MAYER | BROWN

January 2020

Legal developments in construction law

1. Scottish court provides new year reminders on adjudicator's reasons and natural justice

In dealing with challenges to an application to enforce an adjudicator's order for payment, a Scottish court provided two particular reminders of the approach to be taken to the adequacy, and fairness, of adjudicator's decisions. The case in question involved an issue as to whether the adjudicator in question had provided adequate reasons for their decision. The court ruled that, where an adjudicator is required to give reasons, they can be brief, and need not deal with every point. Adjudicators' reasons are not to be judged by the standards applied to judges or arbitrators. A reasonable person informed as to the context of the dispute who reads the decision ought to be able to discern from it what the adjudicator has decided, and why they have decided it. The issue in question in the case was an instance of an issue where the acceptance by an adjudicator of one party's position, was sufficient to indicate the reasons for rejecting the other position.

Another challenge was based on the adjudicator's use of quantity surveying assistance. Should the adjudicator have informed the parties that he was obtaining this assistance and its nature? The court noted that the test for a breach of natural justice was not *"Has an unjust result been reached?"* but *"Was there an opportunity afforded for injustice to be done?"*. Immaterial breaches of natural justice will not render a decision unenforceable: the provisional nature of an adjudicator's decision justifies ignoring non-material breaches. The court inclined to the view that, even if the assistance provided by the surveyor in this case was merely clerical and administrative, natural justice required that the adjudicator ought to have told the parties that the surveyor had been engaged, and, while detailed disclosure for comment would not have been necessary, the adjudicator ought to have indicated (at least in brief, broad terms) just what it was that the surveyor was doing. The court considered, however, that it was not in a position, without inquiry, to decide whether there had been a material breach of natural justice.

Babcock Marine (Clyde) Limited v HS Barrier Coatings Limited at:
https://www.bailii.org/scot/cases/ScotCS/2019/2019_CSOH_110.html

2. Court refuses adjudication award stay where insolvent claimant is a going concern

Granada, a successful adjudication claimant, asked the court to enforce the adjudication award. On the basis of its balance sheet, it was insolvent but had always paid its debts as they fell due, thanks to inter-company loans from the group of which it was a party. So could it successfully resist an application to stay execution of the judgment?

The principles to be applied by the court in exercising its discretion were summarised in ***Wimbledon v Vago***, as supplemented in ***Gosvenor London Ltd & Aygun Aluminium UK Limited***. The court said that there was obviously a risk that Granada would fail to repay the sum awarded in adjudication if required to do so. Doing the best that it could, the court considered that there was a reasonable likelihood that Granada would be unable to repay if and when required to do so, but on the basis of all the available evidence, it did not consider that a future inability to repay was more likely than not. Although Granada was indisputably balance sheet insolvent, as explained, the court did not think Granada would consequently probably be unable to repay. It took into account, in particular, the fact that the group had so far supported Granada, which was continuing to trade, apparently successfully.

Even if it was probable that Granada would be unable to repay, the court would have found that Granada's financial position was similar to its position when the contract was made. Both at the time of contracting and now, Granada's ability to repay depended on its parent's support and the court could see no grounds to believe that the likelihood of parental support had changed. It was important to remember that the price paid for services will often be affected by the financial strength of the provider of those services. A financially weak counter-party is unlikely to command as good a price as a financially solid counter-party. Granada was financially weak at the time of the contract, and its price was the lowest of any of the tenders received. In the absence of a material change in the financial position of Granada, it would be unfair and contrary to the spirit of the adjudication regime to allow the defendant to escape its liability to meet an adjudication award on the basis of the essentially unchanged financial position of Granada. The court declined to order an unconditional stay of execution or to order the judgment sum to be brought into court. To do so would effectively be to substitute security for actual cash flow.

Granada Architectural Glazing Ltd v RGB P & C Ltd (no link available)

3. Standard terms and conditions – are you bound if you don't read them?

At a meeting with a contractor, the sole director of a labour-only subcontractor agreed to, and signed, a one-page written subcontract order provided to it. The subcontractor read the reference to the contractor's terms and conditions in the order but thought nothing of it and did not ask for a copy of the five pages of terms and conditions. Was it bound by them?

The court referred to the textbook **Chitty on Contracts** (33rd edition) which stated the applicable rules laid down by the courts, in particular that it is unnecessary that conditions contained in a standard form document should have been read by the recipient, or that they should have been made subjectively aware of their import or effect. If the recipient did not know that there was writing or printing on it, they are not bound, but if they knew that the writing or printing contained or referred to conditions, they are bound. If the party tendering the document did what was reasonably sufficient to give the other party notice of the conditions, and if the other party knew that there was writing or printing on the document, but did not know it contained conditions, then the conditions will become terms of the contract between them. It is not necessary that the conditions themselves should be set out in the document tendered: they may be incorporated by reference, provided that reasonable notice of them has been given. In this instance, the subcontractor was bound by the terms.

Were those terms then incorporated into subsequent oral contracts? Again the court referred to **Chitty**, which stated that conditions will not necessarily be incorporated into a contract by reason of the fact that the parties have, on previous occasions, dealt with each other subject to those conditions. In this case, the court ruled that the mere conclusion of one prior subcontract on the basis of the five page terms was an insufficient basis for a course of dealing on those terms in respect of subsequent oral subcontracts. It also noted that any analysis of a course of dealing would have to take into account the entire history of

dealing which passed between the parties and many of the contracts made orally were not subject to written terms and conditions at all. A case based on a course of dealing must be capable of ascertainment with certainty and where two written subcontracts were on different revisions of the terms, it was quite impossible to say upon which set of terms a course of dealing was founded.

Everwarm Ltd v BN Rendering Ltd [2019] EWHC 3060

4. New valuation process for high rise buildings

The RICS, the Building Societies Association and UK Finance have agreed a new industry-wide valuation process for buildings above 18 metres (six storeys).

The **External Wall Fire Review** process, developed through extensive consultation with a wide range of stakeholders, will require a fire safety assessment to be conducted by a suitably qualified and competent professional. Only one assessment will be needed for each building and it will be valid for five years.

See: https://www.rics.org/uk/news-insight/latest-news/fire-safety/new-industry-wide-process-agreed-for-valuation-of-high-rise-buildings/

5. Scottish government launches consultation on retentions and CLC backs roadmap to zero retentions

The Scottish government has launched a consultation on cash retention in Scotland. As part of its review of the practice the Scottish government commissioned independent research from Pye Tait, which has been published with the consultation. The research illustrates the challenges with retentions, in particular understanding the extent to which the practice has a negative impact and what solutions might be effective and proportionate in addressing this. The consultation is also seeking views on the potential impacts of introducing legislation in this area.

Responses to the consultation must be submitted by 25 March 2020.

See: https://consult.gov.scot/industrial-sectors/retention-payments-in-construction/

The Construction Leadership Council has endorsed the Build UK Roadmap to Zero Retentions. It says this will build on existing CLC policy, as set out in the 2014 Construction Supply Chain Payment Charter, that the industry should work towards the abolition of cash retentions. The Charter set the objective of moving to zero cash retentions by 2025.

See: http://www.constructionleadershipcouncil.co.uk/news/clc-statement-endorsing-the-build-uk-retentions-roadmap/

6. Government circular explains effect of court judgment on ban on combustible materials on external walls

In November 2019 the High Court ruled that the consultation that introduced the amended Building Regulations banning the use of combustible materials in or on the external walls of buildings over 18 metres was inadequate in respect of the inclusion of products intended to reduce heat gain in a building (for example, blinds, shutters and awnings) within the ban. The Court consequently quashed one part of the 2018 regulations which had included within the ban *"a device for reducing heat gain within a building by deflecting sunlight which is attached to an external wall".*

The government circular explains that the practical effect of the judgment is that the regulations now exist as if that section had never been included in the ban. It also emphasises that the judgment decision does not otherwise affect the ban on the use of combustible material in and on the external walls of buildings.

The review of the ban, promised in the explanatory memorandum published with the regulations, is currently underway and the government will need to consider whether a further consultation is

necessary to clarify the position for products used to reduce heat gain within buildings, in addition to any other issues raised during the review. The circular reminds building control bodies that, in the meantime, they should take account of Building Regulations requirement B4(1) when considering whether to allow the use of combustible materials intended to reduce heat gain within a building in and on the external walls of buildings. It also draws their attention to paragraph 10.4 in volume 1, and 12.4 in volume 2, of the clarified version of Approved Document B, which says that, in relation to buildings of any height or use, consideration should be given to the choice of materials (including their extent and arrangement) used for the external wall, or attachments to the wall, to reduce the risk of fire spread over the wall.

See: https://www.gov.uk/government/publications/building-amendment-regulations-2018-circular-032019

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