MAYER·BROWN

Legal Update
April 2015

Legal developments in construction law

Current issues

1. Why adjudicators should be careful who they talk to

Claimants in an adjudication had phone calls, one of them a long call, with the adjudicator's office manager, who was also his wife. They discussed not only the claimants' earlier adjudication claims but also the final account claim that was the subject of the adjudication in question. The practice manager subsequently briefly outlined these matters to the adjudicator but, despite an enquiry from the defendants' consultant as to what contact he had had with the claimants, he decided not to disclose the conversations. He also supported the claimants' application for summary judgment. Had the rules of natural justice been broken?

Yes, said the court. An adjudicator should not have unilateral conversations with the parties because of the obvious risks involved. A fair-minded observer would conclude that it was inappropriate for a decision-maker who knows about, and fails to disclose, a unilateral material conversation, subsequently to say that it was not disclosable because it had taken place with his practice manager/wife, not him personally. It gave rise to a real possibility that the adjudicator was biased, a possibility supported by the adjudicator's denial, in response to the enquiry from the defendants' consultant, of any contact at all with the claimants. And an adjudicator who was so concerned to see one side win that he supported their application for summary judgment, in trenchant terms, was at risk of having lost all objectivity, and again demonstrated a real possibility of bias.

Paice & Anor v MJ Harding (t/a MJ Harding Contractors) [2015] EWHC 661

2. Adjudication rules not ok

A subcontract contained three sets of terms under which, potentially, either party could request adjudication. The different adjudication provisions were likely to involve different adjudicators being nominated and, not only did the different rules involve different adjudicator nominating bodies (ANBs), but they contained real differences of procedure. In taking its claim to adjudication, however, the claimant contractor did not disclose its position other than by explaining in the Referral Notice how it had arrived at the choice of ANB and the adjudicator decided on the adjudication rules to be applied. The subcontractor challenged the adjudicator's jurisdiction, saying that identification of the terms under which he was appointed and under which he purported to act went to the heart of his jurisdiction.

The court said that the adjudicator has no power to determine what rules of adjudication apply if there is a dispute about those rules and the dispute makes a material difference as to the procedure for appointment, the procedure to be followed in the adjudication or the status of the decision. The substantive (as opposed to the formal) validity of a notice of adjudication depends on whether it can be shown that the correct rules have been applied. It does not depend on what is said in the notice or in the request for a nomination. And a notice of adjudication or purported nomination made under a contractual provision or legislative power which, on a correct analysis, does not apply is invalid. On the judge's analysis of the subcontract provisions not only had the adjudicator chosen the wrong governing adjudication rules but his appointment was made by the wrong body, which meant that he therefore had no jurisdiction to make his decision.

Ecovision Systems Ltd v Vinci Construction UK Ltd (Rev 1) [2015] EWHC 587

3. So can insurers recover money paid out from the guilty party?

For years the courts have grappled with the problems of subrogation, in particular in interpreting insurance provisions in construction contracts. If an insurer pays out an innocent party, can it then stand in their shoes and sue the guilty party to recover what it has paid? What if the insurance is in joint names?

In ***Gard Marine & Energy Ltd v China National Chartering Co Ltd*** the Court of Appeal said that it is vital to construe the underlying contract between the parties to see if there is truly an intention that the insurance is for the joint benefit of the parties. It must also be remembered that one of the main reasons why parties take out insurance is that they need to be covered for the consequences of their own negligence. The prima facie position, where a contract requires a party to the underlying contract to insure, should be that the parties have agreed to look to the insurers for indemnification rather than to each other. That will be all the more so if it is agreed that the insurance is to be in joint names for the parties' joint interest or if there are other relevant circumstances.

Gard Marine & Energy Ltd v China National Chartering Co Ltd (Rev 1) [2015] EWCA Civ 16

Future issues

4. CDM 2015 is now live

The 2015 CDM Regulations made their way safely through Parliament and came into force on 6 April 2015, with a six month transition period for projects started before then.

For a summary of key changes see:

http://www.mayerbrown.com/Files/Publication/e13ca3c2-c087-4cfd-8617-a69f9dd6f717/Presentation/PublicationAttachment/f48dad6c-5bee-44a0-8b21-51ab119a5a94/12-things-you-should-know-apr15.pdf

5. JCT issues CDM 2015 amendment sheets (and 2015 editions are on the way)

The JCT has issued amendment sheets for its 2011 edition contracts, to reflect the changes made in the CDM 2015 regulations.

See: http://www.jctltd.co.uk/cdm-amendment-sheets.aspx

In the meantime, the JCT is working on the 2015 edition of its contracts, which will deal with CDM 2015 and other amendments. It has also released a new edition of its Home Owner Contracts.

See: http://www.jctltd.co.uk/news.aspx?NewsArticleId=62

6. ACE Short Form Agreement

The ACE has published a Short Form Agreement, for use where there is a clear and concise description/brief of the services the consultant is to provide. The agreement may be used in relation to BIM projects.

See: http://agreements.acenet.co.uk/ace-short-form-agreement-2015/82/11/2/3

7. New skills test for major government infrastructure project bidders

Bidders for government infrastructure projects valued at more than £50 million now have to provide evidence of their commitment to developing the skills of their current and future workforce. The new requirements (applicable from 1 April 2015) will be incorporated in contracts and monitored and may be used to inform future procurement decisions. Procurers (who include executive agencies and other public bodies) will also be encouraged to introduce similar requirements, where appropriate, in lower value projects. The policy is set out in the Cabinet Office Action Note 6/15 of 27 March 2015.

See: https://www.gov.uk/government/news/government-secures-skills-boost-for-major-infrastructure-projects and

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/418713/PPN_06-15_Skills_and_Infrastructure_Projects.pdf

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