations issued

The government has issued regulations under the Building Safety Act dealing with:

- **Leaseholder protection**

  The regulations deal, among other things, with the determination of the net worth of a landlord group and the landlord's connection to the developer in relation to relevant works, in order to determine their liability for the remediation of historical safety defects, and the determination of the value of a qualifying lease;

- **Approved inspectors insurance**

  The regulations amend the 2010 Building (Approved Inspectors etc.) Regulations 2010 and remove the requirement for approved inspectors to declare they have insurance when submitting an initial notice, an amendment notice, a plans certificate or a final certificate.

See: The Building Safety (Leaseholder Protections) (England) Regulations 2022 (legislation.gov.uk); The Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022 (legislation.gov.uk); and The Building (Approved Inspectors etc.) (Amendment) (England) Regulations 2022 (legislation.gov.uk);

See also: https://www.gov.uk/government/news/leaseholders-protected-from-unfair-cladding-costs-as-governments-building-safety-reforms-come-into-force

8. Building Safety Act: Secretary of State letter to building owners and managing agents

The Secretary of State for Levelling Up, Housing and Communities has published a letter to the major representative bodies for residential managing agents and landlords, setting out their responsibilities under the Building Safety Act.

See: Building Safety Act leaseholder protections (publishing.service.gov.uk)

9. Building Safety Act: secondary legislation consultations

The government has issued guidance on the Building Safety Act which contains links to the consultations now launched on the new building control regime for higher-risk buildings and wider changes to the building regulations for all buildings, and on the in-occupation regime for occupied higher-risk buildings.

These consultations close on 12 October 2022 and the timetable for implementation remains the outline transition plan of 5 July 2021.

See: The Building Safety Act - GOV.UK (www.gov.uk);

https://consult.levellingup.gov.uk/building-safety-consultations/ and

Outline Transition Plan for the Building Safety Bill - 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.

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