MAYER | BROWN

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Legal developments in construction law

1. Court enforcement of an adjudication award - can a challenge send the decision to arbitration?

An employer applied to the court to enforce an adjudication award for £2.2million, but the contractor asked the court to stay the enforcement proceedings, on the basis that there was a dispute that should be referred to the agreed tribunal, arbitration, under the 1996 Arbitration Act. The court noted that a stay will not be granted under s.9 of the Act if the dispute in question does not fall within the scope of the relevant arbitration provision. The fundamental issue was consequently one of construction. What matters were to be referred to arbitration under the relevant construction contract?

The court ruled that the relevant provisions of both the CIC model adjudication procedure (paragraphs 4, 5 and 31) and the Scheme (paragraph 23(2)) expressly exclude from the matters that can be referred to arbitration, any challenge to an adjudicator's decision. Those provisions are intended to give effect to the requirement in s.108 (3) of the Construction Act that an adjudication decision "*is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement*". These provisions all make clear that an adjudicator's decision is binding on the parties, and provisionally enforceable, until the substantive dispute is finally determined by litigation, by arbitration (if there is an arbitration provision in the construction contract) or by agreement, and despite the existence of any pending reference to arbitration.

The court does not refuse a stay because of the 'pay now, argue later' policy of the Construction Act but because the parties have agreed (consistently with the Act) that to give effect to that policy, the arbitration provisions of their contract do not extend to any challenge to an adjudication decision. The underlying philosophy of s.9 of the Arbitration Act is the contractual autonomy of the parties, to which the court is giving effect when it refuses a stay for arbitration where the dispute falls outside the scope of an arbitration clause. This conclusion was entirely consistent with the case law and views of leading construction adjudication practitioners .

The Metropolitan Borough Council of Sefton v Allenbuild Ltd [2022] EWHC 1443

2. Notice of Dissatisfaction – did it make clear what it was challenging?

In ***The Metropolitan Borough Council of Sefton v Allenbuild Ltd*** the contractor under an NEC2 based contract gave Notice of Dissatisfaction that said it "*…relates to the entirety of the Adjudicator's Decision including all of the Adjudicator's conclusions, reasoning, and decisions.*" But did that wording make clear that a challenge was being made to the validity of the adjudicator's decision, on jurisdictional grounds, in addition to a challenge to its substantive merits?

The court said that, whilst a notice of dissatisfaction does not need to go into the details of any substantive challenge to an adjudicator's decision, the issue of the decision's validity is of a fundamentally different character from its substantive merits and a notice of dissatisfaction needs to make it clear whether a challenge is being made to the validity of an adjudicator's decision on jurisdictional grounds, instead of, or in addition to, a challenge to its substantive merits.

In this case, the court ruled that the contractor's Notice of Dissatisfaction did not make clear that a challenge was being made to the validity of the adjudicator's decision, on jurisdictional grounds, in addition to a challenge to its substantive merits. Because of the court's findings elsewhere in the judgment, however, this issue made no difference to the outcome of the case.

The Metropolitan Borough Council of Sefton v Allenbuild Ltd [2022] EWHC 1443

3. Liquidated damages provisions: when might they be void for uncertainty? If not, might they operate as a cap on general damages?

A contractor asked the court for declarations that the construction contract liquidated damages provisions were void for uncertainty and unenforceable and that the financial cap on liquidated damages for delay operated as a cap on liability for general damages for delay.

In rejecting the contractor's claims, the judge noted that the court is reluctant to find a contract provision is void for uncertainty and, if it can find an interpretation which gives effect to the parties' intentions, then it will do so. It is only if the court cannot reach any conclusion as to what was in the minds of the parties, or where it is unsafe to prefer one possible meaning to other equally possible meanings, that the provision would be void. In this case, the court ruled that it was possible to find an interpretation of the provisions which gave clear effect to the parties' intention.

As none of the contractor's challenges to the liquidated damages provisions succeeded, it was unnecessary for the court to consider the contractor's alternative argument, that any liability it might have for general damages for delay was subject to the cap on maximum liquidated damages in the liquidated damages schedule. It did, however briefly address, and reject, the argument.

The court agreed with the judgment in ***Eco World-Ballymore Embassy Gardens Company Ltd v Dobler UK Ltd*** that the Supreme Court decision in ***Cavendish Square Holding BV v Makdessi*** provides persuasive support for the view that, if a liquidated damages provision is void, it is wholly unenforceable. The next question is whether it also operates as a parallel general limitation of liability provision which could be enforced, even if the liquidated damages were void or penal. One simply had to consider whether the language of the provision was broad enough to encompass any alternative liability that could arise in respect of general damages. The question is determined by reviewing the particular clause in question on traditional principles and limited benefit is to be gained from seeing how a different clause in a different contract was interpreted. At best, ***Eco World*** demonstrates that it is possible, in principle, for a clause to operate as a general limitation of liability provision, even though it is literally expressed as applicable only to liquidated damages.

In this case, the focus was entirely on the expression: "*Cap on Maximum LADs 7.5% £1,928,253.77*". The language of the provision was quite clear. The cap was "*on Maximum LADs*", not on anything other than LADs, and no part of the liquidated damages schedule was concerned with liability for general damages. There was, therefore, no cap on liability for general damages for delay.

Buckingham Group Contracting Ltd v Peel L&P Investments and Property Ltd [2022] EWHC 1842

4. Court tackles key issues in £8million cladding claim

The owner of five tower blocks claimed approximately £8 million from the design and build contractor for the cost of investigating and replacing combustible external wall insulation rendered cladding, fitted by the contractor between 2005 and 2008, and providing a waking watch until the cladding had been removed.

The contractor admitted there were some defects in installation of the cladding but denied that they caused, or justified, the complete replacement works undertaken or the need for the waking watch. It said that the real cause and justification for the replacement and the waking watch was the claimant's realisation, triggered by the 2017 Grenfell Tower fire, of the risk that the combustible

cladding did not meet the raised fire safety standards that came into force after completion of the works, and which were further raised following the Grenfell fire. Only limited repair works, it said, were required to remedy the installation breaches. The claimant's fall back case, as an alternative to its primary installation breach case, was that the cladding, as specified, did not meet the fire safety standards that applied at the date of the contract and that it was entitled to recover the replacement and waking watch costs as caused by the specification breach.

The case was primarily about causation of loss in relation to the defective installation, the alternative specification case and the recoverable loss. The specification claim raised the question of whether the cladding specification breached fire safety standards current in the early to mid 2000's, but the judge warned that, like most other similar cases, this case turned very much on the specific contractual provisions and the specific fire safety standards applicable to the particular product chosen, as well as on the cases pleaded and argued and the evidence called. The lengthy and detailed judgment does, however, consider a wide range of issues, including the legal principles applicable to causation, mitigation of loss, reliance on expert advice and remoteness.

Martlet Homes Ltd v Mulalley & Co Ltd [2022] EWHC 1813

5. Cladding dispute judgment: the experts' role in interpreting Building Regs. and associated materials; Approved Documents and BBA certificates

In the detailed judgment in ***Martlet Homes Ltd v Mulalley & Co Ltd*** the court considered the role of experts in the interpretation of Building Regulations and associated materials, noting that the proper interpretation of the provisions is to be found primarily from the words used. In the court's view, it ought only to be necessary to have regard to experts' evidence:

- to explain technical terms, which are not obvious or adequately explained in the material itself; or
- to explain how the provisions were understood by those involved in the design and specification of external cladding systems when considering the "professional negligence" aspect of the case.

The court would not otherwise decide interpretation questions by reference to the experts' opinions, although the reasons given as the basis for their opinions might assist it in making its own decision.

Approved Documents

In discussing the relevant provisions, the court said that the role of 'Approved Documents' was to provide practical guidance and an indication of what would, and would not, be a breach of the Building Regulations. It was not to make prescriptive requirements.

BBA certificates

The court also noted that it was not disputed that a certificate issued by the British Board of Agrément is one of the aids which might be used to establish the suitability of use of a material for a specific purpose. The introductory wording to the Approved Document in respect of Regulation 7 in the Building Regulations 2000 made clear that a certificate of compliance issued by an accredited authorisation scheme, such as the BBA, might be used as an aid to establish the suitability of a material for use for a specific purpose, alongside such other aids as British Standards, other national and international technical specifications, technical approvals, CE marking, tests or calculations performed by accredited testing laboratories, past experience and sampling. A BBA Certificate is, however, simply one of a number of such specified aids and has no more intrinsic weight than any other of the aids mentioned. BBA Certificates cannot amount to a form of "guarantee" or "passport" to compliance with the Building Regulations.

Martlet Homes Ltd v Mulalley & Co Ltd [2022] EWHC 1813

6. Assessing the reasonable skill and care standard; is what everyone else was doing good enough?

In ***Martlet Homes Ltd v Mulalley & Co Ltd*** liability under the contract for the design was strict and not qualified by a requirement to establish professional negligence for breach. In discussing, however, this lesser, reasonable skill and care design obligation the court noted the evidence of the contractor's experts that, at the relevant time, the typical designer specifier would regularly specify the cladding system actually installed, even for

high-rise residential buildings, on the simple basis of its being a well-known system which had a valid BBA certificate whose use was not expressly prohibited at the time on such buildings.

The court, however, accepted the claimant's argument that the argument that "everyone else was doing it" did not, on a proper application of the principle in ***Bolam v Friern Hospital Management Committee***, operate as a 'get out of jail free card'. Following the analysis in ***199 Knightsbridge Development Ltd v WSP UK Ltd***, for the Bolam principle to operate to exonerate a defendant, there must be "*evidence of a responsible body of opinion that has identified and considered the relevant risks or events and which can demonstrate a logical and rational basis for the course of conduct or advice that is under scrutiny*"…"*A defendant is not exonerated simply by proving that others …* [were] *… just as negligent.*"

Martlet Homes Ltd v Mulalley & Co Ltd [2022] EWHC 1813

7. Causation: is it always the 'but for' test?

In dealing with arguments as to causation in ***Martlet Homes Ltd v Mulalley & Co Ltd***, the court reviewed the legal principles, noting that causation is a highly fact sensitive arena and a matter of fact and common sense. It involves taking account of recognised legal principle but, having done that, it is a question of fact in each case, which is an important reminder of the danger of seeking to import decisions in different cases involving different facts.

In this case the court had to decide whether the appropriate test to apply was the 'but for' or the 'effective cause' test and pointed out that the effective cause test does not require that the cause is the 'dominant' cause; there can be more than one effective cause of an event.

The Supreme Court has recently said that in most cases the but for test is a "*minimum threshold test of causation*" but that "*…it has, however, long been recognised that in law… the but for test is inadequate, not only because it is over-inclusive, but also because it excludes some cases where one event could or would be regarded as a cause of another event*". In another, first instance, judgment, it was noted that the court should not depart from the 'but for' test without clear and proper reasoning but where there were two, concurrent, independent causes of loss, fairness and reasonableness might dictate that the 'but for' test should not be required to be a necessary condition.

In this case, the court said that, where it is not appropriate to apply the but for test, it is sufficient for the claimant to succeed, so long as event X is an effective cause of event Y. The choice of which test to apply may be influenced (and was, in this case) by the question of what loss is the subject of the enquiry. It rejected the contractor's argument that the claimant could recover nothing, because the decision to replace the cladding did not satisfy the 'but for' test for causation, as the cladding would have been replaced anyway due to the changed fire safety landscape. The court decided that the installation breaches were an effective cause of the loss suffered, which led to the decision to replace the cladding, and the contractor was consequently liable for that loss.

Martlet Homes Ltd v Mulalley & Co Ltd [2022] EWHC 1813

8. Is a claimant's recovery limited to what is reasonable? Does reliance on expert advice help?

In assessing, in ***Martlet Homes Ltd v Mulalley & Co Ltd***, the costs of remedying the cladding installation breaches that the claimant could recover, the court identified three legal principles limiting the claimant's recovery to the reasonable cost; the overall requirement of reasonableness when addressing causation and assessment of damages, mitigation and betterment.

A claimant who reinstates or repairs their property has a duty to act reasonably. Where reinstatement is the appropriate basis for assessing damages, it must be reasonable to reinstate and the amount awarded must be objectively fair as between the claimant and defendant. Reasonable costs do not, however, mean the minimum amount which, with hindsight, it could be held would have sufficed.

There is also a separate duty on a claimant to act reasonably to mitigate its loss. The court referred to the case law, including the well-known statement in ***Banco de Portugal v Waterlow & Sons Ltd*** where Lord Macmillan noted that the law is satisfied if the party placed in a difficult situation by reason

of the breach of a duty owed to them has acted reasonably in the adoption of remedial measures, and they will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome might have been taken. The court in this case noted that the touchstone is what is reasonable.

The third principle is betterment, which may be limited to the situation where a party derives a benefit as an incidental consequence of adopting a reasonable reinstatement scheme. The issue was not debated before the court but it did note, from the case law, that even if a claimant has no choice in selecting a remedial scheme, if it derives a benefit that can be valued in money terms it should give credit for that benefit.

The court also discussed the relevance of the fact that a claimant has carried out a remedial scheme on the basis of professional advice and noted that the case law considered illustrated the reluctance of Technology and Construction Court judges, consistent with the general principle of mitigation, to be too willing, with the benefit of hindsight, to second-guess decisions made at the time by claimants in respect of remedial works (including settlements with remedial contractors), with the benefit of reputable competent expert advice.

Martlet Homes Ltd v Mulalley & Co Ltd [2022] EWHC 1813

9. Waking watch costs – too remote?

In ***Martlet Homes Ltd v Mulalley & Co Ltd***, the claimant sought the costs of providing a waking watch as a fire safety precaution until the original cladding had been removed, but was this cost too remote?

The court referred to the key case law on remoteness, starting with the classic Victorian case of Hadley v Baxendale, noting that a loss will not be foreseeable (and therefore recoverable) if, in the particular contract circumstances, the loss was an unusual occurrence outside the parties' contemplation or a different type of loss of which the defendant did not have sufficient knowledge to make it reasonable to attribute to them acceptance of liability for that loss.

In applying the legal principles to the facts and ruling that the waking watch costs were not too remote, the court was prepared to accept that, prior to Grenfell, there was no widespread knowledge or understanding in the construction sector that the risk to fire safety, where combustible external cladding was found on a high-rise residential tower block, was so great that a waking watch would be required until it was removed.

This, however, seemed to the court to reflect more what was clearly a culture of endemic complacency within the construction sector about the true nature and extent of the fire safety risk associated with the use of combustible external cladding on high-rise residential tower blocks, than any reasoned assessment that the risk could never be sufficiently high to justify the provision of temporary additional fire-safety precautions, if serious fire safety related defects were discovered in such a building.

Martlet Homes Ltd v Mulalley & Co Ltd [2022] EWHC 1813

10. Building Safety Act Guidance and explanatory notes

The Building Safety Act has a guidance page with information and links to:

- The Act;
- The Building Safety Regulator page on the HSE website, with links to further materials;
- secondary legislation;
- building safety consultations. (The open consultations close on different dates in October 2022.)

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

Updated explanatory notes on the Act have also been published.

See: 72622 Chapter 30 EN 2022 Covers.indd (legislation.gov.uk)

11. New BSI competence standards: frameworks, requirements and code of practice

The new BSI Built Environment competence standards PAS 8671, 8672 & 8673 and code of practice PAS 8670 v3.0 can be found at, and downloaded from:

Built Environment Competence Standards | BSI (bsigroup.com)

PAS 8671:2022: Built environment – Framework for competence of individual Principal Designers – Specification

PAS 8671 addresses competence thresholds that individuals are expected to meet when managing the dutyholder functions of the Principal Designer role. It also specifies the minimum competence thresholds needed by Principal Designers and the additional requirements for working on higher-risk buildings (HRBs).

PAS 8672:2022: Built environment – Framework for competence of individual Principal Contractors – Specification

PAS 8672 specifies competence requirements for the role of Principal Contractor with regard to:

- Roles and responsibilities
- Skills, knowledge and experience
- Behaviours and ethics
- Additional competences for higher-risk buildings (HRBs)
- Limits of competence

It also describes specific competences common to all Principal Contractors and those which are additional for those undertaking the dutyholder role of Principal Contractor on HRBs.

PAS 8673:2022: Built environment – Competence requirements for the management of safety in residential buildings – Specification

PAS 8673 specifies competence requirements for managing safety in residential buildings and other developments incorporating residential accommodation. It also gives guidance on detailed competencies and the assessment of competence.

BSI Flex 8670: v3.0 2021-04: Built environment – Core criteria for building safety in competence frameworks – Code of practice

BSI Flex 8670 v3.0 sets out core building safety competence criteria, including fire safety, structural safety and public health, to be included in sector-specific frameworks for individuals working in the built environment. It is applicable to buildings of all types and scales.

12. Building Safety Act: sections 126-129 in force

Sections 126-129 of the Building Safety Act, dealing with building industry schemes, prohibition on development for prescribed persons and building control prohibitions, came into force on 1 September 2022.

See: The Building Safety Act 2022 (Commencement No. 2) Regulations 2022 (legislation.gov.uk)

13. Building Safety Act: leaseholder guidance

The government has issued guidance for leaseholders on the implications of the leaseholder protections in the Building Safety Act 2022.

See: https://www.gov.uk/guidance/building-safety-leaseholder-protections-guidance-for-leaseholders

14. Building Safety pledge: Levelling Up Secretary gives update and issues warning to irresponsible house builders

The Secretary of State for Levelling Up, Housing & Communities, Simon Clarke, has reported that 49 of the largest house builders have signed a public pledge to fix unsafe buildings that they developed or refurbished and that those pledges are shortly to be turned into legally binding contracts.

Mr Clarke has also warned that any house builders that fail to act responsibly may be blocked from commencing developments and from being granted building control sign-off for their buildings. The Department's Recovery Strategy Unit is also to expose and pursue firms and individuals involved in the most egregious cases of building safety neglect. Where freeholders are not coming forward and accepting government money to make buildings safe, this unit will be launching legal action. He expects the first cases to be brought very soon.

See: https://www.gov.uk/government/news/building-safety-levelling-up-secretarys-op-ed-for-the-telegraph;

and (previously): Greg Clark: No turning back on protecting leaseholders - GOV.UK (www.gov.uk)

15. NEC secondary Option X29 supports combatting climate change

NEC secondary option X29 has been produced to support the combatting of climate change. Versions of secondary Option X29 for all NEC4 main and main subcontract forms, and guidance notes, can be downloaded from: News | NEC Contracts

16. Government announces fast track planning route for major infrastructure projects

The Secretary of State for Levelling Up announced a new fast-track planning route for major infrastructure projects such as road improvements and offshore wind farms. New powers will enable shorter deadlines for examinations of Nationally Significant Infrastructure Projects. The relevant Secretary of State will decide whether to put the shorter deadline in place.

It will also be possible to make decisions more quickly on smaller (non-material) changes to projects already approved.

The government will make the changes to the Nationally Significant Infrastructure Projects process through amendments to the Levelling Up and Regeneration Bill and intends to publish a full Action Plan, as well as consultation on the national policy statements and on further regulatory and guidance changes to improve the operation of the system, over the coming months. This will include more details about possible timeframes and how the process would work.

Councils and local communities will continue to play a key role in the planning process and only suitable projects will go through the new fast track process.

See: https://www.gov.uk/government/news/fast-track-planning-route-to-speed-up-major-infrastructure-projects

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