MAYER·BROWN

Legal Update
March 2018

Legal developments in construction law

1. Adjudication award: court orders partial stay after SPV abandons its project

A Special Purpose Vehicle terminated its design and build contract with a renewable energy contractor and abandoned its biomass generating plant project. It obtained summary judgment on a second adjudication award, against the contractor, for nearly £10 million but, although the contractor was unsuccessful in challenging enforcement of the award, it asked the court to stay execution.

This was, said the court, an unusual case. The claimant had become an SPV with no P (because it had chosen not to continue with the Project). That meant that, not only did the SPV have no possible incentive to remain in existence for a minute longer than necessary, once it had repaid its debts to its parent, but it was also overwhelmingly likely that it would be wound up sooner rather than later. The risk faced by the contractor, of overpaying and never being repaid, was very real and could not have sensibly been predicted when the contract was agreed. In addition, even if the SPV did remain in existence so as to resolve all outstanding arguments, that could take months or years. Under the contract the defendant was stuck with the adjudication decision until the final accounting process was concluded, and the contract was silent as to when that should take place.

The court was entitled to consider that there was a bona fide challenge to the result of an earlier adjudication, on extensions of time, which was the basis of the decision in the second adjudication. That was a relevant factor when considering a stay. Some form of stay was necessary, a view confirmed by the deliberately limited, and unsatisfactory, financial information made available by the SPV. The court ordered a partial stay. The contractor had to pay £4.5 million without qualification and bring £1 million into court but the court imposed a general stay in respect of the remaining £4.5 million plus.

See: *Equitix ESI CHP (Wrexham) Ltd v Bester Generacion UK Ltd [2018] EWHC 177*

2. Court throws lifeline to adjudication smash and grab victims

Question: can an employer, who fails to issue a valid payment or pay less notice, pay the contractor the sum stated as due in the contractor's interim application and then, in a second adjudication, dispute that the sum paid was the 'true' value of the works for which the contractor has claimed?

Applying first principles, in a case where an adjudication decision on an interim application for £14 million was in issue, the court said it could, for six separate reasons. Where the parties have given an adjudicator power to decide all disputes between them, the adjudicator has the same wide powers as the court, including the power to decide the 'true' value of any certificate, notice or application. There is no limitation, in the Construction Act or the Scheme, on the nature, scope and extent of the dispute which either party can refer to an adjudicator and the dispute that the employer would raise in the second adjudication is different to the dispute decided in the first.

It was also instructive to look at the contract wording and the court noted the deliberate distinction made between *"the sum stated as due"* and *"the sum due"*. Considerations of equality and fairness also apply. If a contractor can attack the *"sum stated as due"* in a pay less notice, because it says it is too low, there would need to be clear words in the Construction Act and/or the Scheme and/or the contract in question to prohibit the employer from doing the same. There are, however, no such words anywhere, and there is nothing in the Act or the Scheme to justify treating interim and final payments differently. On the contrary, sections of the Act apply to both and the JCT contract in question treated interim and final applications/payments in the same way.

The court also analysed the case law and concluded that the Court of Appeal's decisions on the issue confirmed its view. Two Technology and Construction Court cases, ISG Construction Ltd v Seevic College [2014] EWHC 4007 and *Galliford Try Building Ltd v Estura Ltd* [2015] EWHC 412 did, however, take a *"different line"* but Mr Justice Coulson considered that there was, for the reasons given, a *"powerful reason"* for not following those cases. He believed that his decision will strengthen the system, because it will reduce the number of 'smash and grab' claims which, in his view, have brought adjudication into a certain amount of disrepute.

See: *Grove Developments Ltd v S&T (UK) Ltd [2018] EWHC 123*

3. How to spot a pay less notice

A contractor claimed that a pay less notice was invalid because the *"purported"* payment notice and calculation were not attached to it. The calculation was set out in a separate document. Was the contractor right?

The case law shows that a pay less notice will be construed by reference to its background, to see how a reasonable recipient would have understood it. The court will be unimpressed by nice points of textual analysis, or arguments which seek to condemn the notice on an artificial or contrived basis. A way to test whether the contents of the notice are adequate is to see if the notice provides an adequate agenda for a dispute about valuation and/or any cross-claims available to the employer.

The court also considered that the courts should not generally adopt a different approach to the construction of an employer's pay less notice and a contractor's interim application or payment notice. The particularly adverse consequences for an employer from, say, a contractor's unanswered application/payment notice are, however, relevant to the test of the reasonable recipient. Would that recipient have realised that the document in question was an application or payment notice, with contractual force, and with all the potential consequences? An interim application must be obviously identifiable as such and, in the court's view, a payment notice or a pay less notice must make plain what it is and clearly set out the sum which is said to be due and/or to be deducted, and the basis on which that sum is calculated. Beyond that, the question of its validity under the contract is a matter of fact and degree.

There can be no possible objection, in principle, to a payment or pay less notice referring to a detailed calculation set out in another, clearly identified, document. That is how these things are commonly done and is an uncontroversial feature of a number of reported cases. There was at the time no suggestion that the contractor did not know precisely what was being referred to in the pay less notice, which was valid.

See: *Grove Developments Ltd v S&T (UK) Ltd [2018] EWHC 123*

4. Government updates power of trade bodies to challenge late payment terms

The government has updated the Late Payment of Commercial Debts Regulations. The amending regulations amend the UK's statutory framework to provide business representative bodies with broader power to challenge *"grossly unfair"* contractual terms and practices relating to late payment, on behalf of businesses.

They make clear that representative bodies may challenge grossly unfair terms and practices relating to payment dates or periods, the right to late payment interest or compensation for late payment. They extend the right to challenge such terms and practices to representatives of all businesses, not just small and medium enterprises, so representative bodies of any business can decide to challenge. Representative bodies will be able to decide whether to take action on behalf of individual businesses or groups of individual businesses, and also whether to take action on behalf of members or non-members. The updated regulations came into force on 26 February.

See: *https://www.legislation.gov.uk/uksi/2018/117/introduction/made*

5. New consultations on NPPF overhaul and developer contributions

The government has launched consultations on a major overhaul of the National Planning Policy Framework and the reform of developer contributions to affordable housing and infrastructure.

The revision of the NPPF implements around 80 previously announced reforms and the government is seeking views on the wording implementing these commitments. Subject to a consultation on the draft new Framework, the government intends to publish a final Framework before the summer. The consultations close on 10 May 2018.

The government is also considering what further planning reforms could support its housing objective. These would be subject to the outcomes of the Letwin review of build out and future consultation, and include a new permitted development right for upwards extensions and more effective ways of bringing agricultural land forward for housing.

See: *https://www.gov.uk/government/news/prime-minister-launches-new-planning-rules-to-get-england-delivering-homes-for-everyone;* and *https://www.gov.uk/government/consultations/draft-revised-national-planning-policy-framework;* and *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/685428/Developer_Contributions_Consultation.pdf*

6. Considerate Constructors Scheme goes Ultra

Following a two year pilot, the Considerate Constructors Scheme has now launched Ultra Site registration, the highest level in the Scheme.

A registered site can become an Ultra Site when an agreed number of trade contractors and suppliers working on that site are separately registered with the Scheme. To qualify as an Ultra Site a number of other criteria must also be met.

See: *https://www.ccscheme.org.uk/ultrasite/ultra-sites/*

7. Government consults on housing complaints system

In February the government began a consultation on remedies for housing complaints.

Options in the consultation include:

- introducing a single housing ombudsman to cover the whole housing market;
- whether homes builders should have to join an ombudsman scheme;
- naming and shaming poor practice;

The consultation closes on 16 April 2018.

See: *https://www.gov.uk/government/news/government-moves-towards-a-shake-up-of-broken-housing-complaints-system*

8. The GDPR comes into force on 25 May 2018 – are you ready?

The new European General Data Protection Regulation will come into force throughout the European Union on May 25, 2018. The GDPR will replace existing data protection laws throughout Europe and introduce significant changes and additional requirements that will have a wide-ranging impact on businesses around the world, irrespective of where they operate.

For details of the changes and additional requirements see: *https://www.mayerbrown.com/experience/eu-general-data-protection-regulation/*

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