MAYER | BROWN

October 2019

Legal developments in construction law

1. Concrete supplier sets court Construction Act "installation" puzzle

A subcontractor replacing bridge expansion joints engaged a cement supplier to supply concrete for the works. In a dispute about the concrete supplied, the subcontractor obtained an adjudication decision in its favour for damages for breach of contract. The concrete supplier resisted enforcement by the court, claiming that their work involved only delivery of the concrete and was therefore not subject to the Construction Act.

If installation is involved, as well as delivery, the Act applies but was the pouring of the concrete "installation"? The court did not think that it was necessary for the contract to make specific reference to, or use, the word "*installation*" but its absence was indicative of the nature of the parties' contract. It noted that, for example, one does not install bricks, but the delivery of bricks to a site would obviously fall within the exclusion in the Act unless the supplier also did something else, for example, laying the bricks. The word "'*installation*" (or its equivalent verb) in s.105(2)(d) connoted some work done to the materials after delivery, an interpretation supported by the express wording which frames the exception to the exclusion as one under a contract: "*which also provides for their installation*", i.e. the installation of the materials. The very use of the word "*also*" suggested that something other than delivery was contemplated.

In this case, in the court's view, the act of delivery and pouring amounted to the same thing. The pouring was, in these circumstances, part of the delivery and not an additional act of installation involving some work on, or related to, the materials. Nothing in the contract also provided for installation. It was simply the case that, in order for the materials to be delivered to site in the normal way, the concrete would be poured where required, rather than, as would be unusual, placed into some storage facility until it could be poured by someone else. The court therefore refused to grant summary judgment.

Universal Sealants (UK) Ltd (t/a USL Bridgecare) v Sanders Plant And Waste Management Ltd [2019] EWHC 2360

2. Court of Appeal says no to Scheme valuations for milestone payments swap

Payment under a subcontract to design, supply and install hotel modular bedroom units to be made in China was triggered by milestones but, because the Construction Act applied to the subcontract, it had to have an adequate payment mechanism. The amounts of the milestone payments, which were percentages of the contract price, were not in issue but three of the milestones, which were all dependent on "*sign-off*", were challenged. At first instance the court ruled that two of the milestones

did not comply with the Act and that particular paragraphs of the Scheme for Construction Contracts should be incorporated, which meant that the subcontractor was entitled to be paid by reference to the value of the work carried out, even if the units were not ready for "*sign-off*".

The Court of Appeal noted that this was a significant reapportioning of the commercial risk which the parties had agreed and that it would take very clear words in the Act to achieve that. It decided that "*sign-off*" was to be assessed objectively, i.e. by reference to the satisfactory completion of a particular stage, rather than subjectively, by reference to the date on which the sign-off *actually* occurred. And even if actual "*sign-off*" was required, if the prototype or units were ready for "*sign off*" there would be an entitlement to payment and a failure to sign-off the relevant documentation would not be a defence to a claim based on that entitlement. The subcontract therefore did have an adequate payment mechanism.

The court also considered how the Scheme might apply if the contract did not have such a mechanism. It noted that the payment provisions in the Scheme are incorporated on a piecemeal basis, only "*if or to the extent that*" the contract does not contain the relevant provisions. Paragraph 7 of the Scheme, a 'catch all', was the only paragraph that could relate to the milestones, it made commercial sense, did the least violence to the parties' agreement and resolved any concern about sign-off because it provides for payment 7 days after completion of the relevant work (i.e. an objective test). The Act was not designed to delete an agreed workable payment regime and replace it with an entirely different payment regime based on a radically changed set of parameters. That could only happen where the agreed regime was so deficient that wholesale replacement was the only viable option.

Bennett (Construction) Ltd v CMC MBS Ltd [2019] EWCA Civ 1515

3. Construction adjudication dispute - has it crystallised?

Adjudications hatch from disputes. You can't have one without the other. The parties will usually have argued unsuccessfully about their claims before taking them to adjudication. But what if the dispute referred is different from the previous disagreement?

A Scottish court had to deal with this (and other) issues. It said that a party is not entitled to instigate the adjudication provisions of the contract unless and until the dispute or difference has crystallised, and that is the position even if (as in the case) the dispute relates to a Final Certificate. If the dispute described in the Notice first arises at the moment the Notice is served, then the Notice is premature.

In the court's opinion, when a party resists enforcement of an adjudicator's award on the ground that the relevant dispute had not crystallised the court should adopt a robust, practical approach, analysing the circumstances prior to the notice of adjudication "*with a commercial eye*" (as stated in Lord Justice Coulson's book on construction adjudication). An over legalistic analysis should be avoided. The court should seek to determine in broad terms whether a claim or assertion was made and whether or not it was rejected. It should discourage nit-picking comparison between the dispute described in the notice and the controversy which pre-dated the notice.

Even looking at the matter broadly, however, the claims in the Notice for extensions of time and loss and expense appeared to be of a different nature and order of magnitude to the previous disagreements about extensions of time, prolongation and loss and expense. No dispute in anything like those terms had crystallised before the Notice and, consequently, a very material part of the dispute described in the Notice had not crystallised before the Notice was served. One of the four objections to enforcement consequently succeeded but the effect on the adjudicator's decision, and the possibility of severance, could not be decided by the court at the hearing.

Dickie & Moore Ltd v Ronald James McLeish and others at:
https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2019csoh71.pdf?sfvrsn=0

4. Law Commission says electronic signatures are valid

The Law Commission has confirmed that electronic signatures can be used to execute documents, including where there is a statutory requirement for a signature. It says that an electronic signature is capable in law of being used to execute a document (including a deed), provided that the signatory intends to authenticate the document and that any relevant formalities, such as the signature being witnessed, are satisfied. The Commission's view is based upon legislation and court decisions which relate to both non-electronic and electronic signatures.

The Law Commission has identified some practical considerations which can affect the decision to execute documents electronically, including concerns that electronic signatures are more susceptible to fraud, practical issues such as the reliability and security of e-signature technology and the cross-border nature of some transactions and whether deeds can be witnessed remotely via video witnessing. The Commission's view is that the current law probably does not allow for "remote" witnessing such as by video link.

Its recommendations to address some of the practicalities of electronic execution and the rules for executing deeds include the creation of an industry working group to consider practical and technical issues around electronic signatures and provide best practice guidance, to look at solutions to the practical and technical obstacles to video witnessing and consideration, by the government, of legislative reform to allow for this, and a review of the law of deeds.

See: https://www.lawcom.gov.uk/electronic-signatures-are-valid-confirms-law-commission/; and

https://www.lawcom.gov.uk/project/electronic-execution-of-documents/

5. Redrafted Approved Document B (Fire safety) (2019 edition) reissued after corrections

A clarified 2019 edition of Approved Document B (Fire safety) was published on 5 July 2019 and came into force on 30 August 2019. It had been redrafted to clarify its language and content in line with the style guide for approved documents. The government said that it was important to note that no new policy was being introduced as a result of this work and that there were no changes to the technical guidance within Approved Document B.

Corrections were subsequently made to the Document and it was reissued with effect from 19 September 2019.

See: https://www.gov.uk/government/publications/notice-of-correction-to-approved-document-b-2019-edition-circular-032019 and

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/832636/20190911_ADB_2019_Notice_of_Correction_Circular_Letter.pdf

6. VAT reverse charge for construction delayed to 1 October 2020

The introduction of the domestic reverse charge VAT for construction services has been delayed for 12 months, until 1 October 2020. Industry representatives raised concerns that some businesses in the construction sector were not ready to implement the charge on 1 October 2019 and the postponement is to help these businesses and give them more time to prepare. It is also intended to avoid the changes coinciding with Brexit.

HMRC has recognised that some businesses had already changed their invoices to meet the needs of the reverse charge and could not easily change them back in time. Where genuine errors have occurred, HMRC says it will take into account the fact that the implementation date has changed.

Businesses that might have opted for monthly VAT returns ahead of the 1 October 2019 implementation date can reverse that by using the appropriate stagger option on the HMRC website.

See: https://www.gov.uk/government/publications/revenue-and-customs-brief-10-2019-domestic-reverse-charge-vat-for-construction-services-delay-in-implementation/revenue-and-customs-brief-10-2019-domestic-reverse-charge-vat-for-construction-services-delay-in-implementation#explanation-of-the-change

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