



## Legal developments in construction law

### 1. A pre-contract representation is not just for ...

Pre-contract representations can be troublesome. And if a contract does not happen immediately, they can also have staying power. So if, before the contract is concluded, they are discovered to be wrong, or something changes to make them inaccurate, they need updating. A company director told a supplier of sunflower oil that the company had sufficient funds to pay for a shipment of the oil. The supplier contracted to sell the oil, but, after it had been delivered and then loaded on a ship, and title had passed to a third party, the company did not pay and went into administration and, subsequently, liquidation. The supplier sued the director and a former director of the purchaser in deceit.

The Court of Appeal said that the representation that the purchaser had funds to pay for the oil was self-evidently a representation that the purchaser's present intention was to pay the amount due. It was a continuing representation with a continuing responsibility of the representor for its accuracy. A person who subsequently discovers the falsity of facts which they have innocently misrepresented may be liable in damages if they fail to disclose the inaccuracy of their earlier representation. The same continuing responsibility can be seen in the treatment of representations which are true when made, but which become false by the time the contract is entered into. The law can, in appropriate circumstances, impose a continuing responsibility on the maker of a pre-contractual representation, where there is an interval between the making of the representation and the conclusion of a contract in reliance on it.

A mere statement of intention is not actionable but the Court noted that a statement of intention can contain within it various statements of fact, for instance if the person making the statement knows that they do not have the ability to put the intention into effect. It also noted that the correct measure of damages in the tort

of deceit is an award which puts the claimant in the position they would have been in if the deceit had not been perpetrated. The Court upheld the first instance judge's decision, that the director who had made the representation was liable and that the seller's loss was to be measured by the market value of the sunflower oil supplied, because the misrepresentations, on which the supplier relied, continued until it ceased to be able to stop the ship from leaving port.

*Inter Export LLC v Jonathan Townley and Yaroslavna Lasytsya [2018] EWCA Civ 2068*

### 2. Adjudication: Court of Appeal rules on pay and go lifeline for smash and grab victims

Seven years on from the amended Housing Grants Act going live, there are still questions as to how it works, for the courts to sort out. In particular, can an employer, who fails to issue a valid payment or pay less notice, go to adjudication to dispute that the sum stated as due in the contractor's interim application, the "notified" sum as defined in S111 of the Act, was the 'true' value of the works?

In *S & T v Grove* this key question reached the Court of Appeal, who confirmed the original decision of Mr Justice Coulson (as he then was). Sir Rupert Jackson said that the employer who has failed to serve a payment notice or pay less notice under a 2011 JCT D & B contract, is nevertheless entitled to adjudicate to determine the true value of an interim application. If an adjudicator finds that the employer has overpaid at an interim stage, they can order re-payment of the excess as the dispositive remedy flowing from their re-evaluation. The employer must, however, make payment in accordance with S111 of the Act before it can commence a 'true value' adjudication. Otherwise they could begin a 'true value' adjudication without meeting their payment obligation under section 111. That would be unfortunate for the construction industry and it would indicate a need for statutory amendment.

On the first (and, as it turned out) key issue in the case, Sir Rupert also ruled that a pay less notice, which relied for its basis of calculation on, and clearly referred to, a payment certificate and marked up spreadsheet sent five days earlier, did “specify” the basis of calculation. He also noted that it is a question of fact and degree in each case whether a purported pay less notice achieves the requisite degree of specificity.

*S&T (UK) Ltd v Grove Developments Ltd [2018] EWCA Civ 2448*

### 3. So what is a concession contract?

In the world of procurement, there are public contracts, utilities contracts, defence and security contracts and there are (more lightly regulated) concession contracts. But what does a concession contract look like? In *Ocean Outdoor UK Ltd v Hammersmith And Fulham* the court provided guidance in identifying when services contracts with public authorities will be subject to the 2016 Concessions Contracts Regulations. It confirmed that Regulations 3 and 10, which must be read together with the recitals of the Concessions Directive (2014/23/EU), say that an agreement between a contracting authority and an economic operator amounts to a services concession contract governed by the Regulations if:

- the contracting authority entrusts to the economic operator the provision and management of services, which must be for the benefit of the authority or its residents, in furtherance of the strategic objectives of the authority, or to satisfy its statutory obligations;
- there is a mutually binding, legally enforceable contractual obligation to provide the services;
- the consideration for the concession is the right to exploit the services (with or without additional payment); a service concession, unlike a service contract, provides a business opportunity that can be exploited by providing services to third parties for a charge;
- the contracting authority transfers to the economic operator an operating risk in exploiting the services; the recipient of the service under a

concession contract must be a third party and not the contracting authority; the economic operator’s remuneration is derived wholly or in part from that provision of the service, so transferring economic risk to them; even a small transfer of operating risk is enough;

- the contract is not one of the excluded contracts in Regulation 10 (e.g. concerning the acquisition or rental of land) and the court must classify the transaction by reference to the “essential obligations which characterise the transaction”, by ascertaining the main object or purpose of the transaction.

In this case, the contracting authority’s procurement of leases in respect of two sites with planning consents for the provision of advertising services failed to satisfy three of the tests above and was not therefore subject to the Regulations.

*Ocean Outdoor UK Ltd v Hammersmith And Fulham [2018] EWHC 2508*

### 4. Government presses on with its battle against late payment

The government has called for evidence on what more the government can do to create a responsible payment culture, including the current experiences of businesses in their payment practices, the impact of existing measures to improve payment practices, what more can be done to further refine measures and promote good practice, and whether new measures should be introduced.

The government is also introducing a new “tough and transparent” compliance regime to underpin the Prompt Payment Code. Further reform to the Code will be considered through the call for evidence and the government is considering what more it can do to create a responsible payment culture in public sector contracts.

See: <https://www.gov.uk/government/consultations/creating-a-responsible-payment-culture-a-call-for-evidence-on-tackling-late-payment>

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## 5. Budget: Goodbye PF1 & 2; HMRC to become preferred insolvency creditors

In his 29 October budget speech, Chancellor Philip Hammond said that he remained committed to the use of public-private partnership where it delivers value for the taxpayer and genuinely transfers risk to the private sector, but there is compelling evidence that the private finance initiative does neither. He had never signed off a PF1 contract as Chancellor, confirmed that he never would and announced that the Government will abolish the use of PF1 and PF2 for future projects.

The Chancellor also said that the government will make HMRC a preferred creditor in business insolvencies, to ensure that tax collected on behalf of HMRC is actually paid to HMRC.

## 6. Minister threatens private landlords with intervention on Grenfell-style cladding

James Brokenshire, the Secretary of State for Housing, Communities and Local Government, is suggesting he may take direct action in respect of private landlords who are either not replacing Grenfell-style cladding on their tower blocks, or charging leaseholders to do so.

A newspaper report of an interview with Mr Brokenshire states that, if owners will not do the work, the government will pay local authorities to do so and will recoup the money from the owners. If, alternatively, the owners pass the replacement costs to leaseholders, the ministry will exclude them from taking part in any of its housing schemes.

## 7. Letwin final report published

The final report of Sir Oliver Letwin's independent review of build out has been published. It includes, in its recommendations the conclusions that the government should:

- adopt a new set of planning rules specifically designed to apply to all future large sites (initially those over 1,500 units) in areas of high housing demand, requiring those developing such sites to provide a diversity of offerings, in line with diversification principles in a new planning policy document; and
- establish a National Expert Committee to advise local authorities on the interpretation of diversity requirements for large sites and to arbitrate where the diversity requirements cause an appeal as a result of disagreement between the local authority and the developer.

See: <https://www.gov.uk/government/collections/independent-review-of-build-out>

## 8. Retention Bill second reading postponed once again

The second reading debate of the Construction (Retention Deposit Schemes) Bill introduced by Mr Peter Aldous MP has been postponed yet again, and is now expected to take place on Friday 25 January 2019.

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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