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Legal Update
July 2018

Legal developments in construction law

1. Airline claims plane leases are void for common mistake

An airline leased two planes for five years, intending to fly passengers from West Africa to Saudi Arabia for the Hajj and Umrah pilgrimages. For this the airline needed approval from the National Hajj Commission of Nigeria and the General Authority of Civil Aviation of Saudi Arabia (GACA). Nigeria gave approval for 2016 and Saudi Arabia did not, but the notification from GACA only reached the airline after they had entered into the leases. The airline failed to take delivery of the planes, the owner terminated the leases and brought proceedings against the airline, which claimed that there had been a common mistake. The airline said that both parties believed or understood that it would be approved to participate in the 2016 Hajj airlift, which was the, or a, major purpose of the lease agreements. As it was not possible for the airline to make the flights planned for 2016, the contracts were therefore void. But was that right?

The court summarised the elements of common mistake that make a contract void: When the contract was concluded, there must have been an assumption as to a state of affairs that was substantially shared between the parties, fundamental to the contract and wrong. There must be a fundamental difference between the assumed and actual states of affairs, the parties, or at least the party relying on the common mistake, would not have entered into the contract had the parties been aware that the common assumption was wrong and the contract must not have made provision for the assumption turning out to be mistaken. The court decided that the leases were not void for common mistake. The mistaken assumption shared by the parties was not sufficiently fundamental to the leases and did not render them essentially and radically different from what the parties understood or impossible to perform. The reasons for the court's conclusion included the fact that the leases were for five years and that if the airline had obtained the necessary approvals for Hajj airlifts in the remaining four years of the leases, it would still have earned a substantial profit. And even if the shared mistaken assumption was sufficiently fundamental and/or rendered the lease agreements essentially and radically different from what the parties understood or impossible to perform, the court would have concluded that the lease agreements allocated, to the airline, the risk of not obtaining GACA approval.

Triple Seven Msn 27251 Ltd & Anor v Azman Air Services Ltd [2018] EWHC 1348

2. Tough exclusion clause passes Court of Appeal examination

A clause in a contract for the installation of a fire detection and suppression system in a factory excluded all but a limited liability. But when a fire occurred, by subrogation the insurers of the factory owner, Goodlife, sued the installer. The Court of Appeal had to decide if the clause was particularly unusual and/or onerous and, if it was, whether it had fairly and reasonably been brought to the factory owner's attention. If it cleared those hurdles, was the clause unreasonable, and ineffective, under the Unfair Contract Terms Act?

The Court said that a *"particularly onerous or unusual"* condition will not be incorporated in a contract, unless it has been fairly and reasonably brought to the other party's attention. The cases do not always agree as to what amounts to an 'onerous' clause; the fact that it is a limitation or exclusion clause does not of itself mean that it is onerous or unusual; everything turns on the context. Clauses limiting a specialist supplier or subcontractor's liability to the (often modest) amount of the contract price, or excluding liability for indirect loss or loss of profit, have in recent times not been regarded by the courts as particularly onerous or unusual and the Court ruled that the exclusion clause was not particularly onerous and unusual and notice of it was fairly and reasonably given to Goodlife.

The clause was also reasonable under the Unfair Contract Terms Act, even though it was a stringent limitation of liability. A number of the cases have stressed the importance of terms freely agreed by parties of broadly equal size and status and the Court noted the reasonableness of the overall allocation of risk between the parties. Many of the cases also stress, in considering reasonableness, the ease or otherwise with which the parties could obtain insurance. Goodlife was best placed to effect insurance and had that insurance. And the exclusion clause said that if Goodlife wanted the installer's liability to be reinstated, it would cost more but would give rise to insurance. Goodlife did not raise the issue at all before agreeing the contract.

Goodlife Foods Ltd v Hall Fire Protection Ltd [2018] EWCA Civ 1371

3. Court of Appeal blocks escape route for Misrepresentation Act exclusion clauses

A court found that a landlord's replies to enquiries before contract, about the presence of asbestos in warehousing, were false. But a clause in the warehousing lease said that the tenant acknowledged that the lease has not been entered into in reliance wholly or partly on any statement or representation made by or on behalf of the landlord. Was that clause effective to enable the landlord to escape section 3 of the Misrepresentation Act, which says that liability for misrepresentation can only be excluded or restricted to the extent that is reasonable?

The Court of Appeal ruled that it was not. If, as in the case, all the elements necessary to give rise to liability in damages under section 2(1) of the Misrepresentation Act have been proved but a contract term prevents the claim from succeeding because it contains an agreement that no reliance has been placed on the representation, the term is excluding liability which would exist in the absence of the term. Whenever a contracting party relies on the principle of contractual estoppel to argue that, by reason of a contract term, the other party to the contract is prevented from asserting a fact necessary to establish liability for a pre-contractual misrepresentation, the term falls within section 3 of the Misrepresentation Act 1967. Such a term is therefore of no effect except in so far as it satisfies the requirement of reasonableness in section 11 of the Unfair Contract Terms Act and the Court ruled that the term in the lease was unreasonable.

First Tower Trustees Ltd & Anor v CDS (Superstores International) Ltd [2018] EWCA Civ 1396

4. Government announces new requirements for public service contracts

The government has set out its plans for new requirements for public service contracts. Those plans will require:

- all key suppliers to develop 'living wills', to enable contingency plans to allow a supplier to fail, to be rapidly put in place, while ensuring services are still delivered;
- government departments to follow a 'playbook' of guidelines, rules and principles to encourage new entrants to the market and build mixed markets of suppliers;
- key performance indicators, such as response rates, on-time delivery and customer feedback, to be published (with further transparency initiatives possible in the coming months);
- high quality training for 30,000 Civil Service contract managers in the proper management of contracts and suppliers.

The government will also:

- extend the Social Value Act in central government to ensure that all major procurements explicitly evaluate social value, where appropriate, rather than just consider it;
- require all central government departments regularly to report on the social impact of new procurements;
- train all the government's 4000 commercial buyers how to take account of social value and procure successfully from social enterprises;
- develop proposals for the government's biggest suppliers to publish data, and provide action plans, for how they plan to address key social issues and disparities, such as ethnic minority workforce representation, the gender pay gap and what they are doing to tackle modern slavery. The outcomes of the already commissioned review of these priority areas will be announced later this year;

- apply the government's new cyber security standard to its strategic suppliers to assess if they meet it, write this cyber security standard into new contracts and enforce full compliance;
- pilot the introduction of the cyber security equivalent of a 'credit check' on suppliers, allowing easy risk assessments of suppliers; and
- accelerate expansion of the world-leading Active Cyber Defence programme to better protect critical national infrastructure, including such services as hospitals and schools.

See: *https://www.gov.uk/government/speeches/chancellor-of-the-duchy-of-lancaster-speech-to-reform*

5. Government consults on banning combustible cladding

The government has launched a consultation on banning the use of combustible materials on the external walls of high-rise residential buildings.

The government says it is minded to make the change through legislation by amending the Building Regulations to include a specific ban. Failure to comply with the ban would be a breach of the Building Regulations 2010. Those not complying would be open to prosecution in the Magistrates' Court, which has powers to impose an unlimited fine. The government says that it has considered amending the guidance in Approved Document B as an alternative to specify what materials should be used, but as the guidance in Approved Documents is not mandatory it would not deliver the policy intention of a complete ban.

The consultation ends on 14 August 2018.

See: *https://www.gov.uk/government/news/james-brokenshire-publishes-consultation-on- banning-combustible-cladding?utm_source=430277c6-e269-4495-85aa-64e32abbed7c&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate*

6. Letwin house building study published

Sir Oliver Letwin has published his draft analysis of house building build out rates.

In the next phase of his work he is to consider, in the light of the build out rates analysis, what policies the government might adopt to 'close the gap' between permissions and homes completed on the largest sites and thus to increase the overall rate at which land allocated for housing is converted into new homes. Sir Oliver will present his recommendations to the Chancellor and the Housing Secretary at Budget time in the autumn.

See: *https://www.gov.uk/government/news/analysis-from-independent-review-into-building-homes-published*

7. Retention Bill second reading postponed again – to the autumn

The second reading debate of the Construction (Retention Deposit Schemes) Bill introduced by Mr Peter Aldous MP has been postponed again, from 15 June, and is now expected to take place on Friday 26 October 2018.

See: *https://services.parliament.uk/bills/2017-19/constructionretentiondepositschemes.html*

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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