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Legal Update
March 2015

Legal developments in construction law

Current issues

1. Another battle of the forms – my terms, your terms or...?

When a dispute arose between parties who had dealt with each other for years, the first key issue was to determine the contract terms. The purchase order had terms on the back but did not appear to refer to them on the front and, when the buyer placed orders by email or fax, it did not send a copy of the terms. The supplier's acknowledgement of order did refer to its terms, saying that copies were available on request, but it did not supply them. Whose terms applied?

The judge said that a buyer wishing to incorporate their standard terms and conditions in orders sent by fax or e-mail must give the seller reasonable notice of them and make clear that they intend to rely on them. Since the purchase order did not on its face refer to the terms on the back it was essential to fax the terms as a separate document together with the purchase order or, if sent by e-mail, to ensure that the pdf attachment included both the face of the purchase order and the terms on the back. The purchaser had therefore failed to incorporate its terms into the contract.

And a seller wishing to incorporate their terms by referring to them in the acknowledgement of order, making it a counter offer, must, at the least, refer to them on the face of the acknowledgement, making plain that they are to govern the contract. If the terms are not in a form in common use in the relevant industry, the seller must give the buyer reasonable notice of them by printing them on the back of the acknowledgement of order or by sending the buyer a copy, making clear that they are the only terms on which the seller is prepared to do business. Since the seller had done neither, it had not done enough to bring the terms to the buyer's attention and turn the acknowledgement into a counter offer. Neither party's terms applied.

Transformers & Rectifiers Ltd v Needs Ltd [2015] EWHC 269

2. An implied contract obligation of honesty and integrity?

A police authority terminated a contract for the recovery of vehicles, and removed the contractor from a tender competition for further recovery contracts, because the contractor had failed to follow the authority's instructions for disposal of vehicles and had retained a vehicle in its own fleet, while reporting it as sent to be crushed.

The parties accepted that there was an implied term to act with honesty and integrity but the judge also set out his view as to the proper legal basis for implying such a term into the contract. The existence and content of such a condition was, he said, highly sensitive to the context of the contract itself. By using the term "*integrity*" (in much the same way as the judge in ***Yam Seng v ITC*** had used the term "*good faith*") the intention was to capture the requirements of fair dealing and transparency which were no doubt required (and would, to the parties, go without saying) in a contract which created a long-standing relationship between the parties lasting some years and which had certain qualities and features discussed by the judge.

The judge concluded that the contractor was in serious, repudiatory, breach of that implied term, and an express term, and, in relation to the tender process, that breach was "*grave misconduct*" under Regulation 23(4) of the Public Contracts Regulations. The authority was therefore justified in its actions.

D&G Cars Ltd v Essex Police Authority [2015] EWHC 226

3. Court blocks full payment of contractor's £4 million interim application

An employer failed to serve a payment or pay less notice and an adjudicator decided that the employer must pay the contractor the sum stated in its interim application, just under £4 million, which was only

about £4,000 less than the anticipated Final Account figure. Errors in an interim application, or failing to issue the relevant notices, can often be put right on a subsequent interim application or possibly in the final account. Sometimes, however, that may not be possible. In the case in question, that was because the contract form (JCT DB 2011) did not appear to provide for a negative valuation, because of the extraordinarily high amount of the interim application, almost equal to the contractor's anticipated final account claim, and because the application was, in effect, one of the last interim applications likely to be made. In addition, the employer was almost entirely dependent on others to finance its involvement with the project and was apparently unable to pay the adjudicator's award in full. And, if the contractor was paid the full sum awarded, it would have little or no incentive to remain on site and complete the works.

The court's policy is to enforce adjudication awards but the judge, emphasising that this was an exceptional case, ordered a stay of enforcement of part of the summary judgment given, i.e. that part of the judgment above £1.5 million. The judge also set conditions on any application to vary or lift the stay, so as to incentivise the contractor to achieve practical completion and submit its final statement.

Galliford Try Building Ltd v Estura Ltd [2015] EWHC 412 (TCC) (27 February 2015)

Future issues

4. Massive hike in court fees

From 9 March 2015 court fees payable on the issue of proceedings in money claims have undergone a massive increase. Issue fees for all claims valued at £10,000 or more are now 5% of the value of the claim, with a maximum issue fee, for all claims valued at £200,000 or more, and claims for unspecified amounts, of £10,000. This new fee structure applies to all money claims, as well as counterclaims with a value of £10,000 or more. Issue fees for claims worth less than £10,000 are unchanged.

See: http://www.mayerbrown.com/Court-Fee-increases-from-Monday-03-05-2015/

5. Section 106 agreements in line for go-faster treatment

The government has launched a consultation on plans to speed up the procedure for reaching section 106 agreements. The proposals include:

- setting time limits for section 106 negotiations;
- requiring parties to start discussions at the beginning of the planning application process;
- a dispute resolution process; and
- using standardised documents.

In the short-term, the government plans to produce revised guidance but proposes, in the next Parliament, to consider primary legislation to streamline the process. The consultation also deals with affordable housing contributions and student accommodation.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/405819/Section_106_Planning_Obligations___speeding_up_negotiations.pdf

6. Public contract supply chain – new guidance on prompt payment

Statutory guidance has been issued for contracting authorities and suppliers on paying undisputed invoices in 30 days down the supply chain. Regulation 113 of the Public Contracts Regulations 2015 requires contracting authorities to ensure that every public contract they award contains certain payment terms, including requirements that:

- they pay the contractor's invoices no later than 30 days from the date when the invoice is regarded as valid and undisputed; and
- any subcontract contains similar payment requirements, so that the payment requirements are repeated down the supply chain.

See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/413108/4279-15_GN_PQQ_Lord_Young_Guidance.pdf

7. Insurance contract law modernisation - but not in force until 2016

The Insurance Act, which modernises insurance law, has received the Royal Assent. It deals with three main areas of insurance contract law - disclosure and misrepresentation in business and other non-consumer insurance contracts, warranties and similar terms and insurers' remedies for fraudulent claims. It also amends the Third Parties (Rights against Insurers) Act 2010. The provisions on insurance contract law will come into force in August 2016.

https://www.gov.uk/government/news/government-modernises-100-year-old-insurance-rules

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