MAYER·BROWN

Legal Update
September 2017

Legal developments in construction law

1. Contract for £15 million bonus made in a pub? You cannot be serious?

On 24 January 2013, at the Horse & Groom pub in Great Portland Street, Mike Ashley, of Sports Direct, and Jeffrey Blue, a consultant, made an "*agreement*". It was, in substance, that, if Mr Blue could get the Sports Direct share price to £8 per share (within an unspecified time), Mr Ashley would pay him £15 million. But did what was said produce a binding contract? In answering that question, Mr Justice Leggatt provided a helpful reminder of the ingredients of a binding contract under English law. The parties must have reached an agreement, intended to be legally binding, supported by consideration, and sufficiently certain and complete to be enforceable. Subject to those requirements, it is possible to make an oral contract, but if there is no written record it is harder to prove. A contract can be made anywhere, in any circumstances, but was a binding contractual bonus arrangement made by Mr Ashley, during an evening of drinking with three investment bankers, with a consultant who was meeting them on behalf of Sports Direct?

The judge said not, for eight main reasons. The meeting was an unlikely setting to negotiate a bonus arrangement with Mr Blue; its purpose was to enable Mr Ashley to meet the bankers. The nature and tone of the conversation was inconsistent with Mr Blue's claim; everyone was laughing throughout and no one could reasonably have understood it to be a serious business discussion. Mr Ashley had no commercial reason to offer to pay Mr Blue £15 million as an incentive to do work aimed at increasing the Sports Direct share price. A contract made on the terms discussed would have been inherently absurd. The *"offer"* was far too vague to have been seriously meant, none of the three bankers involved in the conversation thought that Mr Ashley was being serious and, at the time, nor did Mr Blue himself.

And, in the judge's view, it was improbable that a person with as much business experience as Mr Blue, had he truly believed the conversation, would have thought it unnecessary to make any written record of what had been agreed. It was even more improbable, indeed wholly incredible, that, if Mr Blue had believed there to be a binding oral agreement, he would have waited nearly a year before mentioning what had been said in the Horse & Groom to Mr Ashley. The fact that Mr Blue had since convinced himself that the offer was a serious one, and that a legally binding agreement was made, showed only that the human capacity for wishful thinking knows few bounds.

Blue v Ashley (Rev 1) [2017] EWHC 1928 (Comm)

2. Broken code leaves Supreme Court with contract interpretation enigma

In June the Supreme Court was presented with another contract puzzle. Who should be given a €26 million bill for dealing with the failed foundations of two wind farms in the Solway Firth? Was it the contractor, MT Højgaard A/S, or its employer, two E.On companies?

In designing the foundations MTH had two key obligations, to comply with an international standard, J101, and to ensure the foundations had a lifetime of 20 years without planned replacement. MTH complied with J101 but, after the foundations were constructed, J101 was discovered to contain a significant error. The foundations started to fail and remedial works costing €26.25 million had to be carried out. The Court of Appeal said that the two obligations were inconsistent and the 20 year requirement could effectively be ignored. The Supreme Court disagreed.

Lord Neuberger noted that, although each case depends on its own facts, the UK and Canadian courts have generally been inclined to give full effect to the requirement that the item produced complies with the contract criteria. Even if the customer or employer has specified or approved the design, the contractor is expected to take the risk if it agrees to work to a design which would make the item incapable of meeting those criteria.

Where the two relevant contract obligations imposed different or inconsistent standards or requirements, rather than concluding that they were inconsistent, the correct analysis under the contract was that the more rigorous or demanding of the two standards or requirements must prevail. The less rigorous could be treated as a minimum requirement. And if there was an inconsistency between a design requirement and the required criteria, the contract made it clear that, although it may have complied with the design requirement, MTH would be liable for the failure to comply with those required criteria, as it was their duty to identify the need to improve on the design accordingly. Which, consequently, left MTH with the bill.

MT Hojgaard AS v EON Climate and Renewables UK Robin Rigg East Ltd & Anor [2017] UKSC 59

3. Adjudicator's liquidated damages ruling shuts out contractor's second wave of eot claims

An employer took its £5 million claim for liquidated damages to adjudication. The contractor limited its defence to just three relevant events as the basis for extensions of time, but subsequently served a full extension of time claim that it made no formal attempt to include in the adjudication. The adjudicator awarded the employer over £4 million (gross) as liquidated damages but the contractor did not pay. It started a second adjudication which included an allegation that it was entitled to a further extension of time, on the basis of relevant events not referred to in the first adjudication. Could it do that?

The court said it could not. In general terms, an adjudicator cannot sensibly decide an entitlement to liquidated damages without first deciding the contractor's entitlement to an extension of time. The dispute referred to the first adjudication was a dispute about liquidated damages (and therefore delay) across all sections of the work, including all the employer's claims for liquidated damages, and all of the contractor's entitlements to an extension of time. The contractor was entitled to raise all its extension of time claims in the first adjudication, just as it had done in the pre-adjudication correspondence. What it could not do was to defend itself by reference to just a few of the potential relevant events, and keep others back for another day. Asking the adjudicator to change the date that he had decided in the first adjudication would open up the liquidated damages already awarded and the contractor was not entitled to do that.

The contractor could not restrict the scope of the dispute in the first adjudication but it could, however, raise the additional matters in court proceedings challenging the adjudicator's decision in that first adjudication. This was really a dispute about the forum for it; there was no risk of the contractor's substantive rights being affected.

Mailbox (Birmingham) Ltd v Galliford Try Building Ltd [2017] EWHC 1405

4. Independent review of Building Regulations and fire safety

Following the tragic fire at Grenfell Tower, the government announced an independent review of building regulations and fire safety, with a particular focus on high rise residential buildings. The review, led by Dame Judith Hackitt, Chair of EEF, the Manufacturers' Organisation, will urgently assess the effectiveness of current building and fire safety regulations and related compliance and enforcement issues, with a focus on multi occupancy high rise residential buildings. This will include addressing whether the government's large-scale cladding system testing programme identified any potential systemic failures. The review's two key priorities are to develop a more robust regulatory system for the future and provide further assurance to residents that the buildings they live in are safe and remain safe.

As part of the review, Dame Judith Hackitt will consult the Buildings Regulations Advisory Committee, the construction and housing industry, the fire sector, international experts, MPs and the public. The review will also work closely with other government departments and the devolved administrations and consider the implications of changes to the regulatory system on other government objectives.

Terms of reference for the review were published on 30 August, an interim report will be submitted this autumn and a final report in the spring of 2018. The government has said it will act swiftly on any recommendations from the review to make sure people living in high rise buildings are safe.

See: https://www.gov.uk/government/news/independent-review-of-building-regulations-and-fire-safety

and https://www.gov.uk/government/news/independent-review-of-building-regulations-and-fire-safety-publication-of-terms-of-reference

5. New white paper on BIM for Civil and Structural Engineering

The British Standards Institution has published a new white paper on BIM for civil and structural engineering. It provides a high level overview of BIM for civil and structural engineers and is intended to give practical concise guidance on what is meant, in discussions, by BIM, and how it affects the role of civil and structural engineers.

See: https://www.bsigroup.com/en-GB/our-services/standards-subscription-services/Eurocodes-Plus/BIM-for-Civil-and-Structural-Engineers/?utm_source=pardot&utm_medium=email&utm_campaign=SM-STAN-BEV-BUILD-BIMConference2017-BUYS-1707&utm_content=cta

6. Industry Response Group to lead construction industry building safety response

A new industry response group will lead the construction industry's response to meeting the recommendations of the Independent Expert Advisory Panel (established in June to advise on immediate steps to ensure building safety) and of the government. The IRG, drawn from government and the construction industry, will include representatives from Build UK, the Construction Industry Council and the Construction Products Association, and is to ensure the construction sector can meet any new demands.

It will take forward work that will:

- provide essential advice on possible solutions for use in particular types of buildings to ensure homes, offices and public buildings are safe;
- provide advice on better ways of building and the latest construction methods, and ensure access to necessary technical expertise;
- help mobilise the UK industry if any major programmes of construction work are needed;
- advise government on the relevant sub-sectors of the construction industry, their expertise and capacity to deliver work at pace.

See: https://www.gov.uk/government/news/new-industry-group-to-ensure-construction-sector-ready-to-meet-building-challenges-after-grenfell-tower

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