



Legal developments in construction law

1. No special interpretation rules for exclusion or limitation clauses, says the court, but...

In times gone by, the courts found ways to curb excessive exclusion clauses, until, of course, the Unfair Contract Terms Act came along. But although the statute is there for the courts to deploy, when needed, are there still special rules of interpretation to be applied to an exclusion, or a limitation, clause?

In ***Drax Energy Solutions Ltd v Wipro Ltd*** the court said there were not. Supreme Court and Court of Appeal judgments have confirmed that commercial parties are free to make their own bargains and allocate risks as they think fit, and that the task of the court is to interpret the words used fairly, applying the ordinary methods of contractual interpretation. The parties are, however, not lightly to be taken to have intended to cut down the remedies which the law provides for breach of important contractual obligations, without using clear words having that effect. The principle is essentially one of common sense; parties do not normally give up valuable rights without making it clear that they intend to do so.

[Drax Energy Solutions Ltd v Wipro Ltd \[2023\] EWHC 1342 \(TCC\) \(09 June 2023\)](#)

2. Can “Can’t pay” stop adjudication enforcement?

The policy behind adjudication is “pay now, argue later”, robustly enforced by the courts, but what if the paying party can’t? Can that stop enforcement?

In ***J & B Hopkins Ltd v A & V Building Solution Ltd*** the court noted that the Civil Procedure Rules give the court discretion to order a stay of execution if satisfied that:

- (a) there are special circumstances which render it inexpedient to enforce the judgment or order, or
- (b) the applicant is unable from any reason to pay the money.

Case law has additionally said that, if (b) is relied on, the burden is on an applicant to show, on the balance of probabilities, that it is unable to pay, including that no funds would be made available to it, including by its owner or by some other closely associated person. The court should judge the probable availability of the funds by reference to the underlying realities of the company’s financial position; and by reference to all aspects of its relationship with its owner, including, obviously, the extent to which they are directing (and have directed) its affairs and are supporting (and have supported) it in financial terms.

Even if the court is satisfied that the applicant is unable to pay, it must still consider its discretion as to whether to grant the stay sought and a no-set off clause is a very strong factor in the discretionary exercise.

[J & B Hopkins Ltd v A & V Building Solution Ltd \[2023\] EWHC 1483](#)

3. Is the label “heads of terms” conclusive?

Sometimes parties’ negotiations end with a binding contract. Sometimes, however, the commitment to a binding contract is postponed until a formal agreement has been signed and sometimes, as in ***Pretoria Energy Company (Chittering) Ltd v Blankney Estates Ltd*** a court has to decide which outcome the parties achieved. In confirming that “*Heads of Terms of Proposed Agreement*” were not a binding agreement, the Court of Appeal referred to the summary of the applicable legal principles set out by the judge at first instance. That summary included these principles:

- Whether there is a binding contract depends on a consideration of what was communicated between the parties by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded, or the law requires, as essential for the formation of legally binding relations;
- even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement;
- the more vague and uncertain an agreement is, the less likely it is that the parties intended it to be legally binding but in most cases it is for the parties to choose which terms they regard as essential for the formation of legally binding relations. They can agree to be bound contractually, even if there are further terms to be agreed between them;
- in a commercial context, the onus of demonstrating that there was a lack of intention to create legal relations lies on the party asserting it, and it is a heavy one;
- parties may expressly negative contractual intention, which they often do by using the phrase “subject to contract” but the use of such words is not essential and nor is the label “*heads of terms*” conclusive: a document referred to as “*heads of terms*” may be intended to be a non-binding record of the broad principles of an agreement to be made in formal written documents subsequently negotiated,

or may be intended, in whole or part, to be a binding contract governing the parties’ relations until a more detailed agreement is drawn up;

- where parties intend to be contractually bound, the courts are reluctant to find an agreement is too vague to be enforced. The court may be able to imply terms to fill apparent gaps, particularly in commercial dealings between parties familiar with the trade in question or where the parties have acted in the belief that they have a binding contract. Business people may record important agreements in a summary way;
- contracts for the disposition of interests in land, including agreements for lease, are subject to additional requirements.

[Pretoria Energy Company \(Chittering\) Ltd v Blankney Estates Ltd \[2023\] EWCA Civ 482](#)

4. Government issues guidance on what is a ‘higher-risk building’ for the occupation phase

The government has issued guidance on the legal criteria for determining what is, for the occupation phase, a ‘higher-risk building’ under the Building Safety Act 2022 and the Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations 2023.

The guidance includes relevant text from the Act and Regulations with explanations and diagrams to help potential principal accountable persons and accountable persons determine if the building they are responsible for is a higher-risk building. The guidance says that they will need to consider the legislation carefully and may wish to seek legal advice. It also notes that the building may also be subject to other legislation and statutory duties, such as the Regulatory Reform (Fire Safety) Order 2005.

See: <https://www.gov.uk/guidance/criteria-for-being-a-higher-risk-building-during-the-occupation-phase-of-the-new-higher-risk-regime>

5. HRB registration applications and KBI to be completed on the portal by 1 October 2023

Key Building Information for high-rise residential buildings in England, the set of information needed about each high-rise building, in order to assess and properly manage the risks of fire spread or structural failure, has to be supplied to the Building Safety Regulator. It can be submitted at the same time as the application to register a building, or at a later date, but all registration applications and KBI must be completed on the portal by **1 October 2023**.

See: [read the guidance on giving BSR structure and fire safety information](#); and [Register a high-rise residential building - GOV.UK \(www.gov.uk\)](#)

6. HSE publishes advice on Planning Gateway One:

The HSE has published advice for local planning authorities, applicants and other technical specialists involved in the design and approval of high rise residential and educational accommodation buildings at the planning stage. It outlines what Planning Gateway One is intended to achieve, how it works and the relevance of fire safety matters at the planning stage, and provides information about using the pre-application service.

See: [The guidance published](#)

7. Government briefing papers on Building regulations and safety

Information for a debate in the House of Commons on 6 July 2023, on building safety and social housing, to mark six years since the Grenfell Tower fire, included two briefings, on Building regulations and safety, and [Fire safety in houses and blocks of flats](#).

The Building regulations and safety briefing includes a summary timetable for the coming into force of various Building Safety Act changes still awaited but, in particular, provides no confirmation that the new Higher-risk building gateway regime will definitely come into force on 1st October, and does not say when the regulations required for that regime will be issued, and then come into force.

See: [General debate on building safety and social housing, to mark six years since the Grenfell Tower tragedy - House of Commons Library \(parliament.uk\)](#);

[CBP-8482.pdf \(parliament.uk\)](#); and

[Fire safety in houses and blocks of flats](#)

8. Government consults on new public procurement regime secondary legislation

The government has launched a consultation on the secondary legislation required to implement the new public procurement regime established by the Procurement Bill. Part 1 of the consultation refers predominantly to areas of the Bill which require lists, calculations or further definitions to be used in practice and the closing date is 28 July 2023.

Part 2 of the consultation focuses on the transparency provisions and notices that will be used by contracting authorities to fulfil their legal requirements under the Bill. It also includes information on the proposed approach to transitional arrangements for procurements already underway at the time that the new regime enters into force and the position on other legislation that will need to be amended in order for the full provisions of the Bill to take effect. The closing date for Part 2 is 25 August 2023.

See: [Part 1 Consultation on draft regulations to implement the Procurement Bill - GOV.UK \(www.gov.uk\)](#);

and

[Part 2 Consultation on draft regulations to implement the Procurement Bill - GOV.UK \(www.gov.uk\)](#)

9. Bid to add project bank account requirement to Procurement Bill rejected

An attempt to add a requirement, in the new public procurement regime established by the Procurement Bill, for the setting up of project bank accounts in contracts with a value of more than £2million, has been rejected.

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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