MAYER·BROWN

Legal Update
November 2014

Legal developments in construction law

1. Adjudication: be careful what you ask for

Mr Horne terminated the contract with his builders, Magna. The contract said that no further payment (if any) would be due to Magna until the account following completion and making good had been prepared. Magna challenged the termination in adjudication and claimed £16,214.88. Mr Horne responded with a schedule of the costs that he said he had incurred in completing allegedly incomplete work. The adjudicator decided that Magna's employment was properly terminated and that Magna was not entitled to the £16,214.88. Mr Horne's legal team asked the adjudicator to decide Mr Horne's entitlement to his costs (£27,164.79 as adjusted by the adjudicator) but the adjudicator said he had no jurisdiction to do that. Was he right?

The court said he was. To identify the dispute, look initially at the Notice of Adjudication but it is not absolutely determinative. The dispute has to have crystallised before the Notice and the parties' preceding communications can be considered in determining the scope of the dispute. A defending party can raise any matter as a defence, even if not raised before, but it may not be effective.

In this case, by the time of the Notice of Adjudication, Mr Horne's defence was that he did not have to pay because he had validly terminated. In the court's view, the dispute referred to adjudication did not include whether Mr Horne was entitled to a net sum. The adjudicator could consider the later accounting documentation to see if there might be a sum due to Magna but he had no jurisdiction to award a net sum to Mr Horne.

Horne v Magna Design Building Ltd [2014] EWHC 3380

2. Court rules on claim for specific performance of bond and warranties

A contracting company's obligations to provide a performance bond and subcontract warranties survived termination of its contract but it failed to provide them. It had no assets and the court would have ordered specific performance of those obligations to provide the bond and warranties but held back from doing so. Instead, it ordered the company to use its best endeavours to obtain the bond and warranties, with the position to be considered at another hearing.

At that further hearing the court concluded that the company had used its best endeavours, but failed, to obtain the bond and that it was, in practical terms, impossible to order specific performance of that obligation in the terms annexed to the contract. It decided, however, that there should be substituted performance by way of a payment into court, as an equivalent to the provision of the bond.

The subcontractor that should have given the warranties was insolvent and dissolved and generally a court would not order specific performance in those circumstances, as it would serve no useful purpose. There was evidence, however, that the subcontractor had had professional indemnity cover of £5 million and the court considered it was therefore appropriate to grant specific performance against the company of the obligation to provide warranties from the subcontractor.

Liberty Mercian Ltd v Cuddy Civil Engineering Ltd & Anor [2014] EWHC 3584

3. Adjudication and settlement discussions – pre-conditions to litigation?

A contract, based on the FIDIC Yellow Book, for the design and supply of a solar energy plant said that disputes should be adjudicated by a dispute adjudication board. After a failed mediation, Enterprise, the contractor, gave notice of adjudication to the employer, Peterborough City Council, but the Council then started court proceedings, saying that it did not have to go to adjudication. Enterprise asked the court to stay the proceedings, claiming that adjudication was a pre-condition to litigation. Was it right?

The court said it was. The contract required determination of the dispute to be by way of adjudication and amicable settlement and, only failing that, by litigation. While the judge sympathised with the Council and favoured the argument (if no other factors were in play) for just one dispute resolution procedure, even if more expensive and extensive, established case law showed there is a presumption in favour of leaving the parties to resolve their dispute in the manner provided for by their contract. The Council had not displaced that presumption and the stay was granted.

Peterborough City Council v Enterprise Managed Services Ltd [2014] EWHC 3193

See also the earlier recent case of Emirates Trading Agency Llc v Prime Mineral Exports Private Ltd [2014] EWHC 2104 (Comm), where the court ruled that a dispute resolution clause requiring the parties to seek to resolve a dispute by friendly discussions in good faith, within a limited period, before the dispute could be referred to arbitration, was enforceable.

Future issues

4. New government planning guidance

The government has published new planning guidance which reaffirms how councils should use their Local Plan, drawing on protections in the National Planning Policy Framework, to safeguard their local area against urban sprawl, and protect the green belt.

See: https://www.gov.uk/government/news/brownfield-sites-to-be-prioritised-for-development

and:

http://planningguidance.planningportal.gov.uk/blog/guidance/housing-and-economic-land-availability-assessmentstage-5-final-evidence-base/#paragraph_044

5. HSE sets out its expectations on timber frame fire risks

The HSE, in cooperation with the Structural Timber Association, has written an open letter to all those involved in the design, specification, procurement and construction of timber frame structures. The letter explains and sets out, in practical terms, HSE's expectations on the management of fire risks before and during the construction of timber frame structures. HSE inspectors expect duty holders to comply with CDM Regulation 11 using STA guidance. Where a duty holder chooses not to follow the STA guidance but to implement a fire-engineered solution, standards equivalent to the guidance should be adopted. If this latter option is chosen and lower standards are adopted then HSE may consider there to have been a material breach of health and safety law attracting charges under HSE's Fee for Intervention Scheme.

See: http://press.hse.gov.uk/2014/hse-writes-open-letter-to-the-structural-timber-industry/

6. New British standard for BIM information exchange

The BSI has issued BS 1192-4:2014 Collaborative production of information Part 4: Fulfilling employer's information exchange requirements using COBie – Code of practice.

BIM models rely on the exchange of structured and accurate data during an asset's lifecycle and COBie (Construction Operations Building information exchange) is an internationally agreed information exchange schema for exchanging facility information between the employer and the supply chain. BS 1192-4 deals with UK usage of COBie and documents the best practice recommendations for implementing COBie, as developed in UK Government pilot projects. It consists of guidance and recommendations but is not to be quoted as if it was a specification.

See: http://shop.bsigroup.com/forms/BS-1192-4/Confirmation/

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

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