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Legal developments in construction law

1. Court says paying the adjudicator's fees did not end its right to challenge the decision

A contractor received an adjudicator's decision finding it liable to make a substantial payment to a subcontractor but told the subcontractor it had been advised that the decision was invalid and unenforceable. It subsequently paid the adjudicator's fees but recorded, in doing so, that payment did not constitute agreement that the decision was correct, valid or enforceable and reserved all its rights to challenge the decision. Was that reservation effective or had it lost its right of challenge?

The court noted that, although there is strong authority that payment of an adjudicator's fees may amount to an election to treat an adjudicator's decision as valid, the question is what is to be inferred from such a payment. As a matter of policy, the judge considered that the court should not do anything to discourage payment of an adjudicator's fees and should perhaps be particularly careful to see whether the inference should properly be drawn that the payer intended to treat the decision as valid. In this case, the contractor's earlier email had made it clear that it regarded the decision as invalid and unenforceable and there was nothing in the payment of fees from which to infer that it had changed its mind.

The contractor also claimed that the adjudicator had breached natural justice in reaching her award on a method of valuation advanced by neither party. In also rejecting that challenge, the judge considered the applicable principles set out in ***AECOM Design Build Ltd v Staptina Engineering Services Ltd***, in particular that there is no rule that a judge, arbitrator or adjudicator must decide a case only by accepting the submissions of one party or the other. An adjudicator can reach a decision on a point of importance on the material before them on a basis for which neither party has contended, provided that the parties were aware of the relevant material and the issues to which it gave rise had been fairly canvassed before the adjudicator.

Platform Interior Solutions Ltd v ISG Construction Ltd [2020] EWHC 945

2. Court provides a refresher on acts of prevention

"*Act of prevention*" consistently appears in construction contracts as a reason for an extension of time. In a recent dispute under shipbuilding contracts, the court had to decide whether the "*prevention principle*" applied, and, in considering the relevant case law, provided a helpful reminder of how it works.

Legitimate actions by an employer under a construction contract, which can include variations, can be acts of prevention, if they cause delay to the contract completion date, but they do not set time at large, if the contract provides for an extension of time in respect of them. The case law says that, if, and in so far as, the extension of time clause is

ambiguous, it should be construed in favour of the contractor; the court should lean in favour of a construction that permits the contractor to recover appropriate extensions of time in respect of events causing delay. Such clauses were not, as sometimes thought, designed to provide the contractor with excuses for delay, but, rather, to protect employers, by retaining their right both to a fixed (although extended) completion date and to deduct liquidated damages for any delay beyond that extended completion date.

In the case in question, on the court's analysis of the contract, provision was made for extensions of time for delay resulting from allegedly wrongful acts of the buyer of the ships and there was, therefore, no room for the application of the "*prevention principle*" as a result of such delays.

Jiangsu Guoxin Corporation Ltd v Precious Shipping Public Co Ltd [2020] EWHC 1030 (Comm)

3. Force majeure – unforeseeable?

During riots in 2011 a warehouse was broken into and set on fire and it, and its contents, were destroyed. The warehouse owner, that had contracted to provide storage and distribution facilities at the warehouse, claimed this was an event of force majeure, to which a clause excluding liability for a failure "*caused by circumstances beyond the reasonable control of the party affected…*" applied.

In proceedings claiming damages against the warehouse owner it was common ground that the riots were unforeseen and unprecedented, but the court said that the risk of intruders was foreseeable (from previous incidents), and the risk of arson and destruction of the warehouse and its stock was, or should have been, foreseen. Adequate security measures that could have been taken would probably have deterred or delayed the attack and reasonable fire precautions (installation of sprinklers) would probably have suppressed the fire and significantly reduced the damage. The fire and resulting loss did not therefore amount to circumstances beyond the reasonable control of the warehouse owner.

2 Entertain Video Ltd & Ors v Sony DADC Europe Ltd [2020] EWHC 972

4. Indirect or consequential loss = ?

"*Indirect or consequential loss or damage*" are familiar words in commercial contract exclusion clauses. But what, precisely, do they mean? Might they, for instance, include loss of profit?

At various times over the last 85 years the courts have had to provide an answer and in ***2 Entertain Video Ltd v Sony DADC Europe Ltd*** the court had to decide if recovery of loss of profits and business interruption losses were excluded by these words. A number of previous cases had decided that such words had not excluded direct loss and damage flowing naturally from the breach of contract, i.e. falling within the first limb of the famous case of ***Hadley v Baxendale***, but the court noted that any general understanding of the meaning of "*indirect or consequential loss*" must not override the true construction of the clause in question, when read in context against the other provisions of the contract and the factual matrix. There was, however, no definition of indirect or consequential loss in the contract that would indicate a wider meaning than the second limb of ***Hadley v Baxendale*** (dealing with indirect losses) and, although the exclusion clause was unhappily worded, its meaning was reasonably clear on the facts. The loss of profits and business interruption costs claimed did not constitute indirect or consequential loss or damage within the meaning of the clause.

2 Entertain Video Ltd & Ors v Sony DADC Europe Ltd [2020] EWHC 972

5. New government guidance on responsible contractual behaviour

The government has issued non-statutory guidance, for parties to contracts in both public and private sectors, in which responsible and fair behaviour is "*strongly encouraged*" in performing and enforcing contracts where there has been a material impact from Covid-19.

It has general application to all active contractual arrangements so impacted, but it is not intended to override specific government, public authority or regulatory authority guidance or procurement policy notes, specific support or relief available in the relevant contract, in law, custom or practice (including equitable relief), or from the government in response to the Covid-19 emergency, or any other contractual legal duties or obligations and any national security interests.

In particular, the guidance lists a number of instances where responsible and fair behaviour is strongly encouraged, including:

- requesting, and allowing, extensions of time;
- making, and responding to, force majeure, frustration, change in law, relief event, delay event, compensation event and excusing cause claims;
- requesting, and making, payment under the contract; and
- making, and responding to, claims for damages, including under liquidated damages provisions.

See: https://www.gov.uk/government/publications/guidance-on-responsible-contractual-behaviour-in-the-performance-and-enforcement-of-contracts-impacted-by-the-covid-19-emergency

6. CLC issues guidance on how to minimise potential disputes

On the same day that the government issued its guidance on responsible contractual behaviour the Construction Leadership Council published practical guidance for all companies involved in the construction supply chain on how to minimise potential disputes. The document seeks to provide examples on the types of issues that are likely to arise, together with practical advice on how to resolve them in a constructive manner. The note applies equally to all those involved in the construction and maintenance supply chain operating in both the public and private sector.

The document is a guide only and is not intended to cover all contract types and issues and says that it will be revised regularly as the situation develops.

See: https://www.constructionleadershipcouncil.co.uk/news/government-backs-industry-guidance-to-avoid-disputes-2/

7. COVID-19 Building Regulation Guidance issued

The government has issued guidance on the application of the Building Regulations during the COVID-19 outbreak.

It states that Building Control Bodies should continue to undertake normal, regular on-site inspection activity where this can be done safely, in line with Public Health England guidance. They may wish to consider the use of alternative methods of checking compliance to supplement physical inspections, for example using digital photographs and video or other remote means of checking compliance but should satisfy themselves within the limits of their professional skill and care that these remote inspections are used appropriately. Remote inspections should not normally be used as the sole method of assessing compliance.

The guidance notes that Building Control Bodies should ensure that they maintain a record that the person carrying out the works has passed key fire safety information to the responsible person when issuing either a full/partial final or completion certificate, in accordance with Regulation 38 of the Building Regulations 2010.

Where local authorities are aware that work has been, or is intended to be, halted, they should be ready to provide advice on ensuring that this is done such as to leave the building in a safe state.

See: https://www.gov.uk/guidance/application-of-the-building-regulations-during-the-coronavirus-covid-19-outbreak

8. CIC launches postponed Low Value Disputes Model Adjudication Procedure

On 1 May the Construction Industry Council launched its Low Value Disputes Model Adjudication Procedure by webinar, the original launch having been postponed from March.

The document sets out a streamlined adjudication procedure for Low Value Disputes and, by linking the Adjudicator's fee to the amount claimed, provides certainty as to how much the Adjudicator will be paid for making an Adjudicator's Decision.

See: http://cic.org.uk/news/article.php?s=2020-04-21-cic-low-value-disputes-model-adjudication-procedure

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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