MAYER·BROWN

Legal Update
January 2019

Legal developments in construction law

1. Work in the trenches – scope of work defeats broad risk allocation

Clauses in a subcontract for trench excavation for an underground district heat network contained a broad allocation of risk to the subcontractor. The subcontract included 'all civil works' but the subcontractor excluded a number of matters, for instance the removal of soft spots and breaking out of obstructions, including rock. So what, precisely, was the scope of the subcontract works? If removal of the soft spots and other excluded items were not included in the scope, instructions to carry out these items would be variations.

The court said the obvious starting point, and key issue, was to ascertain, as a matter of construction, what the subcontractor had contracted to do. The judge accepted that the scope of works document broadly defined the subcontract works as all civil works associated with the network, including break out, excavations etc., in accordance with the drawings, but the invitation to tender and the scope of works itself recognised that the tender might involve exclusions of types of work and risk and/or might deviate from the enquiry. Tenderers were expressly asked to identify exclusions, the subcontractor did just that and was right to say that their works did not include the expressly excluded items. The contractor's argument that the subcontract wording meant that the subcontractor had taken on some broad open-ended risk as to the condition of the site by having inspected and examined and satisfied itself as to that condition made no sense. It would have the effect that the particular clause had allocated to the subcontractor the risk of carrying out work which it had expressly excluded from the subcontract works. An instruction to carry out work that had been expressly excluded would, therefore, be an addition to the subcontract works and, consequently, a variation.

Clancy Docwra Ltd v E.ON Energy Solutions Ltd [2018] EWHC 3124

2. Racing car project leaves contract relationship in the pits

Parties to a racing car project signed Heads of Agreement (HoA) that expressly provided for the preparation and signature of a formal contract, expecting it to be complete within a relatively short time. No formal contract was ever signed but the project commenced. 16 months later one of the parties ended the relationship. The other party sought specific performance or damages, but was the HoA a binding contract? Alternatively, had the parties achieved a contract by conduct?

In considering the relevant legal principles, the court noted the distinction (often easier to state than to apply) between an agreement in principle, which remains incomplete and not binding because important terms have not been agreed, and a complete binding agreement, even though points of detail remain to be settled. Whether a contract is binding must be assessed at the date on which it is alleged to have been made, but the parties' subsequent conduct is admissible as objective evidence of the existence of a contract and its terms at that date, though not as an aid to its interpretation.

Performance of a transaction on both sides will often make it unrealistic to argue that there was no intention to enter legal relations and difficult to submit that the contract is void for vagueness or uncertainty. Execution of a transaction, fully or partly, makes it easier to imply a term resolving any uncertainty, or alternatively, may make it possible to treat a matter not finalised in negotiations as inessential. Reference in a preliminary agreement to the terms being embodied in a formal contract in due course may, or may not, determine whether the preliminary agreement is binding, depending on its purpose.

The court decided that, although the parties carried many of its provisions into effect, the Heads of Agreement was a fundamentally incomplete agreement and was not, in any event, intended to create legal relations between the parties. Its language was casual, vague and 'non-legal', it recognised that important matters remained to be agreed, it did not deal with numerous matters of considerable commercial significance to the parties and the provision for the preparation and signature of a formal contract, expecting it to be complete within a relatively short time, was a recognition that it was only on the execution of a formal contract that a binding agreement would come into force. It was therefore, effectively, subject to contract. Subsequent communications between the parties further demonstrated that the HoA was not understood or intended to be legally binding. And there was no contract by conduct because the parties did not reach agreement on a formal contract and did not waive the requirement for such a written contract.

CRS GT Ltd v McLaren Automotive Ltd & Ors [2018] EWHC 3209

3. Appointing an adjudicator? Follow the right route and don't blow hot and cold.

Opportunities to resist enforcement of an adjudicator's decision are very limited. One is a lack of jurisdiction. What if, for instance, a claimant has not followed the correct route to appoint an adjudicator? And what if one of the parties has relied on the validity of an adjudication for one purpose but challenged it for another?

If a claimant has followed the wrong route to appoint an adjudicator, the adjudicator may have no jurisdiction. In *Skymist v Grandlane* the court noted case law that said that the validity of the procedure by which an adjudicator was nominated goes to the heart of their jurisdiction. It added, however, that it will obviously be a question of fact and analysis in each case as to what the 'correct' route was, and whether the actual appointment was at odds with it.

The court also considered the case law on election, or approbation and reprobation, which, as applied to adjudication, shows that a party cannot both assert that an adjudicator's decision is valid and at the same time seek to challenge the validity of the decision. They must elect to take one course or the other. The court summarised the principles:

- The approbating act or conduct in question needs to be clearly defined and unequivocal;
- the party in question must gain a benefit from the approbation; and
- the reprobating act must be clearly inconsistent with the earlier approbation, and therefore itself clear and unequivocal.

The claimant's challenge to jurisdiction was dismissed but the court said it was of the utmost importance that the adjudicator's jurisdiction is firmly established even though the decision is only temporarily binding. But that does not mean that the court should have to engage in highly technical (but legally unmeritorious) arguments in what effectively becomes satellite litigation in the context of a form of dispute resolution meant to be speedy and efficient.

Skymist Holdings Ltd v Grandlane Developments Ltd [2018] EWHC 3504

4. Government sets out plans for implementing Hackitt report

The government has set out its plans for implementing Dame Judith Hackitt's recommendations in her review of building regulations and fire safety. The stronger regulatory framework to be introduced to improve building safety will mean tougher sanctions for those who disregard residents' safety, more rigorous standards and guidance for those undertaking building work, and a stronger voice for residents. The government's reform programme will take forward all of Dame Judith's review recommendations and includes establishing a new Standards Committee to advise on construction product and system standards and regulations and helping to create a culture change and a more responsible building industry. The government will establish the Joint Regulators' Group to trial elements of a new regulatory system ahead of any new proposed legislation.

In addition, a full review of fire safety guidance within building regulations has been launched and the government has issued a 'call for evidence' that will gather expert advice on the full range of fire safety issues, to enable guidance to be revised. The government is also inviting views from residents and those who manage buildings on how to improve fire and structural safety.

See: *https://www.gov.uk/government/news/brokenshire-introduces-tougher-regulatory-system-for-building-safety--2;*

https://www.gov.uk/government/consultations/good-practice-on-how-residents-and-landlords-work-together-to-keep-their-home-and-building-safe-call-for-evidence; and

https://www.gov.uk/government/consultations/technical-review-of-approved-document-b-of-the-building-regulations-a-call-for-evidence

5. Construction products – statutory instrument sets out post Brexit regime

The government has published a statutory instrument to govern the UK's post-Brexit Construction Products Regulation regime. The UK regime will maintain the requirement on manufacturers to declare the performance of their construction product, in accordance with product standards, when the product is placed on the UK market. The key elements of this legislation include the following:

- construction products already placed on the market will be able to continue to circulate in the UK;
- existing European harmonised standards will become UK 'designated standards', so that, immediately following exit day UK and EU standards will be the same. Thereafter, new UK standards will be designated by the Secretary of State;
- where a UK body has undertaken the third-party conformity assessment processes required under the UK 'designated standard', the manufacturer must affix a new UK mark. Construction products that meet the harmonised European standard and are affixed with a 'CE' mark, can continue to be placed on the UK market without the need for re-testing or additional marking. The intention is that these arrangements will be for a limited period, and businesses will be given sufficient advance notice of this period coming to an end;
- where the product marking is affixed on the basis of self-declaration, then during the time-limited period the manufacturer will have the choice to use either the UK or CE mark (or both); and
- for products not fully covered by a designated standard, there will be an optional route available to enable products to be UK marked.

See: *https://www.gov.uk/government/news/continuity-of-requirements-under-the-construction-products-regulation-when-the-uk-leaves-the-european-union*

6. Government consults on biodiversity net gain proposals

The government is consulting on plans to require developers to deliver a 'biodiversity net gain' when building new housing or commercial development, which means enhancing wildlife habitats and leaving them in a measurably better state than they were pre-development.

The proposed new rules require developers to assess the type of habitat and its condition before submitting plans. Car parks and industrial sites would usually come lower on this scale, while more natural grasslands and woodlands would be given a much higher ranking for their environmental importance. Developers would then be required to demonstrate how they are improving biodiversity – such as through the creation of green corridors, planting more trees, or forming local nature spaces. Green improvements on site would be encouraged, but in the rare circumstances where they are not possible the consultation proposes to charge developers a levy to pay for habitat creation or improvement elsewhere.

The consultation runs until 10 February 2019.

See: *https://www.gov.uk/government/news/gove-sets-out-proposals-for-greener-developments*

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