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April 2019

Legal developments in construction law

1. Who, precisely, do you think you are contracting with?

A company director of an offshore company dealt with the appointment of an architect for works to the company's London property. He signed the architect's fee proposal letter "*Confirmed: KEL Holdings Limited.*", followed by his signature, and underneath that: "*RJF Brothers. Director*". The architect subsequently emailed the director, identifying the company as its client, but the director did not reply. The architect later obtained an adjudication award against the company for its fees but the company challenged jurisdiction, one ground being that the contract was not with the company but with the director personally.

In ***Hamid v Francis Bradshaw Partnership*** the Court of Appeal set out some applicable general principles. In summary the Court said that:

- extrinsic evidence is admissible to resolve an issue as to the identity of a party in a deed or contract;
- the court's approach is objective;
- if the extrinsic evidence establishes that a party has been misdescribed, the court may correct that error as a matter of construction without any need for formal rectification;
- where the issue is whether a party signed a document as principal or as agent, the parol evidence rule is not automatically relaxed. The person who signed is the contracting party unless the document makes clear that they signed as agent for a sufficiently identified principal or as the officer of a sufficiently identified company, or extrinsic evidence establishes that both parties knew the relevant party was signing as agent or company officer.

The court ruled that there was a contract, on the terms of the fee proposal between the architect and the company. There were background facts but they did not provide conclusive evidence of the contractual arrangements. Invoices had been sent to the director directly, but that was not determinative because it could be relied upon by both parties. The issue of who paid the fees was not conclusive because it was common ground that the fees were paid in part directly by the director and in part directly by the company. The fact that the property was intended to be occupied by the director, when finally completed, did not indicate one way or the other who was the contracting party and the fact that the director had entered into contracts directly in his personal capacity with others was not conclusive as to this particular contractual arrangement.

All of those matters, in any event, would not override the very clear effect of the written contract and the confirmatory email. The clear indication by the signature of the director on the fee proposal letter was that the intention must have been for him to sign as a director of the company as the other contracting party. Conspicuous by its absence was any attempt by him to respond to the email in which the architect expressly confirmed that the contracting party and client was the company, as opposed to the director personally.

Donald Insall Associates Ltd v Kew Holdings Ltd [2019] EWHC 384

2. Court of Appeal profiles practical completion

The Court of Appeal has provided guidance in identifying the critical moment when practical completion is achieved. On appeal in ***Mears v Costplan***, Lord Justice Coulson reviewed the cases and set out his conclusions, in summary, that:

- practical completion is easier to recognise than define; there are no hard and fast rules;
- the existence of latent defects cannot prevent practical completion; in many ways that is self-evident;
- in relation to patent defects: the cases show that there is no difference between an outstanding item of work and an item of defective work to be remedied; snagging lists can, and usually will, identify both types of item without distinction;
- the practical approach developed by Judge Newey in two previous cases has been adopted in all the subsequent cases; that can be summarised as a state of affairs in which the works have been completed free from patent defects, other than ones to be ignored as trifling;
- whether an item is trifling is a matter of fact and degree, to be measured against *"the purpose of allowing the employers to take possession of the works and to use them as intended"*. This should not, however, be elevated into the proposition that if, say, a house is capable of being inhabited, or a hotel opened for business, the works must be regarded as practically complete, regardless of the nature and extent of the items of work which remain to be completed/remedied;
- other than ***Ruxley v Forsyth***, no authority addresses the interplay between the concept of completion and the irremediable nature of any outstanding item of work. And even ***Ruxley*** is of limited use because that issue did not go beyond the first instance decision and it does not support the proposition that the mere fact that the defect was irremediable meant that the works were not practically complete.

Mears Ltd v Costplan Services (South East) Ltd & Ors [2019] EWCA Civ 502

3. NEC4: 2019 amendments

Following feedback on NEC4, first published in 2017, in March the NEC issued a set of amendments.

A schedule of amendments is available for each contract on the NEC contract website www.neccontract.com.

See: *https://www.neccontract.com/About-NEC/News-Media/NEC4-Amendments*

4. Government infrastructure finance review: consultation

The government has launched a consultation on how best to support private investment in infrastructure. Its review of infrastructure finance, led by HM Treasury, working with the Infrastructure and Projects Authority and supported by an expert panel, will look at the government's tools for supporting private investment, and how they are delivered, in the context of the UK's changing relationship with the European Investment Bank. It looks to the long-term, and will inform both the 2019 Spending Review and the National Infrastructure Strategy.

At the Budget, the government announced it would no longer use PFI and PF2 models for new projects and it will not be seeking a like-for-like replacement for these models. The government is open to exploring new ways to use private finance in government projects, but the benefits brought by private finance must outweigh the additional cost to the taxpayer of using private capital, and the government will not consider proposals demonstrating the same characteristics as PFI or PF2.

The consultation closes on 5 June 2019.

https://www.gov.uk/government/consultations/infrastructure-finance-review

5. Consultation on social value in government contracts

The government is also consulting on its proposals for taking account of social value in public procurement. The approach proposed goes further than that in the Public Services (Social Value) Act 2012, in requiring central government departments to take account of social impact as part of the award criteria, where the social impact is linked to the subject-matter of the contract and proportionate to what is being procured. Procuring authorities will have the freedom to choose which themes and policy outcomes they apply in each procurement but they should only be chosen where they are relevant to the subject matter of the contract and it is proportionate to do so. Procuring authorities are not required to use any of the themes and policy outcomes; it is for them to determine whether or not to do so.

The proposed requirements will apply to all central government departments, their executive agencies and non-departmental public bodies, when undertaking procurements subject to Part 2 of the Public Contracts Regulations 2015.

The consultation closes on 10 June 2019 and a response is due to be published by 2 September 2019.

See: *https://www.gov.uk/government/consultations/social-value-in-government-procurement*

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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