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Legal developments in construction law

1. Noise and smells from mechanical plant - strict liability to neighbours in nuisance?

A claimant brought proceedings against the owner of the neighbouring restaurant and takeaway, alleging that the noise and smells from mechanical plant were a private nuisance. The local council had previously served an Abatement Notice requiring the abatement of noise, amounting to a statutory nuisance, from the operation of mechanical plant at the premises, but what is the test for private nuisance? Is liability strict? Is a substantial interference with a neighbour's use of their property automatically a private nuisance?

Case law says that a private nuisance is an interference with the reasonable enjoyment of a neighbouring property but it is not a strict liability arising whenever property is used in a way that harms a neighbour. Liability arises when common and ordinary use and occupation of land and houses goes beyond reasonable use. Reasonable use is one of "*give and take*" or "*live and let live*". It is about what the neighbour might reasonably be expected to put up with, assessed objectively, applying the standards of the average person.

In determining whether something is a nuisance, the circumstances are taken into account and whether a particular activity causes a nuisance often depends on an assessment of the locality in which the activity concerned is carried out. In this case the absence of planning permission for the installation of the mechanical plant was not determinative of liability. The unlawfulness which supports a claim for private nuisance lies in the effect that the particular use of property has upon the neighbour, even if there is nothing else unlawful about it. This claim in private nuisance failed.

Ray v Windrush Riverside Properties Ltd [2022] EWHC 2210

2. How final is a JCT 2011 final certificate? Scottish court splits 2-1 on the answer

In 2019 a contractor started court proceedings in Scotland, to challenge a final certificate under a JCT 2011 contract, within the contract time limit. In 2020, well outside the time limit, it also started an adjudication in respect of an interim application made in 2017. The adjudicator awarded the contractor £427,578.75, plus interest, the employer refused to pay and, in enforcement proceedings, counterclaimed that the final certificate was conclusive evidence as to the sum payable to the contractor. A Scottish court, relying on clause 1.9.4 of the JCT form, dismissed the counterclaim because it had not been raised within 28 days of the adjudicator's award.

Clause 1.9.4 of the 2011 JCT form says, in summary, that, if an adjudicator's decision is given after the issue of the Final Certificate and a party wishes the dispute to be determined by arbitration or legal proceedings, they have 28 days to start the arbitration or legal proceedings. Did the Inner House of the Court of Session, on appeal, agree that the employer's counterclaim should be dismissed?

The majority judgments

Two of the three Scottish judges agreed that it should. Lord Carloway said that clause 4.15.2 made clear that the Final Certificate sum did not affect the contractor's right to receive any interim payment due under the contract and this included sums not certified, but payable following an interim payment notice.

If, however, this analysis was incorrect and the Final Certificate balance superseded the interim payment notice regime, the adjudication based on the latter must have been incompetent and could have served no useful purpose. The problem was that the parties were content that the adjudication should proceed on the basis that, under the Construction Act, the parties are free to adjudicate "at any time" and, having done so, they must be taken as bound by the adjudicator's decision, except in so far as it was challengeable under the contract.

The terms of clause 1.9.4 were straightforward and clear; any adjudicator's decision issued after the issue of the Final Certificate could only be challenged within 28 days which, in this case, it was not. The employer was therefore bound by it, must pay the sum awarded and await the outcome of the (dormant) court action on the correctness of the Final Certificate. This approach was the only one consistent with the adjudication regime. The employer must "*pay now, argue later*".

Lord Woolman agreed that the employer's counterclaim should be dismissed. He considered that the original court action should have been the only proper vehicle to challenge the final certificate. The adjudicator was wrong in reaching a different conclusion; he should have made a nil award and the final certificate should have been final but, because the employer had failed to challenge the award within the clause 1.9.4 time limit, it could no longer be challenged.

The dissenting judgment

Lord Malcolm disagreed. After setting out some general propositions derived from case law, he said that clause 1.9.4 had to be set in the context of the terms and purpose of clause 1.9 as a whole (amended in the 2016 edition). It provided a time constraint on challenges to adjudications which comply with the rest of the provision and it made little sense to apply clause 1.9.4 to adjudications raised long after the final certificate, most of which will have nothing to do with its terms.

Clause 1.9 struck a balance between the desire for swift finality as to the status of the final certificate and the resolution of disputes as to its terms. The clause envisaged pre or post final certificate challenges by way of adjudication, arbitration or litigation (the post challenges being time limited). Unlike the others, the outcome of an adjudication, though binding, is temporary ("*pay now - argue later*"). Thus there has to be provision for a challenge to the outcome of a timeous adjudication; but it would run counter to the overall intention if that could occur at a time of the challenger's choosing, hence the imposition of a time cut-off. That was the context and purpose of clause 1.9.4. It was consistent with the general structure that unresolved disputes on valuations in interim certificates or applications are superseded by the final certificate which conclusively states the sum due for the contract work.

In this case the adjudication did not comply with clause 1.9 thus sub-clause 4 was not in play. Since the adjudication was not started within the contract time limit and the contractor had been paid all that was due in terms of the final certificate (which included the works involved in the contractor's 2017 interim payment notice), the adjudicator should have made a nil award. The only valid challenge to the conclusive effect of the final certificate was the pending court action. The counterclaim was the place for a reassessment of the correct status of the final certificate in the adjudication, not a process begun before the adjudication started. Because the sum due under the final certificate had been paid, the adjudicator was wrong to reject the employer's argument that the only legitimate vehicle for extracting more money was the timeous court action.

D McLAUGHLIN & SONS LTD AGAINST EAST AYRSHIRE COUNCIL [2022] ScotCS CSIH_42

3. Contract interpretation: is providing an answer in the abstract more difficult?

A court was asked to give declarations as to the meaning of a PFI construction subcontract for new and refurbishment works. Did the contract requirements as to minimum design lives apply to elements of the buildings to be refurbished that were in sound condition and whose replacement was not envisaged in the Contractor's Proposals? In accepting the subcontractor's interpretation of the requirements for these elements, the court provided a warning about interpreting a contract in the abstract.

The court noted that the applicable principles have been set out in Supreme Court decisions; the court's task is to try to ascertain the intention of the parties by reference to the language used, in its context, but in this case there was no claim for damages, no particular breaches were alleged, there was no assertion of a right to sums as a consequence of acts or omissions and, consequently, no evidence. It was not necessarily inappropriate to grant declarations but the court warned that caution was required.

Although a contract is to be interpreted by reference to its language and the circumstances at the time of its formation, consideration of these matters is best undertaken in the context of a particular alleged breach. The potential practical consequences of competing interpretations, as envisaged at the time of the contract, form part of the context in which the contract's language is to be interpreted.

The court must exercise care in having regard to what it regards as commercial common sense and to the consequences envisaged. It must not rewrite the parties' contract to protect a party from having made a bad bargain or commercially foolish arrangement but regard is to be had to the commercial consequences of competing interpretations. This is part of the exercise of ascertaining the parties' intentions from the language used, in its context. When the exercise is undertaken against the background of a particular alleged breach the court can form a better view of the consequences flowing from the competing interpretations. At the lowest, knowledge of how events transpired can assist in considering what commercial consequences were properly capable of being envisaged at the time the contract was made.

The other, related, reason is that, in dealing with interpretation in the absence of a dispute derived from particular facts, the court is not saying what the effect of the contract is in circumstances which have actually arisen. It is saying what the terms of the contract mean in the abstract and there is a risk that, in choosing between competing interpretations in the abstract, the court will simply end up expressing the contract in different words, with the heightened risk that the court will, in effect, be making a contract different from what the parties agreed.

The court also noted that it is almost inevitable, in contracts of the length and complexity of those connected with the project, that there will be infelicities in the drafting and that there may be definitions worded in a way which, on a strict logical analysis, is circular but whose meaning will be more or less easily and clearly discerned when seen in context. That is why, as must any contract, the subcontract had to be read as a whole and in context.

Solutions 4 North Tyneside Ltd v Galliford Try Building 2014 Ltd [2022] EWHC 2372

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

The Secretary of State for Levelling Up, Housing & Communities 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.

The Secretary of State 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. He said that 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.

A press release from the Department has subsequently reported that the freeholder of a tower block, registered with the Building Safety Fund in 2020, has been given 21 days to commit to remediating the tower's fire safety defects or an application will be made to the courts. It says that the Secretary of State will also consider issuing an application for a Remediation Contribution Order against other entities associated with the freeholder, requiring them to contribute financially to the remediation costs.

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

https://www.gov.uk/government/news/first-legal-action-launched-to-keep-residents-safe

5. Dame Judith advises Facilities Managers to get ready for Building Safety Act changes

The September HSE Building Safety ebulletin reports that, at a CIBSE Facilities Management Group event on 21 September, Dame Judith Hackitt advised the Facilities Managers attending to take several important steps, and to do so quickly, in summary, to:

- engage with the consultation process on secondary legislation (now closed);
- start compiling dossiers now on the buildings for which they are responsible, noting that it is important to gain that sense of how much information they have about the buildings and where the gaps are;
- change their approach to resident engagement – residents in buildings really must be placed at the heart of the process and that means sharing information with them AND listening to their concerns;
- take note of the comments being made by HSE on new building applications – their concerns provide important indicators of the factors which will be examined for existing buildings under the new regime – this will help preparation;
- start taking action now to address the competence of staff. The new regime is a very big change of mindset and approach – it is for dutyholders and responsible persons to demonstrate that they understand the risks and have measures in place to ensure building safety – not about a tick in the box from the regulator or asking them to tell you what you need to do to satisfy them. There needs to be a step change in competence across the board to respond to this in the right way.

To sign up to the ebulletin go to: https://public.govdelivery.com/accounts/UKHSE/signup/15087

See also: https://www.cibse.org/policy-insight/news/from-the-source-dame-judith-hackitt-provides-an-update-on-the-building-safety-act-at-cibse-facilities-management-group-event

6. Latest HSE programme dates for Building Safety Act

The HSE's web page setting out its expected programme for the new building safety framework has the following timetable:

April 2023

- Registration for existing occupied High-rise Residential Buildings (HRB) opens.

October 2023

- Registration deadline for existing occupied buildings. From now on all new buildings must be registered before being occupied.
- Building inspector and building control approver registers open.
- BSR becomes the new building control authority for High-rise Residential Buildings.
- From 1st October 2023 developers must apply to BSR for building control approval before commencing work on any HRB.

April 2024

- BSR starts to call in buildings for assessment and issue Building Assessment Certificates.
- Requirements related to registration for building inspectors and building control approvers become enforceable.

See: https://www.hse.gov.uk/building-safety/prepare.htm

7. No change, after all, for IR35

The Chancellor of The Exchequer, Jeremy Hunt, has announced that the proposed repeal, in the government's September Growth Plan 2022, of the 2017 and 2021 reforms to the off-payroll working rules (IR35), is no longer going ahead. IR35 will now remain in place.

8. RICS opens public consultation on cladding advice to valuers

The RICS has run a public consultation (closing date 31 October) on new proposed guidance on valuation of properties in multi-storey, multi-occupancy residential buildings with cladding.

Implementation of the guidance will be decided by the RICS Standards & Regulation board.

See: https://www.rics.org/uk/news-insight/latest-news/press/press-releases/rics-commence-public-consultation-on-advice-to-valuers-regarding-cladding/

9. More Construction Playbook materials

The government has added a number of guidance notes and other items to the Construction Playbook materials available on the government website.

See: The Construction Playbook - 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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