MAYER·BROWN

Legal Update
January 2018

Legal developments in construction law

1. If a contract notice has serious consequences it needs to be...?

A subcontract said that the subcontractor was bound by the main mechanical and electrical contractor's assessment of the proper amount due under the subcontractor's final account, if it did not dissent within 14 days. The court had to decide, among other issues, what notification of the valuation would trigger this time bar provision.

The judge considered the principles identified in the cases that have considered construction contract provisions relating to time limits and the permanent loss of rights. These principles applied, with even greater force, to the contractor's final account assessment because the court was dealing, not with an interim application which might be capable of subsequent adjustment, but a final account entitlement which could be lost to the claimant for ever, if there had been a valid notification and no dissent.

In the judge's view, if a contract clause notice has a draconian effect, the notice should make clear that it has been issued under that clause. The basic principle was that if a party is supposed to be notifying the other party that a sum is due, under a clause that provides for a deemed agreement that binds the parties unequivocally, then the sum due and the clause must be clearly set out in the relevant notice. The document said to trigger operation of the time bar clause was actually a purported assessment of the gross value of the work carried out and did not identify the amount due for payment. That required a calculation by reference to other figures and documents. It is not good enough to say that the recipient could have worked it out for themselves, particularly when, as in this case, the alleged calculation that, it was said, could have been done by the subcontractor, relied on later documents, some of which were not even in the subcontractor's possession. There had, therefore, been no valid notification of the amount due to trigger the time bar provision.

Systems Pipework Ltd v Rotary Building Services Ltd [2017] EWHC 3235

2. Adjudication – so what exactly is the dispute?

A main contractor obtained an adjudication award against a flooring subcontractor for the cost of replacing all the flooring installed by the subcontractor. The subcontractor resisted enforcement, claiming, amongst other things, that the adjudicator had acted outside his jurisdiction by deciding matters outside the scope of the referred dispute and, alternatively, that he had dealt with two disputes when only entitled to deal with one, because there were separate claims under the contract and at common law. So how strictly is a dispute identified or counted?

The Scottish court agreed with the English law view in *Cantillon v Urvasco* that the courts should not adopt an overly legalistic analysis of what the dispute between the parties is, but should determine in broad terms what is the disputed claim or assertion. If the courts took an overly legalistic approach, each sub-issue or individual point of difference between the parties could be taken as a dispute. That approach is unrealistic and not in accordance with commercial common sense. The scope of the dispute is what a reasonable person in the defender's position, with the background knowledge available to the parties, would have understood the Notice of Adjudication to mean. The language in the Notice must be construed against that background and, in a case like this, the exchanges between the parties leading up to the issue of the Notice might assist in construing its terms, to determine the scope of the dispute.

The court ruled that the adjudicator had not acted outside his jurisdiction and that there was only one dispute. Again it agreed with the English law view that one dispute might encompass two or more causes of action, heads of claim or issues. In this case, the factual basis and the contractual standard were the same, the reality was that there was one dispute and it was artificial to seek to characterise it as involving two separate disputes.

Morgan Sindall Construction and Infrastructure Limited v Westcrowns Contracting Services Limited

3. Recovering adjudication costs – Late Payment Act to the rescue?

The Late Payment Act says that, once statutory interest begins to run in relation to a qualifying debt, the creditor is entitled (in addition to the interest) to £100, for a debt of £10,000 or more, plus its reasonable costs in excess of that £100. This is through the mechanism of an implied term in the contract. An adjudicator awarded a party £14,093.20 under the Act for its costs but could he do that?

No, said the court. Under s108A of the Construction Act, costs incurred by the parties in adjudication are only recoverable if an agreement to that effect is made in writing after the notice of adjudication (unless it is a contractual provision relating to the adjudicator's fees and expenses). The Late Payment Act implied term was caught by s108A and was therefore ineffective unless the subject of an agreement made in writing after the notice of adjudication. No such agreement had been made and the adjudicator consequently had no power to make the reasonable costs award.

Enviroflow Management Limited v Redhill Works (Nottingham) Limited: unreported.

4. Fire safety regulatory system "not fit for purpose"

The interim report of The Independent Review of Building Regulations and Fire Safety has found that the current regulatory system for ensuring fire safety in high-rise and complex buildings is not fit for purpose. This applies throughout the life cycle of a building, both during construction and occupation, and is a problem connected both to the culture of the construction industry and the effectiveness of the regulators. The report concludes that true and lasting change, that needs to start now, will require a universal shift in culture.

Six broad areas for change are identified:

- ensuring that regulation and guidance is risk-based, proportionate and unambiguous;
- clarifying roles and responsibilities for ensuring that buildings are safe;
- improving levels of competence within the industry;
- improving the process, compliance and enforcement of regulations;
- creating a clear, quick and effective route for residents' voices to be heard and listened to;
- improving testing, marketing and quality assurance of products used in construction.

The independent review will now undertake its second phase of work and publish a final report in spring 2018. A summit with key stakeholders was held on 22 January.

See: https://www.gov.uk/government/news/interim-report-into-the-review-of-building-regulations-and-fire-safety

https://www.gov.uk/government/publications/independent-review-of-building-regulations-and-fire-safety-interim-report

and

https://www.gov.uk/government/news/dame-judith-hackitt-hosts-industry-summit

5. HSE sets up new advisory network

The HSE has launched the Construction Industry Advisory Network (CONIAN), a stakeholder network aimed at giving all areas of the construction industry a voice. CONIAN is intended to be a platform for sharing good practice and behaviour, and to reach and support those that need to improve health and safety performance.

See: http://press.hse.gov.uk/2017/health-and-safety-executive-launches-new-construction-advisory-network/

6. Small Business Commissioner's complaint handling service goes live

The complaint handling service of the Small Business Commissioner, intended to ensure fair payment practices for small businesses, is now live. The Commissioner's role is to support Britain's 5.7 million small businesses to resolve payment disputes and tackle larger businesses' unfair payment practices to drive culture change. Small businesses can now submit late payment complaints to the Commissioner.

See: https://www.gov.uk/government/news/government-launches-small-business-commissioner-to-help-small-firms-resolve-payment-disputes

7. FIDIC2: Now on sale and Notice means Notice

The second editions of the FIDIC Yellow, Red and Silver Books are now on sale:

See: http://fidic.org/bookshop

There are a number of new tricks for users of the 1999 vintage to learn. At the front of the queue (for example, in the Yellow Book) are the strict new definition (1.1.56) and clause (1.3) dealing with Notices. A Notice is a written communication that must be identified as a Notice (1.1.56) and issued in compliance with clause 1.3. A monthly progress report or a programme or supporting report, will not be good enough (4.20 and 8.3). Another form of communication must be identified as such and refer to the relevant contract provision(s), where appropriate (see 1.3(b)). And the Contractor's Quality Management System (4.9.1) is now expressly required to contain procedures that "*ensure*" that all Notices and other communications can be traced "*with full certainty*" to the relevant Works, Goods, work, workmanship or test.

An Employer or Contractor submitting a Notice of Claim under re-modelled clause 20 must therefore not only be sure to be in time (20.2.1), but also be very careful to check that the Notice complies with the new requirements.

In addition, there is the separate, amended, obligation (8.4) to give advance warning of any known or probable future event or circumstance that might:

- adversely affect the work of the Contractor's Personnel; or
- the performance of the completed Works; or
- increase the Contract Price; or
- cause delay;

although there is no express time or money sanction for non-compliance in assessing a Contractor's entitlement.

And if the *"statement of the contractual and/or other legal basis of the Claim"* is not filed, with the other items in the *"fully detailed Claim"* to be submitted within 84 days (unless otherwise agreed) after the claimant becomes aware, or should have become aware, of the claim event or circumstance, the Notice of Claim is deemed to have lapsed, unless the Engineer fails to give the required confirmatory Notice or the late submission is successfully justified (see 20.2.4).

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