MAYER·BROWN

Legal Update
December 2016

# Legal developments in construction law

## 1. Liability caps of no use without binding agreements

A specialist concrete subcontractor made a £40 million claim against its consultant, alleging defective design but the consultant denied liability and said that, even if it was liable, there was a simple contract with a liability cap of £610,515. The court had to decide if there was a contract and whether any of the three sets of competing terms and conditions, and the cap, were incorporated in it.

There was, said the court, a simple contract which was not *"subject to contract"*. Work was done and paid for on the basis of instructions from the subcontractor, which were accepted by the consultant, as evidenced by its conduct in undertaking the work. And none of the sets of terms and conditions and the schedule containing the liability cap was incorporated in that contract. While the court should always strive to find a concluded contract where work has been performed, the court is not entitled to rewrite history so as to incorporate express terms which were not the subject of a clear and binding agreement. The case demonstrated, said the judge, that it is usually better for a party to reach a full agreement, which in this case would almost certainly have included some liability cap, through negotiation and give-and-take, than to delay and fail to reach any detailed agreement.

Arcadis Consulting (UK) Ltd v AMEC (BSC) Ltd [2016] EWHC 2509

## 2. Just when you thought you knew what "consequential loss" meant...

You might be forgiven for thinking that the meaning of *"consequential loss"* had been settled years ago. English court decisions going back over 80 years have said that it describes indirect losses under the second limb of ***Hadley v Baxendale***. But a case about a shipbuilding contract reminds us that, in every case, you need to look at the words actually used because the answer might just turn out differently.

An article in a shipbuilding contract set out a code, containing a guarantee by the shipyard, in respect of defects directly caused by defective materials, design error, construction, miscalculation and/or poor workmanship, and replacing and excluding liabilities imposed by statute, common law, custom or otherwise. In particular, the code said the shipyard had *"...no liability or responsibility whatsoever or howsoever arising for or in connection with any consequential or special losses, damages or expenses unless otherwise stated herein."* The parties agreed that the article provided a complete code for determining liability and, on that basis, the court ruled that the article made it clear that the shipyard had no liability beyond its express obligations. Financial losses consequent upon physical damage were not therefore covered by the guarantee and could not be recovered. *"Consequential or special losses, damages or expenses"* did not mean losses or damages under the second limb of ***Hadley v Baxendale*** but had a wider meaning of financial losses caused by guaranteed defects, beyond the cost of replacement and repair of physical damage, and were therefore excluded.

Star Polaris LLC v HHIC-Phil Inc [2016] EWHC 2941 (Comm)

## 3. Roads and premises do not have to be kept in perfect state for visitors

A pedestrian tripped over a small piece of concrete protruding from the base of a damaged traffic bollard and sued the occupier of the premises. The judge found the occupier liable because there was a foreseeable risk of injury. But did the Court of Appeal agree with that analysis?

In the Court of Appeal's view, no highway authority, or occupier of premises like the cathedral in the case, could possibly ensure that the roads or the precincts around a building are maintained in a pristine state. The occupier's obligation is to make the land reasonably safe for visitors, not to guarantee their safety. To impose liability, there must be something over and above the risk of injury from the minor blemishes and defects habitually found on any road or pathway. The law has to strike a balance between the nature and extent of the risk and the cost of eliminating it. The risk is reasonably foreseeable, so as to impose liability, only where there is a real source of danger which a reasonable person would recognise as obliging the occupier to take remedial action. A visitor is, however, reasonably safe despite any visible minor defects on the road which carry a foreseeable risk of causing an accident and injury. And in the end the trial judge has to use their judgment to decide whether the danger is sufficiently serious to require the occupier to take steps to eliminate it.

Dean and Chapter of Rochester Cathedral v Debell [2016] EWCA Civ 1094

## 4. New government policy note on procurement and contracting onerous practices

The government has issued Procurement Policy Note 10/16 on onerous practices in procurement and contracting. The note explains how government buyers can avoid using onerous practices in procurement and contracting activity and applies to all central government departments, their executive agencies and non-departmental public bodies with immediate effect. It says that these organisations should conduct their public procurement and contracting activity in line with published guidance and best practice. This includes:

- conducting effective pre-market engagement;
- ensuring accurate and reliable data is available to suppliers during a procurement, and throughout contract delivery;
- awarding contracts on the basis of value for money;
- putting in place appropriate mechanisms for identifying and managing risks;
- using the guidance developed to support the Model Services Contract, to establish limits of liability in contracts.

See: https://www.gov.uk/government/publications/procurement-policy-note-1016-onerous-practices-in-procurement-and-contracting

## 5. JCT 2016: Intermediate Building Contract

Yet more JCT 2016 contracts have arrived:

The **Intermediate Building Contract** family:

- Intermediate Building Contract;
- Intermediate Building Contract with contractor's design;
- Intermediate Building Contract Guide;
- Intermediate Sub-Contract Agreement;
- Intermediate Sub-Contract Conditions;
- Intermediate Sub-Contract with sub-contractor's design Agreement;
- Intermediate Sub-Contract with sub-contractor's design Conditions;
- Intermediate Named Sub-Contract Tender and Agreement;
- Intermediate Named Sub-Contract Conditions;
- Intermediate Named Sub-Contractor/Employer Agreement;
- Intermediate Sub-Contract Guide.

See: http://www.jctltd.co.uk/category/intermediate-building

## 6. New BSI Code of Practice for asset management

The British Standards Institution has issued a code of practice for asset management. BS 8536-2:2016 gives briefing recommendations for design and construction in relation to energy, telecommunication, transport, water and other utilities' infrastructure to ensure that design takes into account the expected performance of the asset in use over its planned operational life.

It adopts the structure and format of BS 8536-1:2015 and therefore incorporates the BIM Level 2 and Government Soft Landings briefing principles.

See: http://bim-level2.org/en/standards/downloads/

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