MAYER·BROWN

Legal Update
May 2017

Legal developments in construction law

1. Court of Appeal confirms professional's tort duty of care on landscaping project

In early 2016 the court ruled that Mrs Lejonvarn, who carried out professional services for Mr and Mrs Burgess on their garden landscaping project, without a contract or any fee, owed them a duty of care in tort. But did the Court of Appeal agree?

It did, confirming that whether there has been an assumption of responsibility is an appropriate test in cases such as this, involving a relationship similar to contract, rather than the three part test set out in *Caparo Industries Plc v Dickman*, requiring the necessary relationship (or *"proximity"*) between the parties, the foreseeability of economic loss and that it is fair, just and reasonable to impose liability. It was argued, on appeal, that the Caparo test should have been applied and that the *"fair, just and reasonable"* element of it had not been met. The Court said, however, that there was no need to make a further inquiry into this because such considerations would have been taken into account in determining whether there had been an assumption of responsibility.

The Court also noted the important distinction between undertaking positive obligations in contract and the imposition of a negative duty to avoid doing something, or to avoid doing it badly, in the tort of negligence. The Court stressed that Mrs Lejonvarn's duty of care was not a duty to provide the professional services in question. It was a duty to exercise reasonable skill and care in providing those professional services. She did not have to provide any such services, but, to the extent that she did so, she owed a duty to exercise reasonable skill and care in their provision.

Lejonvarn v Burgess & Anor [2017] EWCA Civ 254

2. Disputes arithmetic and the problem with oral construction contracts

An adjudicator can only deal with one dispute at a time. If more than one dispute is referred simultaneously to an adjudicator, they have no jurisdiction. There are few cases in which a challenge on this basis has succeeded, but the most frequently heard argument, disputing jurisdiction on this point, is that there is more than one contract. And deciding such a challenge has been made no easier by the repeal of section 107 of the Construction Act, that required *"construction contracts"*, subject to adjudication, to be in writing.

In *RCS Contractors Ltd v Conway* one party claimed there was one oral contract for works on three sites and the other party unsuccessfully claimed there were three. Mr Justice Coulson noted that, because section 107 had been *"unthinkingly repealed"*, adjudicators consequently now have to deal with entirely oral contracts, with all the uncertainty and contention that that can involve. He also pointed out that, in such cases, even if an adjudicator finds an oral contract, the responding party is likely to obtain permission to defend the claim on enforcement, because only rarely will a disputed oral agreement be the subject of a successful summary judgment application. In this case, the result of the repeal of section 107 had been a process lasting 16 months with large sums incurred in costs. That, he said, was the opposite of the quick, cheap, dispute resolution service that adjudication was intended to provide.

RCS Contractors Ltd v Conway [2017] EWHC 715

3. Reasonable endeavours and good faith again

The owner of a mining project agreed to use reasonable endeavours to obtain a *"Senior Debt Facility"* and to procure the restart of mining activities. It subsequently claimed the obligation was unenforceable because there were no objective criteria by which the court could judge the reasonableness of its endeavours to obtain the Facility.

The court said it should almost always be possible to give sensible content to an undertaking to use reasonable endeavours (or *"all reasonable endeavours"* or *"best endeavours"*) to enter into an agreement with a third party. Uncertainty of object is not a problem, as there is no inherent difficulty in telling whether an agreement with a third party has been made. Whether the party giving the undertaking has endeavoured (or used its best endeavours) to make such an agreement is a question of fact which a court can decide. It may sometimes be hard to prove an absence of endeavours, or best endeavours, but difficulty in proving a contractual breach (the burden of which is on the party alleging non-compliance) is an everyday occurrence and not a reason to hold that there is none. Any complaint about lack of objective criteria could only be directed to the issue of whether the endeavours used were *"reasonable"*, or whether there were other steps which it was reasonable to take so that it cannot be said that *"all reasonable endeavours"* have been used. The court thought, however, that, where the parties have adopted a test of *"reasonableness"*, they were deliberately inviting the court to make a value judgment which sets a limit to their freedom of action.

It also noted that whether, and if so to what extent, a person undertaking to use best endeavours can have regard to their own financial interests depends on the nature and terms of the relevant contract: the same must equally apply where the undertaking is to use *"all reasonable"* endeavours.

And it said that a duty to act in good faith, where it exists, is a modest requirement that does no more than reflect the expectation that a contracting party will act honestly towards the other party and will not conduct itself in a way which is calculated to frustrate the purpose of the contract or which would be regarded as commercially unacceptable by reasonable and honest people. It is a lesser duty than the positive obligation to use all reasonable endeavours to achieve a specified result, which the contract in this case imposed.

Astor Management AG & Anor v Atalaya Mining Plc & Ors [2017] EWHC 425 (Comm)

4. Housing: brownfield site registers and new "permission in principle"

There are new measures to speed up development of derelict and under-used land:

- Local authorities now have to produce and maintain up-to-date, publicly available, registers of brown-field sites available for housing locally;
- permission in principle is a new consent route that will sit alongside existing routes for obtaining planning permission, establishing the use, location and amount of housing-led development.

Secondary legislation introducing the brownfield registers requirement and providing for permission in principle on sites allocated in brownfield registers is now in force.

Prior to the election announcement, the government was intending to publish guidance by June 2017, with further legislation to roll out permission in principle more widely promised for this year.

See: *https://www.gov.uk/government/news/new-measures-to-unlock-brownfield-land-for-thousands-of-homes*

5. New international information management standard: ISO 19650

There is a draft new international standard, providing information management guidance when using BIM, which was put out for public comment.

The standard is split into two parts. ISO 19650-1 Part 1 deals with concepts and principles and applies to the whole life cycle of a built asset. ISO 19650-2 Part 2 deals with the delivery phase of assets and enables the client and/or appointing organisations to establish their requirements for information during the delivery phase of assets.

See: *http://pages.bsigroup.com/webmail/35972/449082899/149fb85476fcb9448a*

afa65713e3d156

6. Government proposals for register of overseas owners of UK property

Before the June general election was announced, the government set out its proposals to introduce the world's first register of overseas companies and other legal entities that own property in the UK. The register would also list the beneficial owners of overseas-registered firms involved in central government procurement exercises. The government called for evidence, asking overseas investors, property and transparency experts for their opinions on how this register could be delivered.

The government also said that a research project to be launched for the Department for Business, Energy and Industrial Strategy would assess the likely impact of the overseas property register on inward investment and wider corporate transparency. We wait to see if, and how, these proposals progress after the election.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/606611/beneficial-ownership-register-call-evidence.pdf

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