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Legal developments in construction law

1. Guarantee or on demand bond? How can you tell?

There are guarantees, and there are on demand bonds, but how do you tell the difference? A Scottish court faced with this question applied the legal principles set out in English cases, in summary that:

- unlike a guarantee, a first demand bond is in principle autonomous of the underlying contract - liability may arise simply on a conforming demand within the validity of the instrument;
- what the instrument is labelled, common terms such as a principal debtor clause, or terms imposing primary liability and the use of words such as "on-demand", may be of limited value in determining its legal nature. The practical question is whether the instrument is effectively payable on demand, with or without supporting documentation: this can only be ascertained by examining its terms;
- the court looks at the instrument as a whole without any preconceptions;
- the nature of the party giving the guarantee is relevant; for instance, there is a presumption against construing an instrument as a demand bond which is not given by a bank or other financial institution, and an instrument issued by a financial institution relating to an underlying transaction between parties in different jurisdictions and containing an undertaking to pay "on-demand", but not containing clauses excluding or limiting a guarantor 's available defences, will almost always be construed as a demand;
- the presence of "protective clauses", excluding or limiting a guarantor's defences, is not necessarily a significant factor but their absence may point to the instrument being a first demand instrument;
- "conclusive evidence" clauses can be found in either kind but a clause requiring payment against certification by the beneficiary is likely to be inconsistent with the need for the beneficiary to otherwise establish liability of the principal debtor for enforcement; conclusive evidence clauses are strictly construed, with any ambiguity being resolved in favour of the guarantor.

The Scottish court decided that the document in issue was in fact a hybrid, having features of both an on demand bond and a guarantee.

Buchan Biogas Ltd v BSG Civil Engineering Ltd [2020] CSOH 42 at: https://www.bailii.org/scot/cases/ ScotCS/2020/2020_CSOH_42.html

2. Adjudication: failure to pursue cross-claim diligently proves fatal to stay of execution

A building owner, PAML, failed to give a Construction Act payment notice and the pay less notice given on its behalf was late. An adjudicator subsequently confirmed that PAML should have paid the contractor £485,216.17, plus VAT, and awarded interest. In enforcement proceedings PAML accepted that judgment should be entered against it but asked for a stay of execution of about two months to allow a "*true value*" adjudication to take place, claiming that a proper evaluation would find a substantial sum due to PAML.

After ruling that, because of the Court of Appeal's decision in ***S & T (UK) Ltd v Grove Developments***, PAML could not challenge the adjudicator's decision in another adjudication without first paying the amount held due in the first decision, the court noted the statement in the textbook Coulson on Construction Adjudication that:

"*a failure by the defendant to pursue its cross-claim or challenge with diligence may itself be a bar to a successful application for a stay of execution*" and said the case before it was exactly the type of case that is caught by that reference. Since September 2019, no attempt had been made by PAML to obtain a ruling from the court as to the amount due.

Although the court decided that, on the facts, the case law justified refusal of the application for a stay, it also considered other issues raised on behalf of PAML, in particular whether it was improbable that the contractor, BLL, would be able to repay the judgment sum at the end of the trial of the underlying issues between the parties. The court could not say whether, because of the possible impact of Covid-19 emergency measures on its projects, BLL would in due course be unable to repay the judgment sum. Given where the burden of proof lay, this made PAML's position difficult but what the court could say was that, if PAML had moved with due diligence and in accordance with the ruling in ***S & T***, it could have had a result by adjudication of its alleged entitlements before the Covid-19 crisis blew up, and at a time when BLL would, on the court's findings, have been able to repay. This finding was also fatal to PAML's application for a stay.

Broseley London Ltd v Prime Asset Management Ltd [2020] EWHC 944 (TCC) (21 April 2020)

3. When does an Eot claim turn into a dispute?

Without a dispute, there can be no adjudication. A claim is not enough. Identifying the point at which it turns into a dispute is therefore critical. An amended JCT subcontract required a subcontractor, giving notice of delay, to provide details of the material circumstances, including the cause or causes of delay, to identify the material relevant event and provide particulars of the expected effects, including an estimate of the expected delay in completion. It also required the subcontractor to notify the contractor of any material change in the estimated delay or other particulars provided and to supply "*such further information as [the contractor] may at any time reasonably require*". The subcontract then required the contractor to give its decision as soon as reasonably practicable and in any event within 16 weeks of receipt of the required particulars.

Eight days before commencing an adjudication on its extension of time claim the subcontractor served a new and substantial delay report introducing a new relevant event, giving rise to 71 out of the 282 days total extension of time claimed, and a new critical delay analysis. The contractor claimed that the adjudicator had no jurisdiction in awarding the full extension of time, saying that it had up to 16 weeks to assess such a claim; no dispute could crystallise until a reasonable time had elapsed for it to consider the claim and either accept or reject it. Eight days fell far short of the agreed contractual allowance or a reasonable time to assess the report and no dispute had therefore crystallised.

In dismissing the contractor's challenge, the court said it is a matter of fact and degree whether, in any given case, a proper analysis leads to the conclusion that information provided under the clause requiring the subcontractor to notify any material change in the estimated delay or other particulars provided, and to supply further information reasonably required by the contractor, supplements a notified claim, or gives rise to a new claim. Noting that, where there is no express acceptance or rejection of a claim, the point at which a dispute can be inferred is very heavily dependent on the facts of each case, the court said that the subcontractor had provided the delay notices and particulars required by the contract. The contractor had not requested, or said it was waiting for, any additional information, it had failed to notify the subcontractor of any decision in respect of each delay notice within 16 weeks, its silence gave rise to an inference that the delay claim was not admitted and a dispute in respect of the cumulative delay crystallised on the expiry of the sixteen-week period following receipt of the last notice. The new delay report did not amount to a fresh notification, it contained a detailed critical path analysis and the total extension of time claimed was not materially different to the delay claim advanced in the earlier notices. It was expert evidence to support the claim in respect of which there was a crystallised dispute and the adjudicator had jurisdiction.

MW High Tech Projects UK Ltd v Balfour Beatty Kilpatrick Ltd [2020] EWHC 1413

4. Amendments to Approved Document B 2019

The government has published amendments to Approved Document B (Fire safety) 2019 edition. The changes, which take effect on 26 November 2020, focus on residential blocks of flats and mixed-use buildings containing flats, and include a reduction in the height threshold for sprinklers in Purpose group 1a (residential (block of flats)) from 30 metres to 11 metres. As a result of the change to the height threshold, Table B4 (Minimum periods of fire resistance) will also be amended when these changes take effect to reflect that a block of flats without a sprinkler system above 11 metres is not permitted if following the guidance in the Approved Document.

See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/887227/Approved_Document_B_May_2020_amendment_-_Circular_letter_2020.pdf

5. Government launches fund for remediation of unsafe non-ACM cladding

The government has published the prospectus for the fund which will meet the cost for remediation of unsafe non-ACM cladding systems on residential buildings, in the private and social sector, that are 18 metres and over and do not comply with building regulations.

The fund is predominately targeted at supporting leaseholders in the private sector facing significant bills but the government is clear that, for leaseholders living in buildings owned by providers in the social sector, it will provide funding to meet the provider's costs which would otherwise have been borne by leaseholders. The government expects landlords to cover these costs without increasing rent for their tenants. Ministers also expect building owners who are already remediating their buildings, to continue to do so and to explore every opportunity to fund this work before seeking funding from government or passing on costs to their leaseholders.

The registration process closes on 31 July 2020. Full application guidance will be issued in July after the registration phase is complete.

See: https://www.gov.uk/government/news/new-1-billion-building-safety-fund-to-remove-dangerous-cladding-from-high-rise-buildings

6. CLC issues version 4 of Site Operating Procedures

The Construction Leadership Council has issued version 4 of its Site Operating Procedures, which have been updated to incorporate a number of technical changes as a result of the government's guidance on Working Safely during Coronavirus (COVID-19) – Construction & Other Outdoor Work. The CLC states that the changes are minimal and include:

- Removal of the requirement for face to face contact to be kept to 15 minutes or less
- The section on PPE now links to the latest Government guidance on face coverings
- References to one-way systems and the reconfiguration of seating and tables and an update on portable toilets
- The requirement to share risk assessments with the workforce
- Clarification on when to travel to work, as set out in the Government's COVID-19 Recovery Strategy
- Updated links and wording on social distancing.

See: https://www.constructionleadershipcouncil.co.uk/news/site-operating-procedures-version-4-published/

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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