MAYER·BROWN

Legal Update
December 2018

Legal developments in construction law

1. Liquidated damages notices: is a seven second warning enough?

Under the JCT 2011 Design and Build contract three notices have to be given, in order, before liquidated damages can be recovered by the employer. There is a non-completion notice, a notice warning that damages may be required, deducted or withheld and then the actual deduction notice. In ***S&T (UK) Ltd v Grove Developments Ltd*** the notices were received in the correct order, but the final, deduction, notice, was received just seven seconds after the warning notice. Was the contractor entitled to have a brief period after receiving the warning notice, to do something about it? Was service of the second and third notices so close together that it was not compliant with the contract?

The Court of Appeal was driven to the conclusion that it was compliant. It could not find, in the contract, any specific period of time that should elapse between serving the warning and deduction notices. Requiring a 'reasonable' lapse of time was unworkable, did not satisfy the requirements for an implied term and would create huge uncertainty in future cases. Where the contract required a specific period of time between notices, it said so. However surprising to a judge, clause 2.29 of the contract required no more than the giving of notices in a specified sequence. Judges should not generally impose their notions of commercial common sense upon the parties to business disputes. A scintilla of time between the two notices was enough.

S&T (UK) Ltd v Grove Developments Ltd [2018] EWCA Civ 2448

2. Court provides reminder of an architect's inspection duties and of the importance of evidence to support a claim

The dispute between Mrs Lejonvarn and Mr & Mrs Burgess over the Burgesses's landscaping project has already been the subject of two court judgments, one by the Court of Appeal. They ruled, in preliminary issues, that Mrs Lejonvarn owed the Burgesses a duty of care in tort in providing professional services as architect and project manager for the project. But after a third hearing the court had to decide if Mrs Lejonvarn was actually in breach of that duty of care. The court's judgment provides a helpful reminder of the extent of an architect's obligation to inspect and it also underlines the importance of the evidence necessary to support a claim.

The Burgesses's own architectural expert accepted that an architect would not be expected to identify structural defects and the judge noted that the Burgesses had done what Mr Justice Coulson (as he then was) had warned against in ***McGlinn v Waltham Contractors Ltd***. They had assumed any claim for bad workmanship against the contractor must automatically be reflected in a claim against Mrs Lejonvarn on the basis that, if there is a defect, then she had been negligent for not identifying it and having it remedied. In ***McGlinn***, Mr Justice Coulson summarised the legal principles relating to an architect's obligation to inspect and the court quoted that summary at paragraph 57 of its judgment in ***Burgess*** (see link below).

The court noted that, despite court case management and lengthy opening and closing submissions, the Burgesses's case and the precise breaches of duties alleged were still not clear. The judge was critical of the Burgesses's approach to their principal criticisms of Mrs Lejonvarn's performance and, in particular, of Mr Burgess's evidence. He rejected all of the alleged breaches of duty and dismissed the Burgesses's claim.

Burgess & Anor v Lejonvarn [2018] EWHC 3166

3. Adjudication enforcement: Court of Appeal confirms extra ground for stay

In ***Wimbledon v Vago*** the court set out general guidance as to when enforcement of an adjudicator's decision should be stayed. In ***Gosvenor London Ltd v Aygun*** the Court of Appeal confirmed the addition of another principle, that, if the evidence demonstrates that there is a real risk that any judgment would go unsatisfied by reason of the claimant organising its financial affairs with the purpose of dissipating or disposing of the adjudication sum, so that it would not be available to be repaid, then this would also justify the grant of a stay.

The party attempting to enforce an adjudication argued, however, that the extra principle should be qualified by stating that it could not be based on evidence that was or could have been deployed in the adjudication. The Court of Appeal disagreed, explaining that, on an application to stay, the court may be asked to weigh up the evidence and decide whether or not it demonstrates a real risk of dissipation. If the court concludes that there is a real risk that any future judgment in favour of the paying party would go unsatisfied, by reason of the dissipation of the judgment sum in the meantime, the court may grant the stay, regardless of what happened (or what could have happened) in the adjudication. That is because the assessment of the risk of dissipation will not have been undertaken before; such a risk will not have been an issue in the adjudication, which will have been concerned solely with whether or to what extent the payer was liable to the payee.

A court subsequently considering whether there is a real risk of dissipation of assets so as to justify a stay is therefore undertaking the exercise for the first time, and must consider all the relevant evidence, regardless of whether or not it was or could have been raised in the adjudication. The use of the evidence to support an application for a stay is for a different purpose and does not amount to a collateral attack on the adjudicator's decision. The Court added that the cases where the extra principle is relevant to the granting of a stay are likely to be small, and the number of those where there may be an overlap between the evidence that was or could have been deployed in the adjudication, and the evidence justifying a stay on the grounds of risk of dissipation, will be fewer still.

Gosvenor London Ltd v Aygun Aluminium UK Ltd [2018] EWCA Civ 2695

4. Government bans combustible materials on high-rise buildings

New Regulations that came into force on 21 December 2018, ban combustible materials on the external walls of new buildings over 18 metres containing flats, as well as new hospitals, residential care premises, dormitories in boarding schools and student accommodation over 18 metres. Schools over 18 metres built as part of the government's centrally delivered build programmes will also not use combustible materials in the external wall.

And local authorities will receive the government's full backing, including financial support if necessary, to enable them to carry out emergency work on affected private residential buildings with unsafe ACM cladding. They will recover the costs from building owners.

The Secretary of State for Communities has said that building owners and developers must replace dangerous ACM cladding and the costs must not be passed on to leaseholders. Private building owners must pay for this work now or they should expect to pay more later.

https://www.gov.uk/government/news/government-bans-combustible-materials-on-high-rise-homes

https://www.gov.uk/government/publications/building-amendment-regulations-2018-circular-022018

5. 2019 start for new government initiatives on social value in procurement, outsourcing and prompt payment

The government has announced that, by summer 2019, government procurements will be required to take social and economic benefits into account in certain priority areas. These include supporting small businesses, providing employment opportunities for disadvantaged people and reducing harm to the environment. Also from 2019, new complex outsourcing projects are to be piloted with suppliers before deciding to use the private sector.

Central government will shortly be publishing new data about the performance of critical contracts, such as response rates and if they are delivering on time. The government's Supplier Code of Conduct is to be reviewed and enhanced and the GovTech catalyst programme to ensure the best ideas and technologies are assessed quickly is to be scaled up, with plans to be published in Spring 2019.

The government has also announced that, from autumn 2019, companies providing services to the government that cannot demonstrate prompt payment to their suppliers could be prevented from winning government contracts.

See: *https://www.gov.uk/government/news/new-social-value-contracts-to-revolutionise-government-procurement* and

https://www.gov.uk/government/news/crack-down-on-suppliers-who-dont-pay-on-time

6. RIBA Professional Services Contracts 2018

The new RIBA Professional Services Contracts, which replace the old RIBA Agreement documents, have now been published and are available in digital format. They can be used for the provision of built environment consultancy services. The five contracts currently in the suite are:

- RIBA Standard Professional Services Contract 2018: Architectural Services
- RIBA Concise Professional Services Contract 2018: Architectural Services
- RIBA Domestic Professional Services Contract 2018: Architectural Services
- RIBA Principal Designer Professional Services Contract 2018
- RIBA Sub-consultant Professional Services Contract 2018

See: *https://www.ribabookshops.com/topic/riba-professional-services-contracts/0401/*

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