MAYER | BROWN

July 2019

Legal developments in construction law

1. No contract? But a quantum meruit will at least give a right to payment?

If parties fail to achieve a legally binding contract, there is always, of course, the fall-back position that the party carrying out requested work is entitled to be paid a reasonable sum for it. Or is it?

A company providing corporate finance and mergers and acquisitions advice claimed payment for services provided to a private equity firm in connection with the acquisition of a company. It claimed there was an oral agreement or, alternatively, that it was entitled to be paid on a quantum meruit basis, on the grounds of unjust enrichment, for valuable services provided.

The court ruled that there was no oral contract, noting that it is not uncommon in the courts for witnesses to deceive themselves in essentially honest, but nonetheless false, recollections. In determining the truth it is more helpful to focus on objective indicia, in the documents and in the inherent probabilities, than to rely on evidence as to a witness's memory, especially when the events in question took place a considerable time ago. Which left the quantum meruit claim. Was payment of a reasonable sum for the services the default position?

The court, in dismissing the claim, said that, in the absence of a contract, there is no general right to payment for requested services. From the case law it derived a number of propositions, in summary that:

- the modern approach is to determine whether, in the circumstances, the law should impose on the defendant an obligation to pay an amount which the claimant deserved to be paid;
- generally speaking, a person seeking to enter into a contract cannot claim the cost of estimating what it will cost them or deciding a price, the cost of bidding for the contract or of showing the other party their capability or skills;
- the court is likely to impose such an obligation where the defendant has received an incontrovertible benefit (e.g. an immediate financial gain or saving of expense) as a result of the claimant's services; or where the defendant has requested the claimant to provide services or accepted them (having the ability to refuse them) when offered, knowing that the services were not intended to be free;
- the court may not regard it as just to impose an obligation to pay if the claimant took the risk that they would only be reimbursed for their expenditure if there was a concluded contract; or if the court concludes that, in all the circumstances the risk should fall on the claimant;
- the court may impose such an obligation if the defendant who has received the benefit has behaved unconscionably in declining to pay for it.

Moorgate Capital (Corporate Finance) Ltd v H.I.G. European Capital Partners LLP [2019] EWHC 1421

2. Is an adjudicator's failure to address an issue fatal?

If an adjudicator fails to address an issue, for instance a key defence issue, is that a breach of natural justice, and potentially fatal to enforcement of the decision? In **RGB P&C Ltd v Victory House General Partner Ltd** the court said that, where the adjudicator has deliberately, but wrongly, declined to address an issue, particularly a crucial defence, it may well be that the adjudicator has not decided the dispute referred to them. Where, however, they have not expressly taken such a deliberate decision, but appear not to have addressed every issue, the more likely conclusion is that the issue is subsumed within consideration of the dispute as a whole.

The judge noted that the case of **Pilon v Breyer** had left open the possibility that an inadvertent failure to consider one of a number of issues might render a decision in breach of natural justice, but it would not ordinarily do so and it was difficult to identify any case in which a decision had not been enforced for this reason. The rarity of such cases seemed to be for two reasons. An inadvertent failure to address a particular issue is in the nature of an error within the adjudicator's jurisdiction rather than a breach of natural justice, but, if that was wrong, it would be an unusual case where the court would both infer that an issue had not been addressed and conclude that that failure was so significant that it meant that the adjudicator had not decided the dispute referred to them and/or that the conduct of the adjudication was so unfair that the decision should not enforced. The more significant the issue, the less likely it is to be inadvertently overlooked; the less significant it is, the more likely it is that it had been taken account of in the round.

RGB P&C Ltd v Victory House General Partner Ltd [2019] EWHC 1188

3. Failure to identify 'contractual basis' sinks contractor's claim

2017 edition FIDIC contracts require a contractor, after giving a Notice of Claim, to submit, as part of its fully detailed Claim, a statement of the "*contractual and/or other legal basis of the Claim*". A Hong Kong court has recently considered the effect of a similar requirement, in a subcontract, for submission of the "*contractual basis*" (together with full and detailed particulars and claim evaluation) as a condition precedent to the subcontractor maintaining its right to pursue its previously notified claim for additional payment or loss and expense. The subcontractor had, at most, notified a *factual* basis for its claim, but had not identified which of the different bases listed in the relevant clause (e.g. breach of subcontract by contractor or variation) was said to have given rise to the claim. Did that matter?

The court ruled that what was required, under the clause, was the basis on which the subcontractor claimed it was entitled, under the subcontract, to maintain and pursue its claim, by reason, or as a result, of the factual circumstances. There might be one, or more, contractual bases which could be identified, but the "*contractual basis*" required was one or more of the different causes or events set out in the relevant subcontract clause as giving rise to a claim. The subcontractor had not complied strictly with the "*contractual basis*" requirement and consequently, by operation of the subcontract, it had no right to the payment claimed.

The court noted that, however much sympathy the contractor might deserve, the subcontract clause in question employed clear and mandatory language for the service and contents of the required notices, with no qualifying language such as "*if practicable*", or "*in so far as the sub-contractor is able*". There is commercial sense in allocating risks and attaining finality by designating strict time limits for claims to be made and for the contractual basis of claims to be specified. In particular, the language used was clear on its plain reading, and the decisions in **Rainy Sky SA v Kookmin Bank** and **Arnold v Britton** highlighted the importance of the language used in the provision to be construed, notwithstanding the need to read such language in the proper factual and commercial context. There was no basis for a court or tribunal to rewrite the subcontract or clause for the parties after the event.

Maeda Corporation and another v Bauer Hong Kong Ltd at: http://www.hklii.org/eng/hk/cases/hkcfi/2019/916.html

4. Government consults on its plans for new building safety regime

The government has set out its plans to overhaul the current building safety system for high rise residential buildings. The proposed new regime will be for buildings that are lived in by multiple households and 18 metres high (6 storeys) or more, but the government says that it wants to make sure that the new system, which will be regularly reviewed, is flexible so that it can adapt and expand to cover more buildings over time.

The proposals include the introduction of dutyholders who will be responsible for making sure buildings are safe and will have duties when a building is being designed and built, when people are living in the building, and that run throughout the building's life cycle. Also included are a new 'accountable person' role, who will be the dutyholder responsible for making sure that building fire and structural safety risks are reduced, a 'Golden thread', a set of key documents, held digitally, on building information, and a new, national, building safety regulator to ensure the regime is enforced robustly and effectively.

The government is also seeking feedback on the Regulatory Reform (Fire Safety) Order 2005, which regulates fire safety in non-domestic premises. This call for evidence is the first step to update the evidence base to ensure that the Order is fit for purpose for all regulated premises.

The consultation and the call for evidence both close on 31 July 2019.

https://www.gov.uk/government/consultations/building-a-safer-future-proposals-for-reform- of-the-building-safety-regulatory-system/building-a-safer-future-quick-read-guide

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/806892/BSP_consultation.pdf

https://www.gov.uk/government/consultations/the-regulatory-reform-fire-safety-order-2005-call-for-evidence

5. Government set to consult on its plans for tougher prompt payment regime

Following its call for evidence in tackling late payment, the government is to consult on strengthening the powers of the Small Business Commissioner in respect of larger businesses which fail to make payments on time. The new powers could include compelling information and disclosure of payment terms and practices and imposing financial penalties or binding payment plans on large businesses found to have unfair payment practices.

The government is also to take a tough approach to large companies which do not comply with the Payment Practices Reporting Duty, the existing mandatory requirement on large businesses to report payment practice to a national database twice a year. The legislation allows for the prosecution of those which do not comply, and fines may be imposed.

See: https://www.gov.uk/government/news/broad-new-measures-to-ensure-small-businesses-get-paid-on-time

6. New CIC Model Mediation Agreement and Procedure

The Construction Industry Council has published the first edition of its Model Mediation Agreement and Procedure.

The panel will consist of experienced, accredited, mediators who are members of CIC member organisations and have at least 10 years' post qualification experience in their primary profession. Panel members will follow the European Code of Conduct for Mediators.

See: http://cic.org.uk/news/article.php?s=2019-06-12-cic-publishes-a-model-mediation-agreement-and-procedure

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

Mayer Brown is a distinctively global law firm, uniquely positioned to advise the world's leading companies and financial institutions on their most complex deals and disputes. With extensive reach across four continents, we are the only integrated law firm in the world with approximately 200 lawyers in each of the world's three largest financial centers—New York, London and Hong Kong—the backbone of the global economy. We have deep experience in high-stakes litigation and complex transactions across industry sectors, including our signature strength, the global financial services industry. Our diverse teams of lawyers are recognized by our clients as strategic partners with deep commercial instincts and a commitment to creatively anticipating their needs and delivering excellence in everything we do. Our "one-firm" culture—seamless and integrated across all practices and regions—ensures that our clients receive the best of our knowledge and experience.

Please visit mayerbrown.com for comprehensive contact information for all Mayer Brown offices.

Americas | Asia | Europe | Middle East

mayerbrown.com