MAYER | BROWN

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Legal developments in construction law

1. When does a course of dealing result in t's & c's applying?

In deciding whether standard terms and conditions were incorporated in a contract for meat storage, the court reviewed case law, including ***Transformers and Rectifiers Ltd v Needs Ltd***, which set out these principles in relation to a course of dealing:

- Where A makes an offer on its conditions and B accepts that offer on its conditions and, without more, performance follows, the correct analysis, assuming that each party's conditions have been reasonably drawn to the attention of the other, is that there is a contract on B's conditions.
- Where there is reliance on a previous course of dealing it does not have to be extensive. Three or four occasions over a relatively short period may suffice.
- The course of dealing by the party contending that its terms and conditions are incorporated has to be consistent and unequivocal.
- Where trade or industry standard terms exist for the type of transaction in question, it will usually be easier for a party contending for those conditions to persuade the court that they should be incorporated, provided that reasonable notice of the application of the terms has been given.
- A party's standard terms and conditions will not be incorporated unless that party has given the other party reasonable notice of those terms and conditions.
- It is not always necessary for a party's terms and conditions to be included or referred to in the documents forming the contract; it may be sufficient if they are clearly contained in or referred to in invoices sent subsequently.
- By contrast, an invoice following a concluded contract effected by a clear offer on standard terms which are accepted, even if only by delivery, will or may be too late.

The court also noted in the case law and textbook commentary that:

- as well as a course of dealing, in order to imply terms, they would have to be necessary for business efficacy or so obvious as to go without saying; and
- a statement that terms and conditions are available on a website may be sufficient, in the case of a contract between commercial parties.

Scotbeef Ltd v D&S Storage Ltd [2022] EWHC 2434

2. Court puts SCL Protocol and delay analysis methods in perspective

In deciding a dispute about significant cost increases and delay overruns on a bus station project the court had to deal with time and money claim issues, which included the status of the Society of Construction Law Protocol and the delay analysis methods it identifies.

There was criticism by delay experts of the selection of a delay analysis method and deviation from the chosen method but the court noted that the Protocol itself states that:

- its object is to provide useful guidance;
- it is not intended to be a contract document nor to be a statement of the law;
- its aim is to be consistent with good practice rather than a benchmark of best practice; and
- its recommendations should be applied with common sense.

It also states that: "*irrespective of which method of delay analysis is deployed, there is an overriding objective of ensuring that the conclusions derived from that analysis are sound from a common sense perspective*".

The court said it would be wrong to proceed on the basis that, because the SCL Protocol identifies six commonly used methods of delay analysis, an expert can only choose one such method and any deviation from that approach renders their opinion fundamentally unreliable. The common objective of each method is to enable the assessment of the impact of any delay to practical completion caused by particular items on the critical path. The court did, however, accept that, if an expert selects a method which is manifestly inappropriate for the particular case, or deviates materially from the method which they have said they are following, without providing any, or any proper, explanation, that can be a material consideration in deciding how much weight to place on the expert's opinions.

The court also referred to the approach to delay claims set out in ***Walter Lilly & Company Ltd v Mackay*** that:

- the court is not compelled to choose only between the rival approaches and analyses of the experts; ultimately it is for the court to decide, as a matter of fact, what delayed the works and for how long;
- if one is seeking to ascertain what is delaying a contractor at any one time, one should generally have regard to the item of work with the longest sequence;
- it is not necessarily the last item of work which causes delay;
- in relation to a contemporaneous concern in ***Lilly v Mackay*** (that the lift shaft was out of alignment), such a complaint is irrelevant to a delay analysis if it was never agreed upon, established or implemented and, in logic also, the fact that one side (wrongly) perceives that a particular problem is more serious than it turns out to be is in itself unlikely to be relevant in ascertaining whether that problem caused delay.

Thomas Barnes & Sons Plc v Blackburn with Darwen Borough Council [2022] EWHC 2598

3. Concurrent delay – and the law is?

In the dispute about the construction of Blackburn bus station the court had to revisit the law on concurrent delay. It recorded that, although there has been much debate as to the law, counsel agreed that, following the approach at first instance of:

- Edwards-Stuart J in ***De Beers v Atos Origin IT Services UK Ltd***;
- Hamblen J in ***Adyard Abu Dhabi v SD Marine Services***;
- Akenhead J in ***Walter Lilly v Mackay***,

the law is settled and accurately summarised by the textbook Keating on Construction Contracts 11th edition:

> *"In respect of claims under the contract:*
>
> *(i) depending upon the precise wording of the contract a contractor is probably entitled to an extension of time if the event relied upon was an effective cause of delay even if there was another concurrent cause of the same delay in respect of which the contractor was contractually responsible; and*
>
> *(ii) depending upon the precise wording of the contract a contractor is only entitled to recover loss and expense where it satisfies the "but for" test. Thus, even if the event relied upon was the dominant cause of the loss, the contractor will fail if there was another cause of that loss for which the contractor was contractually responsible."*

Thomas Barnes & Sons Plc v Blackburn with Darwen Borough Council [2022] EWHC 2598

4. Bus station contract comes to stop but was it a repudiation?

The contractor for a bus station project made clear that it was unwilling to proceed regularly or diligently with the works and had substantially suspended works, unless or until the employer conceded its demands for a substantial extension of time significantly beyond its true entitlement and a blank cheque to accelerate the works. It was not entitled to either. The employer had not granted the claimant the full extension of time to which it was entitled and also had apparently not fully complied with its payment obligations but was the contractor's conduct a repudiation?

In ruling that the contractor was in such serious and significant breach of contract as entitled the defendant to terminate the contract or to accept that breach as repudiatory the court referred to the Court of Appeal's analysis of repudiation in ***Eminence Property Developments Ltd v Heaney***, in summary that:

- the legal test is whether, looking at all the circumstances objectively (from the perspective of a reasonable person in the position of the innocent party), the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract;
- whether there has been a repudiatory breach is highly fact sensitive, which is why comparison with other cases is of limited value;
- all the circumstances must be taken into account insofar as they bear on an objective assessment of the intention of the contract breaker;
- application of the test to the facts of a particular case may not always be easy to apply.

The court also noted that, while there may be cases where the contractor is entitled, or even obliged, to cease works, possibly on a unilateral basis, until some serious safety risk is addressed, in the court's view the starting point must be that, unless and until some sufficient reason arises, the contractor cannot simply down tools without an instruction and then seek to hold the employer liable for the consequential delay.

Thomas Barnes & Sons Plc v Blackburn with Darwen Borough Council [2022] EWHC 2598

5. "Without prejudice" label fails to protect variation correspondence

"*Without prejudice*" – a label to protect settlement negotiations from disclosure in litigation, to encourage parties to speak freely in their discussions and maximise the chances of settlement. But just how far does the protection extend? Does it extend, for example, to discussions about a variation?

A contractor making a variations claim relied on a letter from the oil company employer as agreeing the value of certain variations. The letter was not marked "without prejudice" but, at trial, the employer objected to the letter being admitted in evidence, on the basis that it was part of without prejudice negotiations between the parties.

The Privy Council ruled that the letter was admissible because the agreements reached at an earlier meeting (which the letter recorded) were part of the process under a contract variation clause (intended to be open), for arriving at a value for the relevant work.

In this case the contractual obligation on the parties was to agree both the variation and the value, in a process in which they state, and revise, their positions in relation to whether the work has been varied and, if so, its value, with a view to seeking agreement. This ongoing process was distinct from negotiations between parties seeking to settle their differences in contemplation of litigation.

There is no policy reason why the contractual process should be conducted on a without prejudice basis. If, subsequently, a court must determine whether there has been a variation and its value, the court will be assisted by knowing the parties' earlier positions, e.g. to identify inflated or unmeritorious claims. There can still be two parallel processes, one the open contractual process and the other, separate, "without prejudice" negotiations in which a "without prejudice" offer is made to compromise a position adopted in open correspondence.

In these circumstances a reasonable person would also understand that the parties' joint intention was that the contractual process should be open, even though marked "without prejudice". Even if, contrary to the court's ruling, the negotiations were "without prejudice", the letter in question recorded individual agreements that certain items were

variations, and their value, so that the letter fell within the well-established exception that "without prejudice" correspondence can be admitted to determine whether an agreement has been reached.

Again, even if, contrary to the court's ruling, the negotiations were "without prejudice", there had been waiver of the "without prejudice" protection by the employer's reference to the correspondence in its defence and by its own counsel's reference to the letter in cross-examining one of the contractor's witnesses

A & A Mechanical Contractors and Company Ltd v Petroleum Company of Trinidad and Tobago (Trinidad and Tobago) [2022] UKPC 39

6. HSE consultation on Building Inspector Competence Framework

The HSE is consulting on the Building Inspector Competence Framework (BICoF), which will apply to all who wish to register with the BSR as a Building Inspector, whether they work in the private or public sector.

Registration will open in October 2023 with the sections of the Building Safety Act 2022 relating to registration coming into force in April 2024.

The Building Safety Regulator will:

- Establish and maintain a register of building inspectors;
- Provide for different classes of building inspectors (for example, according to qualifications or experience);
- Register an individual as a building inspector, or a building inspector of a particular class, if satisfied that the individual meets the BSR's criteria;

The consultation closes on 9 December 2022 and the HSE intends to publish the final BICoF in April 2023.

Building inspector Competence Framework (BICoF) consultation - Health and Safety Executive - Citizen Space (hse.gov.uk)

7. Getting ready for Procurement Bill changes - government issues planning checklist and learning and development offer

The changes to be introduced by the Procurement Bill, currently going through Parliament, will not come into force until late 2023 at the earliest, and will have a six month advance preparation period. To assist contracting authorities in preparing for the changes, however, the government has issued a short planning checklist identifying initial actions in four key areas - policies and processes, systems, people, and transition. The Cabinet Office will also be providing a comprehensive learning and development programme to support everyone operating within the new regime.

See: Transforming Public Procurement - planning and preparation checklist - GOV.UK (www.gov.uk); Update on the official learning and development offer for contracting authorities - GOV.UK (www.gov.uk); and https://bills.parliament.uk/bills/3159

8. Redress measure information sheet issued

The Department for Levelling Up, Housing and Communities has published an information sheet in respect of building safety redress measures, including:

- leaseholder protections introduced in the Building Safety Act 2022;
- the changes to the Defective Premises Act 1972;
- Building Liability Orders;
- construction products cause of action.

The guidance also refers to claims being made under section 38 of the Building Act 1984. The Building Safety Act deals, in section 135, with the limitation period under s38, but s38 does not appear to have been brought into force. The government Outline Transition Plan stated the government's intention to commence section 38 of the Building Act 1984 at the same time as the coming into force of the expansion of the Defective Premises Act 1972, i.e. two months after the Bill received Royal Assent, which was 28 June 2022.

See: https://www.gov.uk/guidance/redress-measures-information-sheet; and https://www.gov.uk/government/publications/building-safety-bill-transition-plan/outline-transition-plan-for-the-building-safety-bill

9. Building Regulations amendments deal with gigabit-ready physical infrastructure

The Building etc. (Amendment) (England) (No. 2) Regulations (S.I. 2022/984) amend the Building Regulations 2010 as they apply in relation to England to require the installation of gigabit-ready physical infrastructure and, up to a cost cap of £2,000 per dwelling, gigabit-capable connections for new dwellings. The regulations also amend the Building (Approved Inspectors etc.) Regulations 2010 to update relevant forms.

See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1108635/Circular_04-2022_Part_R_regs_ADRs.pdf

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