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Legal Update
March 2017

Legal developments in construction law

1. A contract can be made anywhere; how about over dinner?

An essential ingredient of a binding contract is an intention to create legal relations. But what if, as in ***MacInnes v Gross***, a contract is claimed to have been made over dinner in a smart restaurant? What principles might a court apply in looking for this intention?

- Where there is an express agreement, in an ordinary commercial context, the burden of disproving the intention is a heavy one;
- Where there is no express agreement, the party claiming a binding agreement has been made has to prove the intention;
- The degree, or lack, of precision in expressing the alleged agreement may be relevant; and
- Vagueness/uncertainty may be a ground for concluding that the parties did not reach an agreement.

The court may decide that there is no agreement because no definite meaning can be given to what was said. The more complicated the subject matter, the more likely the parties are to want to record their contract in a written document, so that they can review all the terms before being committed to any of them; and if there is a "trigger" event (for instance, on which commission becomes payable) express identification of the event is essential.

The court decided that there was no intention to create legal relations and therefore on this (and other grounds) no binding contract had been made over dinner. The fact that the key discussion took place over dinner in a smart restaurant did not, of itself, prevent the making a binding contract. A contract can be made anywhere, in any circumstances. But the fact that the alleged agreement was made in a highly informal and relaxed setting meant that the court should look closely at the claim that, despite the setting, there was an intention to create legal relations. In doing so the court noted that the claimant said, in a subsequent email, that there was an agreement "*on headline terms*", he was unaware of any similar remuneration agreements concluded over dinner in this way and business matters were not always to the fore at this dinner. Neither party had told anyone else they had reached a binding agreement and the claimant had not produced any written contract or draft, an omission that the court regarded as critical. Its absence was the final reason for the court's decision on this issue.

MacInnes v Gross [2017] EWHC 46 (QB)

2. Court of Appeal confirms DOM/2 extension of time is an add-on

In April 2016 the court had to find a home for a subcontract extension of time under the DOM/2 form of subcontract. It decided that it should follow immediately, contiguously, after the current completion date rather than standing on its own, separately, at the time that the relevant event occurred, after the period of delay for which the subcontractor was responsible. This meant, however, that the subcontractor might have no liability to the contractor, during a period when it was actually in delay, for resulting loss or damage. And it would then be liable to the contractor during a period when it was actually not in delay, for example because it was complying with a late variation instruction. But because the loss suffered by the contractor during those two periods was unlikely to be the same, one or other party would gain a windfall benefit. The Court of Appeal could see no answer to this issue but did it still agree with the court's original decision?

It did. While the consequence of the contiguous approach was, at the very least, an oddity, anomalies of this kind did not displace the natural meaning of the extension of time clause, which was practicable and workable.

Carillion Construction Ltd v Emcor Engineering Services Ltd & Anor [2017] EWCA Civ 65

3. Court makes a substitution when wrong document included in contract

Under a waste recycling contract a local authority was entitled to fixed and variable payments. An "*Income Generating Payment Mechanism*" identified the annual fixed payment as £500,000 and recorded that it was indexed for inflation. When the contract documents were put together, however, an earlier and incomplete version of the IGPM, which did not refer to indexation and had gaps that made the contract inoperable, was included. The error was not identified before the contract was concluded and the council asked the court to rectify the contract by substituting the correct version of the IGPM.

The case law says that a party seeking rectification for common mistake must show that:

- the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified;
- there was an outward expression of accord;
- the intention continued at the time of the execution of the instrument sought to be rectified; and
- by mistake the instrument did not reflect that common intention.

The court ruled that all of these ingredients were in place to permit rectification. The ingredients of unilateral mistake had also been shown, the defences put forward failed and the court ordered that the contract should be rectified by substituting the correct version of the IGPM.

Borough of Milton Keynes v Viridor (Community Recycling MK) Ltd (No 2) [2017] EWHC 239

4. New CIC User's Guide to Adjudication

The Construction Industry Council has produced a new "*User's Guide to Adjudication*" in place of the Construction Umbrella Bodies Adjudication Task Group's 2003 version.

The updated Guide provides a general introduction to adjudication in the context of construction contracts and is available for free download from CIC's website.

See: *http://cic.org.uk/news/article.php?s=2017-02-20-cic-publishes-new-users-guide-to-adjudication*

5. Government consultation: CITB and ECITB – how effective are they?

The government has been seeking views on the current and future operation of the Construction Industrial Training Board and the Engineering Construction Industrial Training Board.

The review included the following questions:

- the impact of the levy system and alternate types of incentives;
- what is needed to overcome specific skills challenges;
- how to encourage innovation and new working practices;
- clarity of the "scope" of the existing ITBs;
- which ITB services, if any, are valued by the sector;
- ease of access to support;
- specific challenges and targeting of resource; and
- their role in bringing new entrants to the industry.

See: *https://consult.education.gov.uk/further-education-funding/review-of-the-industrial-training-board-call-for-e/supporting_documents/ITB%20Review%20%20DfE%20consulation%20doc%20Fin.pdf*

6. 22 June 2017 – NEC4 arrives

The NEC4 suite of contracts is to be made available on 22 June. "*Updated and streamlined*", this latest regeneration of the NEC includes a Design, Build and Operate Contract and an Alliance Contract to be published in consultation form.

See: *https://www.ice.org.uk/media-and-policy/ice-press-centre/nec4-the-next-generation-of-nec-contracts*

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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