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Legal Update
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Legal developments in construction law

1. Looking for the contract terms you can't see

The first problem with an implied contract term is, of course, that you can't see it in the contract. One type is implied by statute or by the common law in certain categories of contract (unless expressly excluded). The other type, whose detection has challenged many distinguished judges over the years, is implied into a contract in the light of the express terms, commercial common sense and the facts known to both parties at the time of the contract. The UK Supreme Court's judgment in ***Marks and Spencer plc v BNP Paribas*** is the latest, and authoritative, contribution to identification of this second type.

Some thought that Lord Hoffmann's Privy Council discussion of the identification of implied terms in ***Attorney General of Belize v Belize Telecom Ltd*** had changed the law. In ***Marks and Spencer***, however, the Supreme Court made clear that it has not. The requirements to be satisfied before a term (of the second type) will be implied have not been diluted. Reasonableness is not a sufficient ground for implying a term; an implied term must, among other requirements, pass the test of business necessity or, alternatively, obviousness (the classic *"officious bystander"* test). The question whether a term is implied is also to be judged at the date the contract is made.

Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd & Anor (Rev 1) [2015] UKSC 72

2. Court gives green light to asbestos exclusion and limitation clauses

The appointment of a firm of engineers said that: "Liability for any claim in relation to asbestos is excluded." It also contained a limitation of aggregate liability for pollution and contamination to £5,000,000. English courts have, traditionally, taken a restrictive approach to interpreting exemption and limitation clauses but has that approach changed?

In Persimmon v Ove Arup Mr Justice Stuart-Smith said that there is an increasing recognition that parties to commercial contracts should be left free to apportion and allocate risks and obligations as they see fit, particularly where insurance may be available. Exclusion and limitation clauses are subject to the same rules of construction as any other provision and the court's task is to identify what a reasonable person with all the background knowledge reasonably available to the parties would have understood the parties to have meant.

The relevant agreement and associated warranties were examples of contracts where businessmen capable of looking after their own interests and deciding how contract performance risks could most economically be borne had reached an agreement that the court should be very slow to disturb or to characterise as unbusinesslike. The price paid could be said to reflect the commercial risk allocation and the parties were entitled to apportion the risk of loss as they saw fit. The limitations and exclusions in question were clear in their meaning and covered the liabilities advanced by the claimants.

Persimmon Homes Ltd & Ors v Ove Arup & Partners Ltd & Anor [2015] EWHC 3573

3. Adjudication award enforced even if adjudicator relied on the wrong contract

Chalcroft, a main contractor, challenged enforcement of an adjudicator's award, claiming that the adjudicator had applied the wrong contractual provisions in producing the award. His interpretation of the contract arrangements meant that a payless notice had not been served in time but, if one of Chalcroft's interpretations of the arrangements was correct, it was reasonably arguable that the payless notice was valid and in time, and that the adjudicator's conclusion was wrong. If the adjudicator had wrongly interpreted the contractual position, did that then make the award unenforceable?

No, said the court. The adjudication system is meant to provide quick and effective remedies and now covers oral contracts, which increases the likelihood that they may be mis-described. The case was to be treated as one where the adjudicator had jurisdiction to resolve the dispute referred to him (as to how much was owing under an interim application) and addressed the correct question without bias, breach of natural justice or any other vice that would justify overturning his decision.

If (which could not be resolved in this case), he had made an error of law in referring to the wrong contractual provisions when deciding the substantive question referred to him, that fell within the category of errors of procedure, fact or law which the Court of Appeal had repeatedly emphasised should not prevent enforcement.

RMP Construction Services Ltd v Chalcroft Ltd [2015] EWHC 3737

4. Government bolts social issues guidance on to new steel procurement policy

To support October's Procurement Policy Note 16/15, the government has produced a practical guide on incorporating social issues in major projects with a significant steel component, where the overall project requirement has a capital value of £10 million or more. The key principles of the guidance are, however, relevant to any major procurement project involving materials.

It applies to all central government departments, their executive agencies and non departmental public bodies and primarily places obligations on contracting authorities relating to social issues in respect of their contractual agreements with Tier 1 suppliers but, where the steel component is being sourced at a level deep into the supply chain, authorities are required, where appropriate, to ensure that Tier 1 suppliers have a credible supply chain plan, and pass down the relevant requirements through contract conditions.

The government intends to complement this guidance through the development of a "Balanced Scorecard". In the chosen evaluation approach established criteria such as price are balanced against more complex issues such as social and environmental considerations. The guidance says that it is essential that in consideration of social issues in steel procurement, contracting authorities take full account of the government's overarching value for money policy for all procurement projects. The business case value for money assessment should be in respect of the whole life of the project and contracting authorities should also take into account costs and benefits to society as a whole, not simply those directly relevant to the contracting authority. Examples of social issues or objectives that may be relevant to major projects with a significant steel component include sustainable sourcing, supply chain management, skills and training development, long term unemployed, health and safety and diversity of supplier base.

See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/484843/Social_guidance_supporting_PPN1615_.pdf

5. Report to CONIAC says no new CDM ACOP is needed

A report to the HSE Construction Industry Advisory Committee November meeting says that a case has not been made for a new CDM Approved Code of Practice. It reports that, on the balance of views expressed by CONIAC members, there is no strong support for an ACoP.

It recommends that any further clarification to achieve compliance with CDM 2015 and secure health and safety outcomes is addressed primarily by means of industry guidance and notes that the experience is that the courts regard ACoPs and guidance as having the same standing. The minutes of the CONIAC meeting are currently awaited.

See: http://www.hse.gov.uk/aboutus/meetings/iacs/coniac/181115/m3-2015-2.pdf

6. New NEC3 clauses for early contractor involvement in design and planning

The NEC has issued additional clauses to enable NEC3 to be used for early contractor involvement in the design development and construction planning stage of a project. The new wording allows the contractor to be appointed before details of what is to be constructed have been fully developed and priced and gives two options, one under Option C, and the other under either Options C or E.

See: https://www.neccontract.com/getmedia/ba399179-7e32-42af-8288-a76de9fe0759/NEC_ECC_WEB.pdf.aspx

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