MAYER·BROWN

Legal Update
June 2015

Legal developments in construction law

1. If it takes two to make a contract work...

NEC3's opening clause says the parties must act in a spirit of mutual trust and co-operation. If, however, a contract needs co-operation to make it work, an express obligation may not be necessary, because the law may imply one. So where the appointment of the Engineer (under a fourth edition of the FIDIC Red Book) expired, the Engineer refused to give a decision under clause 67 and no new Engineer was appointed, did the contractor have to wait until the end of the contractual, post-decision, 84 day period before starting an arbitration?

No, said the court. The case law and construction textbooks were clear, that there is an implied duty of co-operation, in such a case, to do whatever may be necessary to enable the other party to perform their part of the contract, e.g. to reappoint the Engineer or appoint a new one. An alternative approach was to say that a person cannot take advantage of the non-fulfilment of a condition, the performance of which they themselves have hindered (e.g. by preventing the Engineer from issuing a decision). The Employer could not therefore rely on the 84 day period as a condition precedent to the contractor going to arbitration.

Al-Waddan Hotel Ltd v Man Enterprise SAL (Offshore) [2014] EWHC 4796

2. Court holds employer to agreement to pay rates not in the contract

A repair and maintenance contract based on NEC3 was signed months after work started but, by agreement, was applied retrospectively. Before it was signed, however, the parties agreed to use a set of rates that were not in the contract and over 12,000 jobs were paid for at these rates.

Originally, the employer had said that there was no need to amend the contract but, after the contract was signed, it decided that these rates should not have been used and deducted £300,000 that it claimed had been consequently overpaid. Could it do that?

No, said the court, because there was estoppel by convention and, almost completely overlapping on the facts, estoppel by representation. Estoppel by convention can arise when parties to a contract act on an assumed, communicated and shared state of facts or law. The party claiming the benefit of the convention must have relied on, or have been materially influenced by, the common assumption (although both parties will almost invariably have relied upon it) and a key element will be unconscionability or unjustness on the part of the person said to be estopped. It can only be used as a shield, and not as a sword, and analysis is required to ascertain in which way it is being used. Once the common assumption is seen to be wrong, estoppel by convention can come to an end.

The court was also referred to the trust and partnering language of NEC3 but it was not satisfied that the obligation to act in a spirit of mutual trust and cooperation or even in a "partnering way" would prevent either party from relying on any express terms of the contract freely entered into. In addition, the "entire agreement" clause did not exclude or limit reliance on any effective estoppel.

Mears Ltd v Shoreline Housing Partnership Ltd [2015] EWHC 1396

3. Interim application dates – it's all in the timing

In the world of the Construction Act, timing can be everything. A late notice, or no notice at all, can have serious consequences. But what about contract payment application dates? What if some applications are a few days late but the contract administrator does not object? Are they valid? And what if an application is early?

In ***Leeds City Council v Waco UK Ltd*** the court reviewed the contract payment history and found that, although there was no express agreement to vary valuation or application dates, there was a course of conduct by which the contract administrator (who had actual and ostensible authority to agree different post-practical completion interim application dates) agreed to accept monthly applications made up to three to four business days after the contract valuation date. The employer would not have been allowed to reject an application made three to four business days late as that would be inconsistent with this established course of conduct.

The contract administrator had not, however, apart from certification of one premature post-practical completion application, done anything to indicate that it would accept a post-practical completion application that was made early, six days before the contractual date for the application. That application was therefore invalid, as was the adjudicator's decision to the contrary.

Leeds City Council v Waco UK Ltd [2015] EWHC 1400

4. CDM 2015 amendments issued for PPC 2000, TPC 2005 and ICC

Amendments to PPC 2000 (amended 2013), TPC 2005 (amended 2008) and the Infrastructure Conditions of Contract, to take account of the changes made in CDM 2015, have been issued.

See: http://www.ppc2000.co.uk/documents/PPCTPCCDM2015Amends.pdf and

see: http://agreements.acenet.co.uk/Documents/Files/Publications/Reference%20ICC-CDM-May%202015.pdf

5. And CDM 2015 guidance issued for NEC3 users

CDM 2015 guidance has been issued for those preparing and managing NEC3 Engineering and Construction contracts.

See: https://www.neccontract.com/getmedia/2454bd32-fd50-49d1-8a70-ff256ff6b8b4/NEC-contracts-and-CDM-2015.pdf.aspx

6. Brownfield land register (and other planning changes) on the way

The Housing Bill announced in the Queen's Speech is to introduce a statutory register for brownfield land. The government's target is to have Local Development Orders in place on 90% of suitable brownfield sites by 2020.

The bill is also set to make changes to simplify and speed up the neighbourhood planning system, and to make other housing and planning legislation changes, to support housing growth.

See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/430149/QS_lobby_pack_FINAL_NEW_2.pdf

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