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Legal Update
July 2017

Legal developments in construction law

1. Lack of sludge contract notice sends £4.4 million claim down the drain

A Northern Ireland sludge treatment upgrade project agreement had a clause dealing with claims. Notification of a compensation event had to be given within 21 days of the contractor becoming aware of the event causing, or likely to cause, delay, breach of the agreement or cost. It was agreed that notification was a condition precedent and the contractor said that it had given notification of a £4.4 million claim in a letter which was part of a chain of correspondence relating to a separate claim. But could notification be inferred from that letter; could it be a hybrid?

The Northern Ireland High Court said that notification has to have certainty. There must be clarity and that was absent. The contractor had not convinced the court that there was a valid notification. The letter relied on had not even been referred to in the preceding adjudication about the same issue. The judge had sympathy for the plaintiff's position because failure to notify prevented a claim being made. That might seem harsh when commercial parties anticipated that there might be a claim but he had to decide the case within the parameters of commercial and contract law. The contract terms were clear, commercial certainty is an overarching consideration and the evidence as to the commercial context and surrounding circumstances had not remedied the defect in the letter. It seemed to him likely that the notification requirement was overlooked in a mass of claims and ongoing discussions.

Glen Water Ltd v Northern Ireland Water Ltd

2. Exemption clauses are not a horror show...

The appointment of a firm of engineers said that: "*Liability for any claim in relation to asbestos is excluded.*" The Technology & Construction Court was happy with that. The relevant agreement and associated warranties were examples of contracts where businessmen capable of looking after their own interests and deciding how contract performance risks could most economically be borne had reached an agreement that the court should be very slow to disturb or to characterise as unbusinesslike. But what did the Court of Appeal think?

The Court of Appeal confirmed that the exclusion of liability was effective. They had to consider the contra proferentem rule, which requires any ambiguity in an exemption clause to be resolved against the party who put the clause forward and relies on it. They said, however, that, in relation to commercial contracts, negotiated between parties of equal bargaining power, the rule now has a very limited role.

They also considered the case law on exemption clauses, in particular the decision in ***Canada Steamship Lines Ltd v The King***, but decided that the case law did not rescue the claimants. The Court noted that, in recent years, and especially since the Unfair Contract Terms Act, the courts have softened their approach to both indemnity clauses and exemption clauses. Its impression was that, at any rate in commercial contracts, the ***Canada Steamship*** guidelines, in so far as they survive, are now more relevant to indemnity clauses than to exemption clauses.

In major construction contracts the parties commonly allocate the risks between them and agree who will insure against what. Exemption clauses are part of the contractual risk distribution apparatus. There is no need for the court to approach such clauses with horror or a determination to cut them down. Contractors and consultants who accept large risks will charge for doing so and will no doubt take out appropriate insurance. Contractors and consultants who accept lesser degrees of risk will presumably reflect that in the fees which they agree.

Persimmon Homes Ltd v Ove Arup & Partners Ltd & Anor [2017] EWCA Civ 373

3. If I say my subcontract work is practically complete, then it is...or is it?

Deciding when practical completion is achieved can be difficult. After the basement of an office building was flooded the date of practical completion of the sprinkler subcontract works became crucial. If the flood occurred before that date, the main contractor had no claim against the subcontractor. And, just to complicate the issue, there were competing definitions of practical completion.

The definition that applied, according to the court, in the JCT-based subcontract, required the subcontractor to notify the main contractor, when, in its opinion, the subcontract works were practically complete. If the contractor did not dissent in writing, with reasons, in 14 days of receipt of the notice, practical completion was deemed to have taken place on that date. The court ruled that the subcontractor had given a valid notice of the practical completion date and, as the contractor had not dissented, practical completion took place on that date. It was irrelevant whether or not the subcontract works were practically complete on that date. The purpose of this clause was to achieve contractual certainty. If the main contractor wanted to dispute the date notified it must do so within the time limit or lose its right to do so later. It was also irrelevant, under the subcontract, where a notice had been served and not disputed, whether or not the subcontractor had sufficiently complied with its obligations to provide as built drawings and health and safety information. Which meant that the flood had occurred after practical completion.

GB Building Solutions Ltd v SFS Fire Services Ltd (t/a Central Fire Protection) [2017] EWHC 1289

4. TAC-1 Term Alliance Contract gets official launch

The ACA Term Alliance Contract, TAC-1, had its official launch in early June. It has been developed from the TPC2005 Term Partnering Contract and operates as a self-contained multi-party term contract for ordering any type or scale of works, services and supplies.

TAC-1 is compatible with any procurement and pricing model. It is for use in any jurisdiction and does not contain provisions taken from English law, although it complies with the Construction Act.

See: *http://www.allianceforms.co.uk/about-tac-1/*

5. GDPR – less than a year away

The new European General Data Protection Regulation (GDPR) will come into force throughout the EU on 25 May 2018. It will replace existing European data protection laws and introduce significant changes and additional requirements with a wide-ranging impact on businesses round the world, irrespective of where they operate.

See: *https://www.mayerbrown.com/files/Publication/ccb2f5b4-c0a0-4208-bc20-e7074c0bad76/Presentation/PublicationAttachment/a8b46834-5b25-436e-93e4-e95390704fec/Preparing-to-comply-with-the-EU-General-Data-Protection-Regulation.pdf*

6. NEC4 is here

NEC4 arrived on 22 June with a new Design Build Operate Contract and an Alliance Contract, in consultation form. Changes to the works contracts include:

- terminology; for example: 'Works Information' becomes "Scope".
- a 4 week period for dispute escalation and negotiation by senior party representatives;
- a core confidentiality clause;
- requiring the contractor to produce a quality management system and plan;
- a secondary option requiring the provision of collateral warranties;
- a single fee percentage (with no separate percentage for subcontract works).

See: *https://www.neccontract.com/NEC4-Products/NEC4-Contracts/NEC4-Free-resources/The-next-Generation-whitepaper*

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