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Legal developments in construction law

1. Recovering retention: wot, no certificate?

A contractor issued court proceedings against a developer for the second half of retention and a sum for VAT. Practical completion of the contracts in question was achieved in 2011, but the developer alleged a number of defects, in particular defective heat pumps, which were replaced in 2015. No certificates of making good defects were ever issued, but did their absence prevent recovery of the balance of the retention?

The court applied the principle in **Henry Boot Construction Ltd v Alstom Combined Cycles Ltd**, that a contractor's right to an interim payment arises when a certificate either was issued, or ought to have been issued. In that case, although the issue of a certificate was a condition precedent to payment, its absence did not bar the right to payment. If that right is established, it enables the court to decide that a certificate for payment ought to have been issued. In this case the court also noted that relevant observations in **Birse Construction Ltd v Eastern Telegraph Company Ltd, Henry Boot** and **S&T (UK) Ltd v Grove Developments Ltd** are essentially to the effect that, when it comes to the determination of the parties' substantive rights, the court should not be too hidebound by the existence or absence of notices which are required as part of the contractual machinery regulating the cash-flow between them.

Applying the **Henry Boot** principle, the court found, as confirmed by the evidence of the Employer's Agent under the contract, that the making good certificates should have been issued no later than 24 May 2016. The developer consequently had no defence to the claim for the retention balance.

Dr Jones Yeovil Ltd v The Stepping Stone Group Ltd [2020] EWHC 2308 (TCC)

2. Transferred loss claim meets third party rights exclusion

In **Dr Jones Yeovil Ltd v The Stepping Stone Group Ltd** the developer of assisted living units brought a counterclaim against the contractor for damages in respect of alleged defects. The site was owned, however, by the developer's wholly-owned subsidiary, which let the units on long leases. The largest claim was for alleged additional electricity costs incurred by leaseholders because of allegedly inadequate heat pumps installed by the contractor. The developer claimed those losses, under either the "broader ground" or "narrow ground" for recovering "transferred loss", as identified in analysis of the House of Lords' decisions in **Linden Gardens Trust Ltd v Lenesta Sludge Disposal Ltd** and **St Martins Property Corporation Ltd v Sir Robert McAlpine & Sons Ltd**.

The court said that it was clear from the **St Martins** and other cases that underpinning the principle of transferred loss (especially the broader ground) is the need to avoid an unacceptable 'legal black hole' where a contract-breaker escapes financial accountability because their contractual counterparty cannot be shown to have suffered the relevant loss. Because the key to avoiding such a consequence lies in establishing that the contracting parties knew that one or more third parties were to benefit from its proper performance it was also clear that the principle touches upon some elementary principles relating to privity of contract and the recognition of separate legal personalities.

Although not a factor at the time of the decision in **St Martins**, privity of contract includes the potential significance of the Contracts (Rights of Third Parties) Act 1999. The court will not recognise the existence of a black hole (as between the contract-breaker and their counterparty) if the third party who benefits from contractual performance has their own, separate right of redress or where a company contracts for the benefit of an associated company but does not tell the other party (the contract-breaker) that it is doing so.

The developer's case on transferred loss fell foul of the requirement identified by Coulson LJ in *BV Nederlandse Industrie Van Eiprodukten v Rembrandt Enterprises Inc as "the known third party benefit"* because the parties expressly agreed in all their contracts that: "nothing in this Contract confers or is intended to confer any right to enforce any of its terms on any person who is not a party to it." Because of this disclaimer it could not be said that the parties had a common intention to benefit future leaseholders of the units.

Dr Jones Yeovil Ltd v The Stepping Stone Group Ltd [2020] EWHC 2308 (TCC)

3. Post Bresco: court maps the adjudication path for liquidators

In June, in **Bresco v Lonsdale**, the Supreme Court gave the green light to liquidators bringing claims in adjudication under a construction contract, leaving the insolvency implications to be dealt with at the enforcement stage. Not long afterwards, in a dispute concerning landscaping works for the 2012 London Olympics, Mr Justice Fraser had to apply the **Bresco** principles, and other case law, in dealing with another liquidator's claim.

He concluded that summary judgment would be available to a company in liquidation seeking to enforce an adjudicator's award where:

- the adjudicator's decision resolved (or took into account) all the different elements of the overall financial dispute between the parties, for instance, if the dispute referred (as in the case) was the valuation of the referring party's final account;
- mutual dealings on other contracts, or other defences, if not taken into account by the adjudicator, will be taken into account by the court on the summary judgment application;
- there is no "real risk" that summary enforcement of the adjudicator's decision would deprive the paying party of security for its cross-claim. This risk could be avoided by the provision, by the liquidator, of adequate undertakings or other suitable security.

The judge emphasised that it is clearly in the public interest that liquidators should be able to pursue and enforce debts owed to companies in liquidation in a cost-effective manner. Simply because one party to a construction contract is in liquidation, this does not entitle the other party to a windfall.

The summary judgment application failed because, on the facts, the security offered was inadequate and there remained a real risk that summary enforcement would deprive the other party of its right to have recourse to the company's claim as security for its cross-claim. Even if summary judgment was granted there would be a stay of execution in any event.

The court also noted that parties in a position similar to that of the claimant, which had waited over five years to commence an adjudication, should not expect their summary judgement claims to be routinely expedited in the same way as more conventional adjudication business.

John Doyle Construction Ltd v Erith Contractors Ltd (Rev 1) [2020] EWHC 2451

4. New measures to strengthen Modern Slavery Act

Under new government measures to strengthen the Modern Slavery Act 2015, public bodies with a budget of £36 million or more, including local authorities in England and Wales, will be required to report regularly on the steps they have taken to prevent modern slavery in their supply chains.

The government is also specifying the key topics that modern slavery statements must cover, from due diligence to risk assessment, to encourage organisations to be transparent about the work they are doing to ensure responsible practices.

The government will also require organisations in all sectors, with a budget of £36 million or more, to publish their modern slavery statements on a new digital government reporting service to be launched early next year. The reporting period will run from 1 April to 31 March and the reporting deadline will be 30 September.

See: New tough measures to tackle modern slavery in supply chains and www.gov.uk/government/consultations/transparency-in-supply-chains

5. World Bank Group and CMA send out important messages on collusion and competition law

In September, the World Bank Group announced the two-year debarment of a Spain-based company specialising in civil works, for collusive and fraudulent practices in two bidding processes. In one process, it arranged with public officials to have a competitor disqualified, which is a "collusive" practice, and misrepresented the use of the contract's advance payment, which is a fraudulent practice. In the other process, it misrepresented the composition and roles of three companies within a consortium that would execute the contract, which is a fraudulent practice.

It is consequently ineligible to participate in projects and operations financed by the World Bank Group and is liable to cross-debarment by other multilateral development banks. As a condition of release from debarment, it has committed to developing an integrity compliance programme consistent with the World Bank Group Integrity Compliance Guidelines. The debarment highlights the trend of increasing enforcement by the World Bank and other MDBs and is an important reminder for companies bidding on MDB-financed projects to be proactive in integrity compliance, and not to wait until action has been taken by MDBs. Its collusive conduct could equally have been sanctioned under applicable competition laws.

The Competition and Markets Authority and the Institute of Risk Management have also provided their own reminder of the importance of competition law compliance, with the issue of their updated risk guide for senior managers, directors and their advisers. This provides guidance on ensuring compliance with competition law, including avoiding collusive conduct which could expose individuals to both civil and criminal sanctions, such as director disqualification and imprisonment, in addition to penalties imposed on the companies themselves.

See: www.gov.uk/government/news/cma-updates-competition-law-risk-guide-for-managers

6. New PPN 06/20 embeds social value in awards of central government contracts

In September the government issued Procurement Policy Note 06/20, which requires social value to be explicitly evaluated in all central government procurement, where the requirements are related and proportionate to the subject-matter of the contract. The PPN applies to procurements covered by the Public Contracts Regulations 2015, and to all central government departments, their executive agencies and non-departmental public bodies. The social value model set out in the PPN 06/20 must be implemented in all new procurements from 1 January 2021.

A minimum weighting of 10% must be applied for the social value score in each procurement and tenderers who cannot, or fail to, demonstrate that they have achieved the relevant social value model factors will be placed at a significant disadvantage to competing tenderers in future procurements. It should be noted, however, that the Public Contracts Regulations 2015 provide significant punishments for tenderers who misrepresent their position to contracting authorities. Authorities may exclude such tenderers from procurements for three years and tenderers will need to expend time and resources to "self-clean" if they want to participate again.

See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/921437/PPN-06_20-Taking-Account-of-Social-Value-in-the-Award-of-Central-Government-Contracts.pdf

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