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Legal developments in construction law

1. Client agrees to pay "the total cost of works" but what did that mean?

Under an interior refurbishment contract, the designer provided the client with weekly estimates for each element of the work. Once approved, invoiced and paid by the client, the designer would place orders and procure the relevant furniture and fittings. The contract referred to "the total cost of works" but how should that phrase be interpreted. Was it the total cost of the works to the designer, after adjusting for trade prices or discounts, or was it the total cost of works to the client, by reference to the accepted and paid estimates?

The Court of Appeal noted that, in some building contract forms, references to cost will be to the cost to the contractor undertaking the work but, in this case, an assumption that the designer was the equivalent of a contractor, and that this was some form of cost-plus construction contract, would be contrary to the contract terms and gave rise to other difficulties. It would, among other things, require rewriting the contract by adding "to the (designer)" after "total cost". Adding those words, however, would be contrary to the general principles of construction and, other than in exceptional circumstances, the court should never add words to a contract so as to construe what is already there.

Those general principles of construction, comprehensively set out in ***Rainy Sky SA v Kookmin Bank; Arnold v Britton and Wood v Capita***, are that the contract must be construed against the surrounding circumstances, to ascertain what a reasonable person would have understood the parties to have meant; that this should be done primarily by reference to the language that the parties have used; and that only if the meaning of the words used is uncertain or ambiguous does the court need to have regard to other matters, such as commercial common sense or excessive literalism.

The Court confirmed that, on the particular terms of this contract, and the way in which it operated, the designer was entitled to the sums it had invoiced.

Alebrahim v BM Design London Ltd [2022] EWCA Civ 183

2. Court emphasises 'robust' judicial approach to adjudication enforcement

An employer resisted enforcement of an adjudicator's award in favour of the contractor, claiming breaches of natural justice. It alleged that the adjudicator's findings were based on arguments not advanced by either party and not canvassed with them. It also claimed that, in refusing to accept the defence of rectification regarding the contractual rate for liquidated damages, the adjudicator took a restrictive view of his jurisdiction which he did not canvass with the parties, and that he had thereby failed to exhaust his jurisdiction.

In rejecting both arguments, the court reiterated the robust judicial approach to adjudication enforcement, noting the Court of Appeal's ruling that the objective which underlies the Construction Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which they have decided was not the question referred to them or the manner in which they have gone about their task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator.

In the overwhelming majority of cases, said the Court of Appeal, the proper course for the unsuccessful party in an adjudication under the scheme must be to pay the amount ordered. If they do not accept the adjudicator's decision as correct (on the facts or in law), they can take legal or arbitration proceedings to establish the true position. To challenge the adjudicator's decision on the ground that they have exceeded their jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense.

The court in this case noted that the principles of natural justice require that the parties to an adjudication are confronted with, and given a fair opportunity to respond to, the main points relevant to the dispute and the decision. An adjudicator cannot, and is not required to, consult the parties on every element of their thinking leading up to a decision, even if some elements of their reasoning may be derived from, rather than expressly set out in, the parties' submissions. But where an adjudicator considers that the referring party's claims as made cannot be sustained, yet they themselves identify a possible alternative way in which a claim of some sort could be advanced, they will normally be obliged to raise that point with the parties in advance of their decision.

Failure of an adjudicator to consider part of a defence to a claim may also render their decision unenforceable but that failure must be deliberate, rather than inadvertent, and material, having a potentially significant effect on the overall result of the adjudication.

Bilton & Johnson (Building) Co Ltd v Three Rivers Property Investments Lt [2022] EWHC 53 (TCC)

3. Court of Appeal says exclusion clause does not block £80 million claim

A dispute about the provision of an IT system that was very late, and, ultimately, not delivered at all, involved interpretation of an exclusion clause. The clause excluded liability for, amongst other things, "…loss of profit, revenue, savings.." but did those words apply to wasted expenditure that the customer had incurred before the IT supplier had wrongfully repudiated the contract? On the answer to that question rested liability for at least £80 million.

The Court of Appeal, in ruling, for a number of reasons, that liability for wasted expenditure was not excluded, said that the objective meaning of the exclusion clause, as understood by a reasonable person in the position of the parties, was that the clause did not exclude a claim for expenditure incurred, but wasted because of the other party's repudiatory breach. Claims for costs actually incurred but wasted, were not referred to in the clause and, on the natural and ordinary meaning of the words, were not included in "loss of profit, revenue [or] savings". The well-known principles of construction set out in three recent Supreme Court cases led inexorably to that conclusion.

This view was confirmed by the principles relating to the construction of exclusion clauses. The more valuable the right, the clearer the language of any exclusion clause needs to be; the more extreme the consequences, the more stringent the court must be before construing the clause in a way that allows the contract-breaker to avoid liability for what may be their catastrophic non-performance, and there was nothing in the exclusion clause to suggest that the costs which the customer inevitably incurred in the expectation that the project would be completed satisfactorily, would somehow be irrecoverable if the supplier repudiated the contract.

The types of loss expressly identified by the words in the exclusion clause (loss of profit, revenue, savings) were all of a similar kind, often considered as types of consequential loss and which, because they depend on hypotheticals, inevitably involve at least an element of speculation. Claims for wasted expenditure are entirely different; if the victim of a breach of contract has spent money in anticipation

that the contract would be performed, then their loss, easy to ascertain, is the opposite of speculative. They are precisely ascertainable and not usually regarded as claims for consequential loss. It is not uncommon for claims for wasted expenditure to be the subject of an exclusion clause of this type, but such claims were not excluded in this case.

Some types of loss of bargain damages, like loss of profit, revenue or savings, were excluded by the exclusion clause. Other types, such as re-procurement costs and wasted expenditure, were not. And to characterise "wasted expenditure" as a method of calculating "lost profits, revenues or savings" as the judge at first instance had done, was an unjustified leap of reasoning.

Soteria Insurance Ltd v IBM United Kingdom Ltd [2022] EWCA Civ 440

4. CLC publishes guidance note in response to Ukraine crisis

The Construction Leadership Council has published Industry response to the Ukraine Crisis. Guidance Note 1 which provides guidance outlining the practical steps that all parts of the industry can take to mitigate the market impacts of the current crisis in Ukraine.

The Note states that all projects are likely to be affected by issues triggered by the Ukraine conflict, ranging from inflation problems to issues associated with supply chain stability. The crisis may not be resolved quickly, and businesses should be ready for an extended period of disruption.

Checklists have been produced for main contractors, subcontractors and clients.

See: https://www.constructionleadershipcouncil.co.uk/wp-content/uploads/2022/03/CLC-Press-Release-29-March-2022-CLC-guides-firms-on-impacts-of-Ukraine-crisis.pdf

5. EWS1 form and RICS valuation guidance updated

Following the withdrawal, in January, of the Government Consolidated Advice Note, and its replacement with PAS 9980:2022, the EWS1 form and RICS valuation guidance have been updated.

The RICS says that the EWS1 form and guidance remain under constant review and envisages, as more Fire Risk Assessments are carried out under the PAS9980, with EWS appraisals, the need for an EWS1 form to drop away.

The RICS also strongly recommends that all completed EWS1 forms are uploaded to the Fire Industry Association portal to avoid duplication.

See: https://www.rics.org/uk/news-insight/latest-news/news-opinion/update-to-ews1-form-and-rics-valuation-guidance/

6. New NEC ECI practice note

The NEC has released a new practice note on Early Contractor Involvement, based on secondary option X22, for use with NEC4 Options C or E.

The practice note considers the issues to be taken into account at the procurement stage and gives advice on how to establish the most advantageous offer. It provides guidance on what should be included in the Pricing Information, how to manage submissions in stage 1 and how to agree a price for the construction stage.

See: NEC news and articles (neccontract.com)

7. IPA issues PFI contract expiry guidance

The Infrastructure and Projects Authority has issued practical guidance for contracting authorities on managing PFI contract expiry and service transition. The guidance, which applies to PFI contracts in England across all sectors, is aimed at PFI contracting authorities, including Senior Responsible Owners and PFI contract management teams, but says it should also be useful to private sector investors, funders, asset managers and market suppliers.

See: IPA_Guidance_-_Preparing_for_PFI_Contract_Expiry.pdf (publishing.service.gov.uk)

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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