MAYER | BROWN

March 2023

Legal developments in construction law

1. The t's and c's that apply are on my website – is that good enough? (And was a delivery note a counter offer?)

A housebuilder sent a purchase order to a stone supplier. The order stated that it was subject to the company's standard conditions for purchase orders, which could be viewed at its stated website address. Were these terms and conditions, which were not set out in the purchase order, incorporated by reference in the contract made?

In ruling that they were, the court noted that the textbook, Chitty on Contracts, 33rd edition, said that reference to standard terms to be found on a website may be sufficient to incorporate the terms on the website into the contract and in ***Impala Warehousing and Logistics (Shanghai) Co Ltd. v Wanxiang Resources (Singapore) Pte Ltd*** the court had said:

> *"In this day and age when standard terms are frequently to be found on web-sites I consider that reference to the website is a sufficient incorporation of the warehousing terms to be found on the website."*

In this case, the court said that the contract with the supplier was made on the website terms and conditions incorporated by reference in the purchase order, which the supplier had accepted by commencing supply of the stone ordered.

The supplier argued that it had made a counter offer in a document called a delivery note, which recorded acceptance of the conditions of sale on the reverse of the note. There was, however, no communication to the person at the housebuilder with whom the supplier had been dealing, of the supplier's conditions of sale or about a counter-offer. The delivery note was intended to be handed by a delivery driver to someone on site and there was no possible basis on which it could have been anticipated that someone on site, whether the site manager or some other operative, would have authority to contract with the supplier on any basis, let alone on some basis other than the purchaser's standard terms.

The delivery note was exactly what it said it was – a delivery note in respect of the first consignment and, despite the reference to the conditions of sale on the reverse, it was not intended to be a counter-offer.

BDW Trading Ltd v Lantoom Ltd [2023] EWHC 183

2. A contract obligation to negotiate in good faith, but what does 'good faith' mean?

A settlement agreement in respect of a contaminated cargo of oil said that the parties would discuss in good faith with a view to agreeing a level of reimbursement. One party to the agreement alleged that the other party had failed to negotiate in good faith. But what does '*good faith*' mean? The court provided a helpful reminder.

The court noted the discussion of the term by Mr Justice Leggatt (as he then was) in ***Al Nehayan v Kent*** where he said that the

"usual content of the obligation of good faith is an obligation to act honestly and with fidelity to the bargain; an obligation not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for; and an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained.

In my view, this summary is also consistent with the English case law as it has so far developed, with the caveat that the obligation of fair dealing is not a demanding one and does no more than require a party to refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people".

A subsequent case added that, in judging whether a party has not been faithful to the parties' bargain it is necessary to bear in mind the nature of the bargain, the terms of the contract and the context in which the matter arises.

In considering the consequences of breach of an obligation to seek in good faith to agree the reasonable cost of an item, the court referred to the Court of Appeal's comments in ***Petromec Inc v Petroleo Brasileiro SA Petrobras (No. 3)*** which it understood to mean that, unless there were special factors, the product of the good faith negotiation will match the basic entitlement (e.g. to be paid the reasonable cost). The essence of the exercise would be to decide, on the evidence, what final figure would have been arrived at in the negotiations.

In the court's view there were two themes in this case to the allegation of a failure to negotiate in good faith. One was being slow to respond to the other party's letters but that was not, in the court's view, commercially unacceptable. The other was that the other party had made unrealistic demands for documents that it knew could not be obtained from a third party. This argument was also rejected.

Glencore Energy UK Ltd v NIS J.S.C. Novi Sad [2023] EWHC 370

3. Adjudication – court goes back to basics

Since the Construction Act introduced adjudication as a construction dispute option, there have been many court battles about different issues arising. In one of the latest judgments, the court has provided a helpful reminder of some basic principles.

The subcontractor had asked the court to suspend the enforcement proceedings because the claimant had not complied with the Technology and Construction Pre-Action Protocol, by failing to respond to a letter from the subcontractor within the period specified in the Protocol. The court pointed out, however, that the Protocol does not apply to adjudication enforcement proceedings and it was therefore unnecessary for the claimant to respond to the defendant's letter as a pre-condition to proceeding with its enforcement application.

Before dealing with the subcontractor's submissions, the court revisited the relevant principles in deciding an adjudication enforcement application. There are only very limited grounds upon which adjudicators' decisions will not be enforced by the courts by summary judgment. The starting point is that if the adjudicator has decided the issues referred to them, whether they are right or wrong in fact or in law, as long as they have acted broadly in accordance with the rules of natural justice, that decision will be enforced. Adjudication is all about interim cash flow and it is routine to enforce decisions that require substantial allocations of cash to one party or another in the knowledge that it may prove to be merely an interim measure. The fact that the basis of an adjudicator's decision is to be challenged in other proceedings is of itself seldom, if ever, a ground for non-enforcement. On contested enforcement applications, there are only two bases on which a decision will not lead to summary judgment, if the decision was made without jurisdiction or if there were material breaches of natural justice.

The principles of enforcement are subject to two narrow exceptions identified in ***Hutton v Wilson***. The first is an admitted error; the second is a self-contained legal point concerning timing, categorisation or description of payment notices or payless notices, in respect of which the potential paying party has issued Part 8 proceedings seeking a final determination of that or those substantive points.

The court also confirmed the following propositions:

- an adjudicator does not need to provide an answer to each and every issue raised in the parties' submissions;
- an inadvertent failure to consider an issue within a dispute will not ordinarily render a decision unenforceable;
- in ***Broughton Brickwork Ltd v F Parkinson Ltd***, an adjudicator's inadvertent failure to consider a particular document was held, at its highest, to be a procedural error which did not amount to a breach of natural justice.

J & B Hopkins Ltd v A&V Building Solution Ltd [2023] EWHC 301

4. Court of Appeal awards 'blight' damages for knotweed encroachment

Knotweed is a nuisance, or can be, but the law provides no remedy if there is no more than a claimed diminution in value of land because of the presence of knotweed on a neighbour's land. There are three kinds of nuisance, encroachment, direct physical injury to land and interference with quiet enjoyment. In ***Davies v Bridgend County Borough Council*** the Court of Appeal had to rule on a claim for £4,900 for the "residual" diminution in value of a property, also called "blight", which remained even after knotweed had been treated as best as it could be. All other heads of claim had been dropped or failed and were not appealed.

In upholding the claim, the Court referred to its decision in ***Williams v National Rail***, which said that the non-trivial presence of knotweed on the claimant's land is an immediate burden. It interferes with amenity/quiet enjoyment and, in so far as damage is needed to complete the tort, it is provided by the diminished ability of the claimant to use and enjoy their property. Japanese knotweed not only carries the risk of future physical damage to buildings, structures and installations on the land but its presence, and indeed the mere presence of its rhizomes, imposes an immediate burden on the owner of the land in terms of an increased difficulty in the ability to develop, and in the cost of developing, the land, should the owner wish to do so. Japanese knotweed and its rhizomes are a classic example of an interference with the amenity value of the land.

The Court in ***Williams*** distinguished between "pure economic loss", i.e. loss without physical damage or physical interference which is not actionable, and cases in which there is physical change to the claimant's property as a result of the presence there of knotweed rhizomes. Once that natural hazard is present in the claimant's land (to a non-trivial extent), the claimant's quiet enjoyment or use of it, or the land's amenity value, has been diminished. For the purposes of the elements of the tort of nuisance that amounts to damage and it is the result of a physical interference. If consequential residual diminution in value can be proved, damages on that basis can be recovered. They are not pure economic loss because of the physical manner in which they have been caused.

Davies v Bridgend County Borough Council [2023] EWCA Civ 80

5. NEC4 2023 amendments issued

NEC has published a further set of amendments to NEC4. A schedule of amendments is available for each contract on the NEC website and the schedules detail all the amendments made, except minor typographical amendments which do not affect the interpretation or application of the contracts.

Copies of the contracts published from January 2023 will contain the amendments and a table summarising them. Updated versions of the User Guides have also been produced to reflect the amendments made to the contracts.

The principal amendments deal with:

- Secondary Option X29 (climate change - all main contracts);
- working from home and other locations outside Working/Service Areas (Amendments to Schedule of Cost Components and Short Schedule of Cost Components);
- client's ability to use supplier's design;
- adjudication (all contracts featuring Y(UK)2);
- Secondary Option X22 – early contractor involvement;
- contractor's liability for design limited to reasonable skill and care;
- liability limit;
- damage to client's property;
- payment on termination.

See, for more details and applicable contracts: News | NEC Contracts

6. Government publishes action plan for Nationally Significant Infrastructure Projects

The government has published an action plan for Nationally Significant Infrastructure Projects. These are large-scale projects related to energy; transport; water; waste water and waste, which are of national importance and go through a separate planning process to other infrastructure projects.

The changes in the action plan include:

- reviewing and updating National Policy Statements more regularly; (the government has asked the National Infrastructure Commission to provide recommendations on the future of the Statements);
- speeding up the application process by streamlining regulations and updating guidance and piloting a new fast track process with powers for the Secretary of State to set shorter timelines for certain projects;
- reforming environmental regulations around new development and introducing the Environmental Outcomes Report;
- strengthening community engagement and revising the use of Planning Performance Agreements;
- measures to help infrastructure developers get the early expertise they need, including powers for certain experts consulted during the process to recover full costs for services.

See: https://www.gov.uk/government/news/cross-government-plan-to-speed-up-delivery-of-major-infrastructure-projects

7. HSE starts 'Be ready' HRB building safety campaign

The HSE has launched the first phase of its building safety campaign and its new website. The campaign aims to help and encourage everyone affected by changes to building safety law to:

- be ready – understand what is coming and how to prepare
- step up – take ownership and manage risks
- act now – comply with new law

The campaign's first focus is on being ready for high-rise building registration, the first operational function of the BSR to come into force under the Building Safety Act, 2022. As registration will open in April, the HSE is encouraging people who own or manage high-rise residential buildings to be ready and prepare now.

See: building safety campaign website

8. Government commits £42million for building control and fire inspectors to support the BSR

The government has announced funding for recruitment and training of building control inspectors and fire inspectors over the next three years to support the Building Safety Regulator in overseeing the safety and standards of the design, construction and management of higher-risk buildings, as well as strengthening the sector as a whole. The £42million package consists of a £16.5m grant to Local Authority Building Control (England and Wales) and £26million for fire and rescue services in England.

Around 110 Building Inspectors and 111 new Fire Protection Officers will be recruited and trained in a three year programme designed to direct skills and resources to areas with a greater distribution of high-rise buildings.

See: https://www.gov.uk/government/news/42-million-to-support-delivery-of-building-safety-reforms

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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