MAYER·BROWN

Legal Update
September 2015

Legal developments in construction law

1. Disastrous, but unambiguous, contracts cannot be rewritten

99 year leases of chalets in a caravan park in South Wales granted between 1977 and 1991 contained a covenant to pay an annual service charge, starting at £90 and increasing, on a compound basis, by 10% each year. Taking, for example, a lease granted in 1980, the service charge would consequently be over £2,500 in 2015, and, by 2072, over £550,000. Had something gone wrong with the wording of the relevant clause, so that the court could intervene to change it?

The Supreme Court, by 4-1, said it had not. From 1974-1981, for instance, annual inflation had been running at well over 10%, although it was less than 10% after 1981. The 10% annual increase was included to allow for a factor out of the control of either party, namely inflation, and there is no principle of interpretation entitling a court to re-write a contractual provision simply because the factor the parties catered for does not seem to be developing in the way they might well have expected. Just because a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. A court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed.

Arnold v Britton & Ors [2015] UKSC 36

2. Subcontractor's insurance derailed by non-disclosure and misrepresentation

A tunnelling subcontractor installed a micro-tunnel for power cables under a railway line. Ground settlement above the tunnel was greater than anticipated (or permitted by Network Rail), and a void occurred in an adjacent road. Another void, under the railway line, subsequently caused a train derailment. The subcontractor renewed its insurance cover during this period but failed, at the relevant time, to disclose the additional settlement and the road void. The court found that it also represented to the insurer that it was not tunnelling under or near to an active railway line. Did this non-disclosure and misrepresentation entitle the insurer to avoid the policy?

If a prospective insured fails to disclose a '*material*' circumstance or makes a '*material*' misrepresentation, a policy can be avoided. Whether a circumstance is '*material*' is a question of fact to be determined objectively by the court from the perspective of a hypothetical prudent insurer. It does not depend upon the assured's own appreciation or assessment of its potential importance and is not settled automatically by current practice or the opinion of insurers. The relevant question is simply whether the circumstance would have had "*an effect on the mind of the insurer in weighing up the risk*".

A misrepresentation is similarly '*material*' if a prudent insurer would have taken the matter into account; it is again a question of fact to be determined objectively by the court and there is no need for an insurer to prove negligence or fraud. The court found that there had been material non-disclosure and misrepresentation and the insurer was therefore entitled to avoid the policy.

Brit UW Ltd v F & B Trenchless Solutions Ltd [2015] EWHC 2237 (Comm) (31 July 2015)

3. Contractor liable under NEC contract despite CAR policy obligation

A contractor for a £125 million hydro-electric scheme using NEC2 took out a joint names construction all risks policy. Damage occurred to the works, costing some £130 million to put right but did the CAR insurance put in place, as required by the contract, remove any liability that the contractor might otherwise have?

A Scottish court, construing the relevant provisions of NEC2 as a preliminary issue, ruled that it did not. The judge noted that this is a difficult area of the law and that the thrust of the cases is in favour of joint names insurance displacing contractual liability. Care must, however, be taken not to merge the law of insurance with the law of contractual interpretation and the primary focus in each case is on the words used by the parties set in their context.

In this case clause 83.1 expressly said that each party indemnified the other against claims etc due to an event at their risk and the court decided that the contractor's obligation to take out joint names insurance for contractor's risk events did not displace the parties' contractual liability. There is no irrebuttable presumption that they have no liability to one another simply because a joint names policy is in place. That would tend to merge the law of insurance with the law of contractual interpretation.

SSE Generation Ltd v Hochtief Solutions AG

4. 1 September start for apprenticeship quotas in public contracts

Businesses bidding for public contracts (i.e. with central government departments, their executive agencies and non-departmental public bodies) with a full life value of £10 million or more and a duration of at least 12 months will, in most cases, have to provide evidence of their commitment to developing and investing in skills in performance of the contract in question, and in particular their commitment to the creation of apprenticeships, under the contract. This commitment is then to be included in the contract.

The government Action Note 14/15 of 27 August 2015, which applies to procurements advertised on or after 1 September 2015, expects contractors to aim for 3-5% of the workforce to be apprentices, sponsored students and/or on graduate programmes, with a focus on apprentices, with 5% representing a 'gold standard'. Construction is considered more likely, by virtue of workforce numbers and the type of work undertaken, to offer greater opportunity for apprenticeship creation.

See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/456805/27_08_15_Skills__Apprenticeships_PPN_vfinal.pdf

5. Considerate Constructors Scheme goes to the next level

The Considerate Constructors Scheme has launched Ultra Sites, which sets a new level of industry standards and collaboration amongst clients, contractors, subcontractors and suppliers. Ultra Site status is awarded to sites that take considerate construction to the highest level, by stipulating that a number of suppliers and subcontractors are also to be registered with the Scheme. Ultra Sites, which is currently being piloted, will receive regular monitoring and must commit to operating at the very highest standards across the Scheme's Code of Considerate Practice.

See: http://www.ccscheme.org.uk/index.php/ultra-sites-launched

6. Hello, Consumer Rights Act, goodbye CDM co-ordinators and.... here comes the Small Business Commissioner

On 1 October the majority of the Consumer Rights Act comes into force, as scheduled, and on 5 October, on unfinished construction projects where a CDM co-ordinator was appointed before 6 April 2015, the time for appointing a principal designer runs out.

And sometime in the future the government is aiming to establish a Small Business Commissioner offering:

- general information and advice to help small businesses avoid or resolve disputes;
- where appropriate, mediation or conciliation;
- a complaint handling function to look into complaints by small businesses about a medium or large business and act as an 'honest broker' between the two parties.

The Government is not currently proposing to make particular practices unlawful or to give the Commissioner power to award financial compensation. It does, however, propose that the Commissioner will monitor the reporting, by the UK's largest businesses (under the Small Business, Enterprise and Employment Act 2015) of their payment policies and practices, naming and shaming poorer performers and naming and celebrating top performers.

See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450695/BIS-15-438-a-small-business-commissioner.pdf

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