MAYER | BROWN

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Legal developments in construction law

1. Without prejudice communications – the principles and the apparent bias test

To encourage parties in dispute to see if they can settle their differences, a court, arbitrator or adjudicator cannot generally look at without prejudice communications. If, however, agreement is reached then the without prejudice protection is no longer needed, but if the existence of an agreement is disputed, a tribunal can consider the communications to decide the issue. But what if the tribunal decides that there was no agreement? Does its knowledge of the communications prevent it deciding the dispute fairly, because there could be apparent bias?

In ***AZ v BY*** the court considered the case law and summarised the relevant principles of without prejudice protection:

- the without prejudice rule is founded partly in public policy and partly in the agreement of the parties;
- the court has to determine whether or not a communication is bona fide intended to be part of, or to promote, negotiations. To determine that, the court has to work out what, on a reasonable basis, the intention of the author was and how it would be understood by a reasonable recipient;
- the fact that a document is marked "without prejudice" is not conclusive as to its status, although it is often a strong pointer;
- where negotiations are expressly made without prejudice to begin with, the burden is upon the party who wishes to change the basis of such negotiations to do so explicitly and with clarity. Whether they have done so is assessed objectively;
- whilst parties may be communicating both openly and on a without prejudice basis concurrently, the court must exercise extreme caution in embarking upon a dissection of the communications, or discussions in meetings, so as not to undermine the public policy objective;
- once a communication is covered by without prejudice privilege, the court is slow to lift the cloak of that privilege unless the case for making an exception is absolutely plain;
- one such exception relates to when the issue is whether without prejudice letters have resulted in an agreed settlement. In this situation, the correspondence is admissible, because it contains the offer and acceptance forming a contract which has replaced the cause of action previously in dispute. However, where the without prejudice letters have not in fact resulted in an agreed settlement which has replaced the original dispute about which the parties were negotiating, the decision-maker, having seen the without prejudice material, must then assess their own ability to go on to decide the remaining dispute fairly, in accordance with the principles which govern apparent bias and the rules of natural justice.

The court cited the test for apparent bias set out by the Court of Appeal in ***In Re Medicaments and Related Classes of Goods (No. 2)***:

"The Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."

AZ v BY [2023] EWHC 2388

2. Mental suffering, distress, physical inconvenience and discomfort caused by breach of contract – can damages be recovered?

In ***J & B Hopkins Ltd v A & V Building Solution Ltd*** a claim was made for mental suffering, distress, physical inconvenience and discomfort caused by breach of contract. But can damages be awarded for any of those conditions?

The court set out the relevant law, including these principles:

- It is clearly established as a general rule that, where there has been a breach of contract, damages cannot be awarded for the vexation or anxiety or aggravation or similar states of mind resulting from the breach;
- there is, however, an exceptional category of cases. Where the object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective. A contract to survey the condition of a house for a prospective purchaser does not, however, fall within this exceptional category.
- In cases not in this exceptional category, damages are recoverable for physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort.
- In addition, in ***Ruxley v Forsyth***, speeches in the House of Lords established that, in some cases, the plaintiff, notwithstanding that they suffer no financial loss, should be compensated where the defendant is in breach of a contractual obligation;
- and in ***Farley v Skinner*** the House of Lords emphasised that damages for non-pecuniary damage can only be awarded where the damage alleged is within the contemplation of the contracting parties as potentially flowing from a contractual obligation, the achievement of which was at the heart (the very object) of the contract.

See: J & B Hopkins Ltd v A & V Building Solution Ltd [2023] EWHC 2475

3. Staying enforcement of an adjudication decision and true value court proceedings

A plumbing subcontractor asked the court to stay enforcement of summary judgment on an adjudicator's award against it. It had also, separately, launched court proceedings to establish the true value of its claims against the contractor but the contractor asked the court to stay those court proceedings, because the subcontractor had not paid the original adjudicator's award, and it also sought security for costs. In staying enforcement of the adjudication award, but not the true value court proceedings, and rejecting the contractor's application for security for costs, the court noted these principles from the case law:

- Whether it is a stay of execution which is being sought, or whether it is being suggested that an order for security for costs will stifle a bona fide claim, the court expects information not only as to the company's position but also as to the position of those standing behind the company;
- in first deciding, on an adjudication enforcement application, whether to grant summary judgment the court should not be distracted by a view that the adjudicator's decision is wrong or less than satisfactory;
- it is important to note that the issues relevant to a stay application are different from those relevant to whether summary judgment should be granted. In the case of a stay, it may be relevant to consider whether the adjudicator's decision is likely to be reversed or modified in later arbitration or liquidation; these considerations are irrelevant to summary judgment, except in the rare cases of the court entertaining a concurrent Part 8 claim;
- once summary judgment has been granted, there is a strong presumption against a stay of execution being granted, not only as general policy but particularly in judgments enforcing adjudicators' decisions where the policy of the courts, giving effect to the intention of

Parliament, is to apply the principle "pay now, argue later"; that presumption is, if anything, stronger where the disputing parties are commercial entities;

- the court does, however, have a discretionary power to order a stay of enforcement of adjudicators' decisions in cases falling within CPR 83.7, particularly where the enforcement of the summary judgment might or would cause manifest injustice;
- an applicant for a stay relying on its parlous financial situation so as to fall within CPR 83.7(b) does not have to establish that its financial situation is the result of any act or omission on the part of the judgment creditor, but it seemed to the court that its position will be stronger if it does demonstrate that link, particularly if it can be shown that that act or omission was a breach of contract;
- in most cases before the court a monetary judgment is (subject to appeal) the final word on the amount due but, in adjudication, the court is enforcing a rapidly reached decision on a provisional view as to liability, the final view to be determined, should the parties wish it, by a court or arbitral tribunal;
- in ***S&T (UK) Ltd v Grove Developments Ltd*** it was held that a party is not entitled to resort to a fresh adjudication seeking a "true value adjudication" unless and until that party has first discharged its obligations to pay the amounts determined as payable in a prior adjudication;
- where, however, a party seeks a determination by the court as to the true state of the account between the parties whilst refusing to honour an adverse adjudicator's decision, the position is more nuanced. The victor in the adjudication may apply for a stay of any court proceedings by the losing party in the adjudication seeking a determination of the true state of accounts between the parties;
- the court will, in appropriate cases, exercise its discretion to stay a claim seeking a "true value" determination if the claimant has refused to honour an adjudicator's decision but it is clear that, in doing so, the court will exercise its power "sparingly and in exceptional circumstances" and "having regard to all the circumstances of the case".

See: J & B Hopkins Ltd v A & V Building Solution Ltd [2023] EWHC 2475

4. Exclusion clauses and how to interpret them

Exclusion clauses can be a challenge. What, exactly, and objectively, does a clause exclude? Could it even exclude all liability for a breach, reducing the contract to no more than a statement of intent? In ***Pinewood Technologies Asia Pacific Ltd v Pinewood Technologies Plc*** the court summarised the key principles to be applied in interpreting an exclusion clause.

- Construing an exclusion clause must be undertaken in accordance with the ordinary methods of contractual interpretation. Commercial parties are free to make their own bargains and to allocate risks as they think fit; exclusion and limitation clauses are an integral part of pricing and risk allocation. The principle of freedom of contract requires the court to respect and give effect to the parties' agreement;
- however, a vital part of the setting in which parties contract is a framework of rights and obligations established by the common law. In construing an exclusion clause, the court will start from the presumption that, in the absence of clear words, the parties did not intend to derogate from those normal rights and obligations;
- the more valuable the right, the clearer the language of the exclusion clause will need to be if it is to be given effect;
- however, "[i]*n commercial contracts negotiated between business-men capable of looking after their own interests and of deciding how risks inherent in the performance of various kinds of contract can be most economically borne…it is…wrong to place a strained construction upon words in an exclusion clause which are clear and fairly susceptible of one meaning only…*"
- notwithstanding the principles above, an exclusion clause will not normally be interpreted as extending to a situation which would defeat the main object of the contract or create a commercial absurdity, notwithstanding the literal meaning of the words used. This is a context in which it is open to the court to strain to avoid a particular construction, rather than one which requires ambiguity on a fair reading before the principle comes into play, because it is inherently unlikely that the parties intended that the clause should have so wide an ambit as in effect to deprive one party's stipulations of all contractual force such that the contract becomes 'a mere declaration of intent';

- however, even in this context, where language is fairly susceptible of one meaning only, that meaning must be attributed to it unless "*the meaning is repugnant to the contract*". This is a principle which "*should be seen as one of last resort and there is authority that it applies only in cases where the effect of the clause is to relieve one party from all liability for breach of any of the obligations which he has purported to undertake: Only in such a case could it be said that the contract amounted to nothing more than a mere declaration of intent*";

After considering the case law, the court rejected the suggestion that there is any principle that exclusion clauses cannot apply to the non-performance of contractual obligations or to repudiatory breaches of contract. Subject to the application of these principles, it will be a question of construction in every case whether the exclusion clause covers the breach.

Pinewood Technologies Asia Pacific Ltd v Pinewood Technologies Plc [2023] EWHC 2506

5. First-tier Tribunal makes BSA s123 Remediation order

In January the First-tier Tribunal made a Remediation contribution order under s124 of the Building Safety Act. It has also made a Remediation order under s123, requiring:

- a "*relevant landlord*" (s123(3) of the BSA)
- to remedy, by a specified time, "*relevant defects*" (s120(2))
- having arisen in connection with "*relevant works*", being works relating to the construction or conversion of the building within the "*relevant period*" of 30 years (ending on 28 June 2022) (s120(3); and
- which have caused, and continue to cause, a "*building safety risk*" (s120(5))
- in two blocks that were "*relevant buildings*" (over 11m tall with more than two dwellings: s117(2)).

In its decision, the Tribunal noted, amongst other things, that:

- it is important for any remediation order to be sufficiently precise so that the respondent can know what it must do to remedy the relevant defects (and for court enforcement purposes);
- although no standard or benchmark for work was specified in the Building Safety Act, in this case it was persuaded that the remediation works must comply with the Building Regulations applicable at the time the remedial work is carried out and, at the very least, a post-Works Fire Risk Appraisal of External Walls (FRAEW) pursuant to PAS 9980:2022 should not prevent a satisfactory Form EWS1: External Wall Fire Review from being issued;
- the Tribunal is a "no costs" jurisdiction (so that a party cannot recover its costs in pursuing the remediation order) save where a party has acted unreasonably in the conduct of proceedings.

The Tribunal also made an order under section 20C of the Landlord and Tenant Act 1985 that 80% of the landlord's costs of the proceedings should not be passed on to non-qualifying leaseholders through the service charge (the qualifying leaseholders being protected against such costs payments by paragraph 9 of Schedule 8 to the BSA).

See: https://assets.publishing.service.gov.uk/media/64d9ebc63fde6100134a51a9/Combined_Decision__Remediation_Order_2-4_Leigham_Court_Road_FINAL.pdf

6. Draft HRB regulations identify golden thread information to be kept by Accountable Persons

The government has issued the draft **Higher-Risk Buildings (Keeping and Provision of Information etc.) (England) Regulations 2023** which specify the information and documents that the principal accountable person and accountable persons must keep and share with those who have an interest in relation to a higher-risk building. The regulations also amend the Higher-Risk Buildings (Key Building Information etc.) Regulations 2023 and the Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations 2023 in relation to provisions about what part of the building an accountable person is responsible for, when there are multiple accountable persons for the same higher-risk building, and in relation to the exclusion of certain types of military premises.

In addition to providing necessary new detail on existing requirements under sections **88**, **90** and **92** of the Building Safety Act, and new requirements, further to section **89**, on those responsible for

higher-risk buildings in occupation, these new requirements set out, in **Schedule 1** (see: The Higher-Risk Buildings (Keeping and Provision of Information etc.) (England) Regulations 2023 (legislation.gov.uk)), the golden thread information and documents that accountable persons are required to keep and share with prescribed persons.

The Act and these regulations define those with whom information and documents must be shared:

- other accountable persons in the building;
- Responsible Persons in the higher-risk building and any wider building (if they are not an accountable person);
- the client for building work in the building (if they are not an accountable person);
- the Building Safety Regulator;
- the local fire and rescue authority;
- residents;
- landlords of residents in the building and owners of flats in the building.

The Regulations require the golden thread information to be handed over from an outgoing accountable person to a new accountable person when an accountable person leaves their role and also set out exceptions to the duty on the accountable person in respect of information or documents if there are sensitivities around security, commercial confidentiality or personal data.

See: The Higher-Risk Buildings (Keeping and Provision of Information etc.) (England) Regulations 2023 (legislation.gov.uk)

7. Second staircases: Michael Gove announces transitional arrangements

Following the government's confirmation in July, that it intends to introduce new guidance requiring second staircases in new residential buildings in England above 18m, Michael Gove, Secretary of State for Levelling Up Housing and Communities, has announced the intended transitional arrangements that will accompany this change to Approved Document B.

From the date that the government formally publishes the changes to Approved Document B, developers will have 30 months during which new building regulations applications can conform to:

- either the existing guidance; or
- to the updated guidance requiring second staircases.

When those 30 months have elapsed, all applications will need to conform to the new guidance.

Any approved applications that do not follow the new guidance will have 18 months for construction to get underway in earnest. If it does not, they will have to submit a new building regulations application, following the new guidance.

Sufficient progress, for this purpose, will match the definition set out in the The Building (Higher-Risk Buildings Procedures) (England) Regulations 2023 (legislation.gov.uk), and will therefore be when the pouring of concrete for either the permanent placement of trench, pad or raft foundations or for the permanent placement of piling has started.

In his statement Mr. Gove said he wanted to be absolutely clear that existing and upcoming single-staircase buildings are not inherently unsafe and will not later need to have a second staircase added, when built in accordance with relevant standards, well-maintained and properly managed. He expects lenders, managing agents, insurers, and others to behave accordingly, and not to impose onerous additional requirements, hurdles or criteria on single-staircase buildings in lending, pricing, management or any other respect.

Mr. Gove also said that the Building Safety Regulator is working to agree, rapidly, the design details that will go into Approved Document B and he is to make a further announcement soon.

See the full statement at: Written statements - Written questions, answers and statements - UK Parliament

8. Guidance on identifying HRBs during occupation and building phases

The government has updated the guidance on identifying HRBs during the occupation phase.

It has also published guidance on identifying HRBs:

- during building work in an existing building; and
- where a new building is being designed and constructed.

See: https://www.gov.uk/guidance/criteria-for-being-a-higher-risk-building-during-the-occupation-phase-of-the-new-higher-risk-regime#full-publication-update-history;

https://www.gov.uk/guidance/criteria-for-determining-whether-an-existing-building-is-a-higher-risk-building-during-building-work;
and
https://www.gov.uk/guidance/criteria-for-determining-whether-a-new-building-that-is-being-designed-and-constructed-is-a-higher-risk-building

9. DLUHC issues guidance to building control bodies on new building control regime

The Department for Levelling Up, Housing and Communities has issued guidance to local authorities, approved inspectors, the Chief Fire Officer and fire and rescue authorities on the changes made to the building control process for higher-risk buildings and the wider changes to procedural building regulations, that came into force on 1 October 2023 in England.

See: https://assets.publishing.service.gov.uk/media/65411c081f1a600010360b59/Building_Circular_Letter_-_Changes_to_the_building_control_process.pdf

10. HSE guidance on reporting a mandatory occurrence

HSE guidance for principal designers and principal contractors who are responsible for a higher-risk building:

- in construction
- undergoing building work

is at: https://www.gov.uk/guidance/reporting-a-mandatory-occurrence