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Legal developments in construction law

1. Adjudication: counting disputes, exam papers and natural justice (again)

An employer faced with an adjudication award against it, in favour of a claimant in administration, asked the court for declarations that the adjudicator had no jurisdiction. In rejecting the employer's original claims, but granting a declaration in respect of an additional argument that there had been a failure of natural justice, the court restated some key adjudication principles.

The parties had entered into a framework agreement and a call-off contract and the dispute was said to relate to, and to arise in relation to, both contracts. A dispute said to arise under more than one contract cannot, in general, be the subject of one reference to adjudication, because that would contravene the well-established principle that only a single dispute can be referred:

The contract provisions did in fact deal with this issue, but the court also referred to ***Witney Town Council v Beam Construction (Cheltenham) Ltd***, where the judge had said that, if there is a clear link between two or more arguably separate claims, that may well point to there being one dispute. A useful, if not invariable, rule of thumb is that, if disputed claim no 1 cannot be decided without deciding all or parts of disputed claim no 2, that establishes such a clear link and points to there being only one dispute. In this case the court said that the individual declarations sought by the notice of adjudication were all staging posts along the way to the resolution of the ultimate dispute and the ultimate remedy claimed was a financial payment under the call-off contract.

In rejecting another challenge, the judge noted that the court should not decide, on an enforcement claim or on a similar Part 8 claim, whether or not the adjudicator's decision was right or wrong. The court can only decide whether or not the decision is unenforceable on well-established and limited grounds, such as lack of jurisdiction or procedural unfairness. An adjudicator's decision is not to be treated like an answer to an exam paper, where they have to answer every single point raised. It is enough that they decide the dispute referred to them and do not fail to deal with the key points raised by the parties in such a way as to breach principles of natural justice.

The two principles of natural justice or procedural fairness are that the person affected has the right to prior notice and an effective opportunity to make representations before a decision is made and the right to an unbiased tribunal. The breach must also be material, and will be, if the adjudicator failed to bring to the parties' attention a point or issue on which they ought to have been given an opportunity to comment, if it is either decisive, or of considerable importance to the outcome of the dispute, and is not irrelevant or peripheral.

The employer did succeed on this further ground because the decision was found to have been reached in a procedurally unjust manner.

Liverpool City Council v Vital Infrastructure Asset Management (Viam) Ltd [2022] EWHC 1235

2. Pay less notice referred to the wrong application – but did that matter?

A subcontract pay less notice issued by a contractor referred to the subcontractor's application 25, but the contractor claimed that the notice was a valid notice in response to application 24. It said that the contract requirements for timing and content had been satisfied and, properly construed, the terms of the notice would have indicated to the reasonable recipient that it did not intend to make any further payment in respect of application 24 or 25. But did the court agree?

The court summarised, from the case law, the approach to be taken to the interpretation of contractual notices:

- the question is not how a recipient understood a notice (including those under the Construction Act payment regime); instead, the issue is how a reasonable recipient would have understood the notices, taking into account the "relevant objective contextual scene", and, amongst other things, crediting the reasonable recipient with knowledge of the relevant contract;
- the notice's purpose will be relevant to its construction and validity; the court will take a common sense, practical, view of the contents of a pay less notice and will not adopt an unnecessarily restrictive or overly legalistic interpretation;
- there is no principled reason for adopting a different approach to different kinds of payment notices;
- to be valid, any payment notice must comply with the statutory (and, if more restrictive, the contractual) requirements in substance and form; payment and pay less notices must clearly set out the sum due and/or to be deducted and the basis on which they are calculated; beyond that, their validity is a question of fact and degree;
- an additional question is whether the document was intended (assessing the intention objectively, in context) to be a valid notice, free from ambiguity;
- although payment notices must make plain what they are, there is no requirement for a particular type of notice, such as a pay less notice, to have that title or to refer to the specific contract clause in order to be valid;
- one way to test a pay less notice's validity is to see whether it provides an adequate agenda for an adjudication as to the true value of the works.

The court accepted that a pay less notice need only identify the sum that the payer considers to be due for payment "*on the date the notice is served*" but considered that the notice, which expresses an intention to pay less than the notified sum, must be referable to the payment notice in which the notified sum is identified. There is no absolute requirement for the pay less notice to make express reference to the notice to which it is responding, but it must be clear which notice it is responding to.

Viewed objectively, the court considered that the reasonable recipient in the subcontractor's shoes would not have understood the pay less notice to be responding to application 24. There was nothing on the face of the notice or the payment certificate to which it was attached to indicate that that was intended. In addition, the notice could not have provided an agenda for an adjudication in respect of the sum due because there was a mismatch; the notice was responding to a different application, assessed on a different date and due for payment on a later date.

Advance JV & Ors v Enisca Ltd [2022] EWHC 1152

3. Litigation and legal advice privilege – what documents do not have to be disclosed?

Court or arbitration proceedings to resolve construction disputes frequently present the parties with the challenge of disclosing to each other substantial quantities of project documents. Some, however, do not have to be disclosed if they attract the protection of 'privilege'. There are two types, litigation privilege and legal advice privilege, and in ***Northumbria Healthcare NHS Foundation Trust v Lendlease Construction (Europe) Ltd*** the court reviewed when this protection applies.

Litigation privilege covers all documents brought into being for the purposes of litigation, while legal advice privilege covers communications between lawyers and their clients where legal advice is sought or given.

Litigation privilege

Litigation privilege protects communications between parties or their solicitors and third parties, for the purpose of obtaining information or advice in connection with existing or contemplated litigation, but only when:

- litigation is in progress or contemplation;
- the communications were made for the sole or dominant purpose of conducting that litigation;

- which must be adversarial, not investigative or inquisitorial.

The party claiming privilege has the burden of proof and must establish that litigation was reasonably contemplated or anticipated. Where litigation has not started at the time of the communication, it has to be 'reasonably in prospect'; the prospect of litigation need not be greater than 50% but it must be more than a mere possibility. The party must also show that the relevant communications were for the *dominant* purpose of either enabling legal advice to be sought or given, and/or seeking or obtaining evidence or information to be used in or in connection with such anticipated or contemplated proceedings. Where communications were for a number of purposes, the party claiming privilege must establish that the dominant purpose was litigation.

An assertion of privilege and a statement of a communication's purpose are not determinative of privilege and are evidence of a fact which may need to be independently proved. The court will carefully scrutinise the claim to privilege and the witness statements asserting privilege (if it comes to that) should be as specific as possible.

Legal advice privilege

The test for legal advice privilege is whether the communication or other document is made confidentially for the purpose of legal advice. Those purposes have to be construed broadly. Communications between a party and its solicitors are privileged from production, provided they are confidential and written to, or by, the solicitor in their professional capacity, and for the purpose of getting legal advice or assistance for the client.

For these communications to fall within the scope of legal advice privilege, they have to be created or sent for the dominant purpose of seeking legal advice and the communications covered by this privilege include documents that evidence the substance of the confidential communications. The privilege extends to internal communications where an employee has been tasked with seeking, and receiving, such legal advice.

The court also considered the approach to be taken in cases where a claim to privilege is challenged.

See paragraphs 81-89 of Northumbria Healthcare NHS Foundation Trust v Lendlease Construction (Europe) Ltd [2022] EWHC 1266

4. New fire safety guidance and changes to building regulations

The government has made changes to fire safety guidance and building regulations. All new residential buildings over 11m will now have to include a Secure Information Box to give fire and rescue services access to important details about a building in the event of fire. New residential developments over 18m will also have to incorporate an Evacuation Alert System to help fire and rescue services inform residents of a change in evacuation strategy, during an incident.

Also introduced are tougher standards for external wall materials on new medium-rise blocks of flats. Further regulatory updates extend the previously announced ban on the use of combustible materials in and on the external walls of new blocks of flats over 18m, in England (as well as hospitals, student accommodation and dormitories in boarding schools), to new hotels, hostels and boarding houses of this height.

The latest changes will also ban Metal Composite Material panels with unmodified polyethylene core (MCM PE), on all new buildings at any height. New statutory guidance will also be introduced to restrict the combustibility of materials used in and on the external walls of residential buildings, between 11-18m in height and other updates to the regulations are being put forward. The amending regulations come into force on 1 December 2022 (see: The Building etc. (Amendment) (England) Regulations 2022 (legislation.gov.uk))

The government has also published an update on its technical review of guidance on building regulations for fire safety, Approved Document B, and the evidence supporting it.

See: https://www.gov.uk/government/news/fire-safety-guidance-strengthened-for-new-high-rise-homes; and https://www.gov.uk/guidance/approved-document-b-2022-update

5. Procurement Bill now on its way through Parliament

The Procurement Bill has had its first and second readings in the House of Lords and the committee stage (detailed line by line examination of the Bill) starts on 4th July.

The purpose of the Procurement Bill is to reform the UK's public procurement regime following Brexit and to give effect to the policies set out in

the government's Green Paper 'Transforming Public Procurement', published in December 2020, and the government's response to the consultation, published in December 2021.

The new regime is to provide a number of sector-specific features, including tailored rules for defence and security procurement and the Bill will also amend Part 2 of the Defence Reform Act 2014 which regulates single source contracts (contracts for goods, works or services for defence purposes awarded other than through competition).

The Bill will replace a number of existing statutory instruments, most notably the Public Contracts Regulations 2015, Utilities Contracts Regulations 2016, Concession Contracts Regulations 2016 and the Defence and Security Public Contracts Regulations 2011.

See: Procurement Bill [HL] - Parliamentary Bills - UK Parliament

6. Sewerage and water undertaker infrastructure project contracts to be excluded from Construction Act

An Exclusion Order which comes into force on 1 October 2022 excludes, from Part 2 of the Construction Act, infrastructure project contracts where a party to the contract is a sewerage or water undertaker and the contract relates to a project designated by the Water Services Regulation Authority as a direct procurement for customers project in accordance with the conditions of the relevant undertaker's appointment.

Such contracts must also involve the making of regular payments by reference to actual costs incurred and which become due after one or more parts of the construction operations are completed and are capable of performing a sewerage or water service.

The Order also excludes section 110(1A) of the Act from applying where a party to such a contract enters into a subcontract. (Section 110(1A) provides that the requirement for an adequate payment mechanism is not met if payment is conditional on obligations being performed under another contract.)

See: The Construction Contracts (England) Exclusion Order 2022 (legislation.gov.uk)

7. 28 June: first Building Safety Act provisions in force

On 28 June 2022, some provisions of the Building Safety Act (Building Safety Act 2022 (legislation.gov.uk) came into force, including the amendments to the Defective Premises Act, the new limitation periods that apply to the Act and section 38 of the Building Act 1984, provisions as to liability and limitation periods for construction and cladding products, building liability orders and remediation costs under qualifying leases.

See also: The Building Safety Act 2022 (Commencement No. 1, Transitional and Saving Provisions) Regulations 2022 (legislation.gov.uk)

8. Building Safety Act secondary legislation programme

Eight sets of draft regulations were issued with the draft Building Safety Bill but were withdrawn after the Bill received Royal Assent. The HSE reports that the Department for Levelling Up, Housing and Communities has advised that they will be introducing a programme of secondary legislation (the proposed actual regulations), for consultation, consistent with the transition timetable published with the draft Bill (see PowerPoint Presentation (publishing.service.gov.uk)), and that they expect to consult on the first regulations over the summer. (See the first consultation at item 9 below.)

9. Consultation on definition of higher-risk buildings for new safety regime

The government is seeking views on the regulations that define higher-risk buildings for the new building safety regime.

The consultation, which does not relate to buildings in the leaseholder protection scheme or the building remediation funds, closes on 21 July.

See: https://www.gov.uk/government/consultations/consultation-on-the-higher-risk-buildings-descriptions-and-supplementary-provisions-regulations

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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