



Legal developments in construction law

1. Does a Housing Grants Act payment mechanism need a final account?

A power cabling contract subject to the Housing Grants Act had no express provision for a final account. A contractor claimed that made its payment mechanism inadequate, so that a term should be implied by s.110 of the Act.

The court said the threshold question is whether the contract provides an adequate mechanism for determining what payments become due under the contract, and when. If it does, then it complies with s.110(1)(a) and there is no question of implying the default terms in the Scheme for Construction Contracts. Section 109 of the Act is concerned with interim or stage payments, but s.110 is not so limited. Section 110(1)(a) requires the court to take a holistic view of the overall contract payments mechanism and to ask whether it is adequate for determining what payments become due under the contract, and when.

In many construction contracts the parties agree that interim invoices can be submitted in respect of the then estimated value of the works, with the true value of the works to be determined at the time of the final account. Nothing, however, in sections 109 and 110 necessarily requires the parties to make separate provision for a final account. The question is broader, namely whether the payment mechanism is adequate for determining what payments become due under the contract, and when.

In the court's judgment, section 110(1)(a) requires the court to exercise a value judgment in assessing whether the payment mechanism is adequate for determining what payments become due under the particular contract, and when. This is essentially a question of fact to which the answer will vary depending upon the circumstances and other terms of the contract. In the case in question, because of the outstanding factual and legal disputes, the court could not rule on the question of adequacy, and dismissed the strike-out, or, alternatively, summary judgment, applications made.

JSM Construction Ltd v Western Power Distribution (West Midlands) Plc [2020] EWHC 3583

2. Adjudicator failure to exhaust jurisdiction – does it have to be deliberate?

An employer under NEC3 resisted enforcement of an adjudication award, alleging that the adjudicator had failed to exhaust his jurisdiction, in failing to consider their argument as to the proper contractual basis for assessment and payment. The contractor accepted that failure to exhaust jurisdiction might render a decision unenforceable, but only where the failure was deliberate and not inadvertent. Was that correct?

After noting that an adjudicator does not have expressly to address every point taken by the parties in their submissions, and that it is not a breach of natural justice if one particular sub-issue

is not referred to in the decision, the Scottish court said that a distinction between deliberate and inadvertent failure to address the critical issues did not emerge clearly from the Scottish case law. The test that has been adopted by the Scottish courts is, however, similar to the “touchstone” identified by the English court in **KNN Coburn LLP v GD Holdings Ltd**, that the adjudicator did not effectively address the major issues raised on either side.

The Scottish court ruled that the adjudicator did not address the issue in question, which was a critical issue raised by the employer, and in failing to do so, the adjudicator had failed to exhaust his jurisdiction, and his decision could not be enforced.

The court did not consider it necessary to characterise the adjudicator’s failure to exhaust jurisdiction as deliberate before it could be held to be unenforceable but, if it had to decide the point, it considered that the adjudicator’s failure was deliberate; on two separate occasions the employer had insisted that the adjudicator had to decide the issue. As there had been a failure to exhaust jurisdiction, the contractor’s alternative argument, based on inadequacy of reasons, did not have to be considered. If, as the court found, the adjudicator failed to address the critical issue, no question of adequacy or inadequacy of reasoning could logically arise.

Barhale Ltd v SP Transmission plc at: https://www.bailii.org/scot/cases/ScotCS/2021/2021_CSOH_2.html

3. 1 March 2021 start for VAT reverse charge for construction services

From 1 March 2021 the domestic VAT reverse charge must be used for most supplies of building and construction services.

The charge applies to standard and reduced-rate VAT services:

- for individuals or businesses who are registered for VAT in the UK
- reported within the Construction Industry Scheme.

See: <https://www.gov.uk/guidance/vat-domestic-reverse-charge-for-building-and-construction-services>

4. NEC launches new facilities management contracts

The NEC has launched two new facilities management contracts, the NEC4 Facilities Management Contract (FMC) and NEC4 Facilities Management Subcontract (FMS), produced with the support of the Institute of Workplace and Facilities Management (IWFM).

Like the NEC4 Term Service Contract (TSC) and its short (TSSC) and subcontract (TSS) versions, the new contracts are designed for appointing suppliers for a defined period of time to manage and provide a service.

The NEC says that both the TSC and FMC can be used for any type of service, but users in certain sectors may find the facilities management versions more accessible or user-friendly, due to the terminology and processes being more closely aligned to reactive maintenance.

The formal first editions are to be released later this year, along with a short form (FMSC) and short subcontract (FMSS) for lower risk and less complex services.

See: https://www.neccontract.com/About-NEC/News-and-Media/NEC-launches-new-NEC4-facilities-management-forms?utm_source=Communicator&utm_medium=email&utm_content=ImageLink42&utm_campaign=8805537&ccCt=G4Qnq2aio%7e4uomatGQoMmwRMIchHt9zNhNiybmxDnyPPdV9vGXQPU7BLdDPXGoSX

and

<https://www.neccontract.com/About-NEC/News-and-Media/NEC4-Facilities-Management-Contracts-Update>

5. New construction materials watchdog

The government has announced it is establishing a national regulator for construction products. The regulator will have strong enforcement powers, including power to remove any product from the market presenting a significant safety risk, to prosecute any companies not complying with product safety rules and the ability to conduct its own product-testing when investigating concerns. Businesses must ensure that their products are safe before being sold in addition to testing products against safety standards.

The regulator will operate within the Office for Product Safety and Standards which will be expanded and given up to £10 million to establish the new function. It will work with the Building Safety Regulator and Trading Standards to encourage and enforce compliance.

The government has also commissioned an independent review to examine weaknesses in previous testing regimes for construction products, and to recommend how abuse of the testing system can be prevented. It will be led by a panel of experts with regulatory, technical and construction industry experience and is to report later this year with recommendations.

See: [https://www.gov.uk/government/news/new-regulator-established-to-ensure-construction-materials-are-safe#:~:text=New national construction products regulator,are built from safe materials.&text=Residents will be protected through, today \(19 January 2021\).](https://www.gov.uk/government/news/new-regulator-established-to-ensure-construction-materials-are-safe#:~:text=New national construction products regulator,are built from safe materials.&text=Residents will be protected through, today (19 January 2021).)

6. UK public procurement post-Brexit – quick guide

Mayer Brown has produced an update, including a Quick Guide, on Post-Brexit Procurement. The first of a two-part series examines the immediate legal and practical challenges arising from Brexit from 1 January 2021, and the impact on UK suppliers of the EU-UK Trade and Cooperation Agreement and the WTO Government Procurement Agreement.

See: <https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2021/01/uk-public-procurement-postbrexit.pdf>

Part II, available soon, will look at what the future holds for the UK regime under proposed reforms. The government has published a Green Paper setting out its proposals to comprehensively streamline and simplify the current public procurement regulations.

The consultation closes on 10 March 2021.

See: <https://www.gov.uk/government/consultations/green-paper-transforming-public-procurement>

7. CLC Site Operating Procedures: Version 7

The Construction Leadership Council has published version 7 of its Site Operating Procedures. It says that the changes in version 7 are minor, including updated guidance on self-isolation and shielding and the removal of the requirement to display a QR code in site canteens.

See: <https://www.constructionleadershipcouncil.co.uk/news/site-operating-procedures-version-7-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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