MAYER·BROWN

Legal Update
June 2018

Legal developments in construction law

1. Supreme Court says parties must stick to their NOM clause

Does a NOM clause mean what it says? A "No Oral Modification Clause" says that an agreement can only be amended in writing signed on behalf of the parties. But does a NOM clause work? The Court of Appeal said no but did the Supreme Court agree?

It did not. In the opinion of the majority of the Court, the law should and does give effect to a contractual provision requiring specified formalities to be observed for a variation. What the parties to a NOM clause have agreed is not that oral variations are forbidden, but that they will be invalid. It is not difficult to record a variation in writing, except, perhaps, in cases where the variation is so complex that no sensible business person would do anything else. The natural inference from the parties' failure to observe the formal requirements of a NOM clause is not that they intended to dispense with it but that they overlooked it. If, on the other hand, they had it in mind, then they were courting invalidity with their eyes open. There is a risk that a party may act on a contract varied orally, for example by performing it, and then find itself unable to enforce it but, in England, the safeguard against injustice lies in the various doctrines of estoppel.

A second issue raised in the appeal was whether an agreement to vary a contract to pay money by substituting an obligation to pay less money or the same money later, is supported by consideration. Any decision on this point was considered likely to involve re-examination of the decision in ***Foakes v Beer***. The Court said it is probably ripe for re-examination but if it is to be overruled, or its effect substantially modified, it should be before an enlarged panel of the Supreme Court and in a case where the decision would be more than obiter dictum.

Rock Advertising Ltd v MWB Business Exchange Centres Ltd [2018] UKSC 24

2. Adjudication "true" valuation derails winding up petition

A contractor brought a winding up petition, based on an adjudication decision and the court's summary judgment in its favour, against its employer under a building contract. The judgment debt was due and payable, had not been stayed and could not be said to be in dispute as a judgment debt. The employer failed to comply with the court order. In a second adjudication, however, the adjudicator had ruled that the contractor had received of the order of £1.5 million in excess of the sum due on a *"true"* valuation in accordance with the contract. That amount received by the contractor did not include the unpaid judgment sum. Did the second adjudicator's finding make a difference?

The employer claimed that if it paid the judgment debt it would then immediately have a cause of action for repayment of that figure. That cross-claim should prevent the contractor winding up the employer for non-payment of the judgment debt. It was bad enough for the employer that it had already overpaid by of the order of £1.5 million; it would be worse still if, to avoid winding up, it also had to pay the judgment debt.

The court agreed. The general test, in the absence of special circumstances, is that a petition should be dismissed if there is a cross-claim put forward, bona fide, on substantial grounds in an amount which exceeds the petition debt. The court had no doubt that the employer's claim was a bona fide claim on substantial grounds and, as there were no special circumstances to take the case outside the general rule, the winding up petition was dismissed.

Victory House General Partner Ltd v RGB P&C Ltd [2018] EWHC 1143

3. Subject to board approval term blocks contract formation

Terms for settlement of an arbitration claim, under a contract to build a luxury superyacht, were discussed in without prejudice correspondence. The builder made an offer marked as being in full and final settlement but subject to certain terms, one of which was that a formal settlement agreement would be concluded, and, before signature, formally approved by the competent corporate body of the builder. The purchaser accepted the offer, subject to clarifications required, but the builder subsequently responded with an extensively revised draft agreement and claimed no agreement had been reached. The purchaser claimed that it had accepted the builder's earlier offer. Was there a binding contract?

The court reiterated that, in deciding whether parties have concluded a contract, the whole course of the parties' negotiations must be considered, parties can conclude a binding contract even though it is understood or agreed that a formal document will follow, which may include terms not yet agreed, and whether this is what the parties intended must be determined by an objective appraisal of their words and conduct.

Words such as *"subject to contract"* indicate that parties do not intend to be bound until a formal contract is executed and the same applies to an agreement stated to be subject to board approval. When a person concludes an agreement on behalf of a company which is stated to be subject to board approval, they make clear that they do not have authority, or at any rate are not prepared, to commit the company, unless and until the approval is given. Since directors have to exercise an independent judgment as to whether the transaction is in the company's best interests, it is very hard to see how there could in such circumstances be any implied promise binding the company to the effect that approval will be forthcoming or that it is a mere formality or a *"rubber stamping"* exercise. Even an express promise would be problematical. If the negotiator makes clear that they are not authorised to commit the company, they can hardly be authorised to commit the board to commit the company. When an agreement is concluded subject to board approval, neither party is therefore bound until the approval is given.

In the court's view, it was abundantly clear from an objective consideration of the parties' exchanges as a whole that there was no shared understanding that a binding settlement had been reached.

Goodwood Investments Holdings Inc v Thyssenkrupp Industrial Solutions AG (M/Y PALLADIUM) [2018] EWHC 1056

4. Hackitt final report calls for new framework to drive culture change and the right behaviours

The final report of the Independent Review of Building Regulations and Fire Safety led by Dame Judith Hackitt has recommended a new regulatory framework to drive *"real culture change and the right behaviours."* Under the new framework:

- those who procure, design, create and maintain buildings will be responsible for ensuring that those buildings are safe for those who live and work in them;
- the government will set clear outcome-based requirements for the building safety standards which must be achieved;
- the regulator will hold dutyholders to account, ensure that the standards are met and take action against those who fail to meet the requirements;
- residents will actively participate in the ongoing safety of the building and must be recognised by others as having a voice.

The new framework will focus, in the first instance, on multi-occupancy higher risk residential buildings (HRRBs) of 10 storeys or more and the report's recommendations include establishing a new Joint Competent Authority, the regulator for the whole of the building in relation to fire and structural safety in occupation, a mandatory incident reporting mechanism for dutyholders with concerns about the safety of an HRRB and creating a more robust and transparent construction products regime.

See: https://www.gov.uk/government/news/radical-reform-of-building-regulatory-system-needed-finds-dame-judith-hackitt

5. Government to act on final Hackitt report

The government has responded to the final Hackitt report with a number of commitments and comments, including the following, that:

- it will lead fundamental reform of the system, with strong sanctions for those who fail to comply;
- it will ensure, in future, that those responsible for a building demonstrate they have taken decisive action to reduce building safety risks and that they will be held to account;
- the system should be overseen by a more effective regulatory framework, including stronger powers to inspect high-rise buildings and sanctions to tackle irresponsible behaviour, and that
- there should be no buck passing between different parts of the industry and that everyone needs to work together to change the system; and
- crucially, residents must be empowered with relevant information;
- it will bring forward legislation (that will take time) that delivers meaningful and lasting change and gives residents a much stronger voice in an improved system of fire safety, ensuring they have a better mechanism for blowing the whistle on landlords who do not maintain safe buildings; but
- there must be a change in the culture and practice *"right now"*;
- as a first step, it is asking everyone involved to have their say on how the government can achieve this by contacting the government by the end of July;
- the response will inform a more detailed statement in the autumn on how the government intends to implement the new regulatory system;
- there will be a progress update before the summer recess;
- the government has accepted, and been implementing, the recommendations that relate to it since publication of the December interim report;
- it will ban the use of *"desktop studies"* if the consultation that closed on 25 May does not demonstrate they can be safely used;
- it is working with industry to clarify Building Regulations fire safety guidance, and will publish this for consultation in July;
- it will consult on banning the use of combustible materials in cladding systems on high-rise residential buildings;
- it will work with the industry to make the wider suite of building regulations guidance more user-friendly; and
- it has issued a direction to all local housing authorities to pay particular regard to cladding-related issues when reviewing housing in their areas.

See: *https://www.gov.uk/government/speeches/statement-on-the-hackitt-review*

6. GDPR guidance issued for NEC4

NEC Practice Note 3 has been issued, providing guidance on the information that needs to be included in an NEC4 contract which includes the processing of personal data as defined in the GDPR in order to comply with Article 28.

The Note describes the requirements in relation to an NEC4 contract but says that equivalent clauses would be needed on other NEC4 contracts when applicable. Any processing of personal data must be carried out in accordance with other requirements of GDPR but this practice note does not extend to those requirements. It adds that similar provisions are needed in the Works Information or equivalent of an NEC3 contract which requires the processing of personal data and that the terms should be changed to reflect the defined terms in the appropriate NEC3 contract. It also notes that if an NEC3 or NEC4 contract has already been awarded, the Scope (or equivalent) may need to be changed to add in any of these provisions that are not already covered by the contract and that such a change would be a compensation event.

See: *https://www.neccontract.com/getmedia/293773a5-17de-42ac-baef-5cf19de7f4d7/GDPR-Practice-Note.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.

Mayer Brown is a global legal services provider advising many of the world's largest companies, including a significant portion of Fortune 100, FTSE 100, CAC 40, DAX, Hang Seng and Nikkei index companies and more than half of the world's largest banks. Our legal services include banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; US Supreme Court and appellate matters; employment and benefits; environmental; financial services regulatory and enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and private clients, trusts and estates.

Please visit www.mayerbrown.com for comprehensive contact information for all Mayer Brown offices.

0565con