MAYER | BROWN

March 2022

Legal developments in construction law

1. A defective extension is demolished and rebuilt – but what about mitigation of loss?

In a claim by home owners against their builder in respect of defective and incomplete work, the most significant issue was whether it was necessary to demolish the extension it had built and reconstruct the foundations and steelwork. How did the court approach the issue?

The court said that, even if the defects did not (contrary to its view) compel or necessitate the demolition or rebuild, the relevant question, as a matter of law, was whether the claimants, in relying on their expert's opinion, had failed to act reasonably/mitigate their loss. Both parties accepted that the relevant principle of law was encapsulated in the case of ***The Board of Governors of the Hospitals for Sick Children v McLaughlin & Harvey plc***, where the judge had said that the plaintiff who carries out repair or reinstatement of their property must act reasonably.

They can only recover, as damages, the costs which the defendant ought reasonably to have foreseen that they would incur; the defendant would not have foreseen unreasonable expenditure. Reasonable costs do not, however, mean the minimum amount which, with hindsight, it could be decided would have sufficed. When the nature of the repairs are such that the plaintiff can only make them with the assistance of expert advice, the defendant should have foreseen that they would take such advice and be influenced by it.

When parties put forward rival schemes, the court has to choose between them, or variants of them. The assessment has to be made on the basis of what the plaintiff can reasonably do. It is not for the court to consider afresh what should have been done and what costs should have been incurred, either as a check on the reasonableness of the plaintiff's actions or otherwise.

The court in this case noted that asking the question "*Could the works have been provided in an alternative scheme for a lower cost?*" and answering it "*Yes*" was not an answer of itself to the claimants' claims. Even if the costs were high or very high, that did not mean they were objectively too high or unreasonable and the court accepted the claimants' expert's evidence that the costs were, in the overwhelming number of cases, reasonable for remedial works of this nature. The claimants' decision to demolish and rebuild was therefore necessary and appropriate, and not unreasonable to take on proper expert advice.

Struthers & Anor v Davies (t/a Alastair Davies Building) [2022] EWHC 333

2. Termination notice sent by the wrong person – did that matter?

The employer under an RIBA building contract sent a Notice of Intention to Terminate to the contractor by recorded delivery and email, later followed by a Notice of Termination. There was, however, a problem. The contract required the Contract Administrator to issue the Notice of Intention but the employer had issued it. Did that matter?

It is established law that termination clauses must be construed strictly and, although the language of the relevant contract clause did not say that only a Contract Administrator could issue the Notice of Intention, the court considered, as a matter of interpretation, that that was the case, and said there were sound reasons for requiring the initial Notice to come from the Contract Administrator, rather than the employer.

The court was not referred to any case where the wrong person had sent a contractual notice triggering termination and the notice was held to be valid. In addition, in the absence of first-hand factual evidence from the employer, the court was not satisfied that the contractor did receive the Notice of Intention a clear 14 days before the subsequent Termination Notice was sent and received, as the contract required. Even if, therefore, the Notice of Intention was valid, it had not been shown that the contractual Notices were properly served on the contractor.

The court was in no doubt, however, that the contractor was in repudiatory breach of the contract. It had abandoned the works in refusing to perform the contract, and in having given up any attempt to comply with its obligations to continue and complete the works. In addition, the contractor's approach to the work on site was a failure to regularly and diligently progress the works and case law demonstrated that such a failure can, in an appropriate case, amount to repudiatory breach. The contractor's egregious self-caused failures to progress regularly and diligently were, in fact and law, repudiatory in nature. The employer was entitled to accept the repudiatory breach and the contractor accepted that the Termination Notice operated as an acceptance of the repudiation, even if it was not a contractually valid Notice. The contractor was consequently liable for the additional reasonable costs of completing any of the works that were incomplete at the relevant date.

Struthers & Anor v Davies (t/a Alastair Davies Building) & Anor [2022] EWHC 333

3. Adjudicator resigns on jurisdiction issue – was he right not to take the 'ostrich' option?

An adjudicator resigned because he considered that one of the parties in the adjudication was not a party to and/or identified in the contract on which the adjudication had been referred and he therefore had no jurisdiction. He sent in his fee note for time spent in the failed adjudication but, as he had not produced an enforceable adjudication award, was he entitled to a fee?

His terms and conditions, drafted in the light of the judgment in ***PC Harrington Contractors Ltd v Systech International Ltd***, and to which the parties did not object, provided that if the adjudication ceased "*for any reason whatsoever prior to a Decision being reached*" a fee invoice would be raised immediately and would be due for payment seven days after the date of the invoice. The terms also provided that, save for any act of bad faith by the adjudicator, he would also be entitled to payment of his fees and expenses if the decision was not delivered and/or proved unenforceable.

Although the court, at first instance, ruled that, on the true construction of the terms and conditions, the adjudicator was entitled to be paid for the work done, that court also said, noting that, when he resigned, there was no dispute as to the identity of the contracting parties or as to his jurisdiction, his reasoning in deciding to resign on the basis that he had no jurisdiction, when that was not an issue the parties had referred to him, was wrong. But did the Court of Appeal agree?

The Court of Appeal said that under paragraph 13 of the Scheme for Construction Contracts, which applied in this case, the adjudicator has to investigate the matters "*necessary to determine the dispute*". If an adjudicator considers it necessary to work out if they have the jurisdiction to determine the dispute in the first place, then they are duty bound to consider and determine that issue. That, in turn, means that they should raise that issue with

the parties before coming to their own conclusion. And it would strike at the heart of an efficient system of adjudication and adjudication enforcement if adjudicators were encouraged to believe that they must stay silent when they spot a potential jurisdictional problem, and wait for the parties to raise it before considering it themselves, an approach that the Court described as the 'ostrich' option. On this issue, the adjudicator was entitled to decline jurisdiction under paragraph 13 of the Scheme. In all the circumstances of the case, he had reasonable cause to resign.

Steve Ward Services (UK) Ltd v Davies & Davies Associates Ltd [2022] EWCA Civ 153

4. So when is an adjudicator who resigns, entitled to their fees?

In ***Steve Ward Services (UK) Ltd v Davies & Davies Associates Ltd***, the Court of Appeal considered the leading case on an adjudicator's entitlement to fees when the adjudication does not go as expected, ***PC Harrington Contractors Ltd v Systech International Ltd***, and summarised the applicable principles on the issue:

- Under the Scheme for Construction Contracts, an adjudicator is entitled to resign. No reason is required.
- Whether or not the adjudicator is entitled to fees following any such resignation depends on the precise terms of their appointment, and the conduct of the adjudicator.
- The court's consideration of conduct may involve asking why the adjudicator resigned, so it may matter whether the adjudicator was right or wrong to resign.
- A finding that the resignation involved, or was the result of, default/misconduct or bad faith, depending on the terms of appointment, will usually be sufficient to disentitle the adjudicator from recovering fees. Conversely, in the absence of such a finding, there will usually be an entitlement to the fees incurred prior to resignation.

Clause 1 of the adjudicator's terms of appointment said that, save for any act of bad faith by the adjudicator, he would be entitled to payment of his fees and expenses if the decision was not delivered and/or proved unenforceable. The Court of Appeal agreed with the first instance judge that Clause 1 meant that, in the absence of bad faith, the adjudicator was entitled to be paid his fees. Was there bad faith?

In concluding that the adjudicator was not guilty of default or misconduct, much less bad faith, the Court of Appeal noted that an act of bad faith will usually require some measure of dishonesty or unconscionability. There is a material difference between default or misconduct (an expression used in the Scheme), and bad faith. For the purposes of Clause 1, a finding of bad faith must involve some form of unconscionable or deliberately unacceptable conduct on the adjudicator's part.

The Court also ruled that section 3 of the Unfair Contract Terms Act (dealing with the rendering of a contractual performance substantially different from what was reasonably expected) did not apply to clause 1, and even if it did, it was reasonable. Such terms are commonly found, and in the Court's experience, ubiquitous. There was no inequality of bargaining power, both sides were represented when the contract was made and most importantly of all, clause 1 made complete commercial sense and fitted easily with other terms of the contract.

Steve Ward Services (UK) Ltd v Davies & Davies Associates Ltd [2022] EWCA Civ 153

5. April update on the way for JCT Project Bank Account documentation

An updated version of JCT's Project Bank Account documentation will be available in April 2022 for those who wish to use a project bank account as part of fair payment practice. The documentation, designed to support the Government's Fair Payment Guidelines as part of the Construction Strategy, consists of:

- JCT Project Bank Account Agreement (PBA) (including the JCT form of Joining Agreement (PBA/JA);
- enabling provisions for the building contract and subcontracts, requiring the relevant parties to enter into the PBA;
- guidance notes.

See: https://www.jctltd.co.uk/product/jct-project-bank-account-documentation-2022-pba-2022

6. Minister's deadline for developer agreement on remediation of fire safety defects

The Secretary of State for Levelling Up, Housing and Communities, Michael Gove, responded to the Home Builders Federation's proposals to remediate unsafe buildings. He said that the proposal fell short of full and unconditional self-remediation, that he expected all developers to commit to full self-remediation of unsafe buildings without added conditions or qualifications and asked the Federation to continue working with officials to develop the proposals further.

Mr Gove expects developers to make public commitments and said that, if an agreement was not reached by the end of March, the government would impose a solution in law and had taken powers to impose this solution through the Building Safety Bill.

See:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1059257/07.03.2022_Letter_to_HBF_from_DLUHC_SoS.pdf

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