MAYER | BROWN

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Legal developments in construction law

1. Adjudicator's power to correct – just a matter of arithmetic?

In calculating the sum due in an adjudication, the adjudicator made a mistake. He deducted the sum he had determined as the total value of the contra charges, from the sum certified by the defendant. But the certified sum already included a substantial deduction, by the defendant, for contra charges. The result of this error was that no sum was stated to be due to the claimants and their claim failed. The adjudicator issued a corrected decision but the defendant claimed that the amendments in the amended decision went beyond those permitted by the "slip rule" in the Scheme for Construction Contracts, because they were not made "so as to remove a clerical or typographical error arising by accident or omission."

The court's starting position was that decisions of adjudicators are to be enforced save in very exceptional cases. The important starting point was to consider the dispute referred to the adjudicator, and the dispute which he considered he had to decide. The principal elements of the dispute were the appropriate value of variations and what, if any, contra charges should be deducted. Once those had been resolved the amount, if any, payable should follow as a matter of arithmetic or mechanics. Once the second limb (as to contra charges) had been decided, the arithmetic had to be carried out to give effect to that part of his decision. In the court's judgment the error made in incorrectly over-deducting for contra charges was the sort of error falling within the statutory slip rule as construed in a previous case, namely "…an arithmetical error in adding or subtracting sums [or] …. a slip in carrying over a calculation from one part of the decision to another".

But had the adjudicator been entitled, not only to correct his decision in respect of the sum payable, but then, because a sum was due, to award interest and to reverse his order as to payment of his fees? The court ruled that he was. Once one element of a decision has been corrected, any other changes consequential upon the correction should be made, since otherwise the decision is likely to be internally inconsistent.

Axis M&E UK Ltd & Anor v Multiplex Construction Europe Ltd [2019] EWHC 169

2. Challenging jurisdiction: how to make a reservation that works

A respondent in an adjudication reserved "its right to raise any jurisdictional and/or other issues, in due course, whether previously raised or not and whether within the forum of adjudication or other proceedings". But was that effective to enable the respondent, on appeal, to raise a specific jurisdiction point for the first time?

The Court of Appeal noted that the law on general reservations has proved particularly controversial in adjudication, because of the short time frame, and the policy behind the Construction Act. The courts have been anxious to ensure that the purpose of the Act is not defeated by technical points,

including the use of general reservations of position to allow novel jurisdiction points to be taken at the enforcement stage. The Court set out the principles applicable in adjudication:

- If the responding party wishes to challenge jurisdiction, it must do so "appropriately and clearly". If it does not reserve its position effectively and participates in the adjudication, it will be taken to have waived any jurisdictional objection and will be unable to avoid enforcement on jurisdictional grounds.
- It will always be better for a party to reserve its position based on a specific objection or objections: otherwise the adjudicator cannot investigate the point and, if appropriate, decide not to proceed, and the referring party cannot decide for itself whether the objection has merit.
- If the specific jurisdictional objections are rejected by the adjudicator (and the court, if the objections are renewed on enforcement), the objector will subsequently be precluded from raising other jurisdictional grounds otherwise available to it.
- A general reservation of position on jurisdiction is undesirable but may be effective. Much will turn on the wording of the reservation but a general reservation may not be effective if, when it was provided, the objector knew, or should have known, of specific grounds for a jurisdictional objection but failed to articulate them, or the court concludes that the general reservation was worded in that way simply to try and ensure that all options (including ones not yet even thought of) could be kept open.

Applying these principles, the court decided that the general reservation in question was too vague to be effective.

Cannon Corporate Ltd v Primus Build Ltd at: https://www.bailii.org/ew/cases/EWCA/Civ/2019/27.html

3. Architect's brief: the importance of writing, communication and approval

An architect was engaged to design a cinema in a pool house and project manage construction. There was no written agreement or brief but, in a subsequent dispute, the court ruled that the architect had redesigned the cinema box without telling his clients, and had arranged for the construction of a cinema box which they had not approved. Its "wonky industrial look" was significantly and critically different from the "sleek modern look" they were expecting.

The court considered that it would be bad practice for the initial brief, and any design development or changes, not to be recorded in writing. Relying on sample boards, mood boards or pinterest pictures is not sufficient for both architect and client to have clarity as to what has been designed, and what was to be built.

To avoid misunderstandings at the very least, a written brief is essential and changes to that brief must be recorded in writing whether by drawings, sketches and/or minutes of meetings. If that is not done, the absence of such written records must be explained to the clients in writing and they must make an informed decision not to receive a written brief and written records of any changes or developments of that brief. A written brief is of even greater importance when the project is a small project with a novel design. In those circumstances, it is even more important to have a brief expressed not just in words. There must be a drawing and/or a mock-up or a 3-D drawing and a detailed written description of the design.

Any reasonably competent architect should ensure that the brief is recorded in writing, whether or not that is best expressed in 3-D sketches together with drawings and detailed descriptions. If they did not, in exceptional circumstances, produce a written brief and did not explain in those exceptional circumstances in writing why such a written brief had not been produced, they would be in breach of any duty of care owed to the client.

The same approach should also be adopted to any changes or variations to the written brief. This approach is not to help manage a client's expectations as to what is being designed and what can be built. It is an essential part of the architect's services paid for by the client and is all the more important where there is an element of unfamiliarity in the relationship between the client and the architect, to ensure that the client knows what is being designed and the architect knows what the client expects to be built.

Freeborn & Anor v Marcal (t/a Dan Marcal Architects) [2019] EWHC 454

4. Updated National Planning Policy Framework issued

The government has updated the National Planning Policy Framework. Following a technical consultation on updates to national planning policy, the government has made very minor changes to the text and published an updated Framework.

See: *https://www.gov.uk/government/collections/revised-national-planning-policy-framework?utm_source=c4dbd6be-0b04-4f8a-b3b7-dbbe284b09a2&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate*

5. Government publishes 'Outsourcing Playbook'

The government has published an 'Outsourcing Playbook', designed to improve government procurement and deliver better public services. While the Playbook is not mandatory for building, civil engineering or equipment projects, the guidelines, rules and principles are stated to be good practice for any procurement project and 'may still be useful'.

The Outsourcing Playbook contains a set of guidelines, rules and principles that apply across the procurement lifecycle when obtaining services from an outside supplier. They have been structured around the main commercial stages of a typical procurement lifecycle: Preparation and Planning, Publication, Selection, Evaluation and Award and Contract Implementation.

See: *https://www.gov.uk/government/news/outsourcing-playbook-published*

6. Project Bank Account Bill second reading postponed

The second reading debate of the Public Sector Supply Chains (Project Bank Accounts) Bill 2017-19 sponsored by Debbie Abrahams MP, which requires public authorities to pay certain suppliers using project bank accounts, did not take place, as scheduled, on Friday 1 March 2019. A new date is awaited.

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