MAYER·BROWN

Legal Update
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Legal developments in construction law

1. Settlement agreement – or is it?

Mr and Mrs Seeney agreed a property swap with Gleesons. Gleesons would take the Seeneys' defective house and build them a new one. A detailed specification for the new house was to be agreed, together with a price for any additions and alterations that the Seeneys wanted to make to the specification. The £30,000 bill for the extras was agreed but was that figure binding on Gleesons or was it subject to a formal contract that was never concluded?

In deciding whether parties have reached agreement the court considers all the negotiations. If they appear to have agreed in the same terms on the same subject matter, usually through offer and acceptance, a contract will have been formed. The parties can conclude a binding contract, even if a formal document recording, or adding to, the agreed terms needs to be executed. Whether they intend to be bound in such circumstances, or whether they intend to be bound only when the formal document is executed, depends on an objective appraisal of their words and conduct.

The court found that a binding agreement had been reached, as recorded in an email from the mediator in the dispute. The judge also said that the courts should be very reluctant to undo agreements reached with or through a mediator, and should take a realistic, if not mildly sceptical, view of parties who seek to avoid the consequences of such an agreement months, if not years, down the line.

Seeney & Anor v Gleeson Developments Ltd & Anor [2015] EWHC 3244

2. Hybrid construction contract gives court a payment headache

The Construction Act does not apply to all construction works. Sometimes a construction contract is for both included and excluded construction works. In this situation, the Act says, disarmingly simply, that it only applies in so far as the contract relates to 'construction operations' as defined in the Act. But where does that leave an application for payment for both sorts of works, without distinguishing between the two?

A steelwork contractor for two power generation plants submitted a hybrid payment application. No valid payment or payless notice was served in time and the contractor issued adjudication proceedings for the part of the application that it said related to construction operations under the Act. Enforcement of the adjudication award for the full amount was refused, because of jurisdiction issues, and the contractor issued separate court proceedings and asked for summary judgment for a further reduced part of the original application.

Not only do payment notices under the Act have to set out the sum considered due and the basis of calculation but recent cases have said that, to engage the default mechanism of the Construction Act, the payment notice must be clear and unambiguous. The court ruled that the original application was not a valid payment notice because it did not state the reduced sum subsequently claimed in the court proceedings as due, or show its basis of calculation, and it was not clear and unambiguous. Because this was a hybrid contract, it was imperative that the claimant spelled out the fact that, regardless of the position in relation to excluded operations, this was a payment notice (with all that that entailed) in respect of the claim for construction operations. The reduced payment claim was arguably a revised claim, that required a fresh payment notice and may in fact have included items that fell outside the Act.

Severfield (UK) Ltd v Duro Felguera UK Ltd [2015] EWHC 3352

3. No pay less notice? Court of Appeal confirms it's not the end of the road

As the name implies, final accounts under building contracts are fundamentally different from interim applications. If a final account payment notice and pay less notice are missed there is no opportunity for the payer to claw back an overpayment in the next valuation, because there are no more. But in Paice v Harding, Mr Justice Edwards-Stuart decided that an employer, under a JCT 2011 Intermediate Form of contract, who failed to serve a valid pay less notice and consequently had to pay the final account sum applied for, following termination, could still go to adjudication or litigation to have a determination of the sum properly due. Did the Court of Appeal agree?

It did. It said that the employer's failure to serve a pay less notice had limited consequences. The employer had to (and did) pay the full amount applied for and awarded in adjudication and argue about the figures later but it was then entitled to go to adjudication (or litigation) to determine the correct value of the contractor's claims and its own counter-claims. Which meant the contractor failed in its application for an injunction to stop the employer's adjudication to that end.

Harding (t/a M J Harding Contractors) v Paice & Anor [2015] EWCA Civ 1231

4. IUK + MPA = I &PA = ?

Infrastructure UK and the Major Projects Authority are to tie the knot and merge. From 1 January 2016 they will be one, and known as the Infrastructure and Projects Authority, reporting to the Chancellor and the Minister for the Cabinet Office. The current Chief Executive of MPA, Tony Meggs, is to become the Chief Executive of the new body.

See: https://www.gov.uk/government/news/government-creates-new-body-to-help-manage-and-deliver-major-projects-for-uk-economy

5. CIOB renames its Complex Projects Contract in 2015 edition

The CIOB has issued a 2015 edition of its 2013 Complex Projects Contract, with a name change and updated to take account of industry feedback. Now known as the Time and Cost Management Contract, it is said to be most suitable for those projects which cannot be effectively managed intuitively and which require for their success a more scientific approach to time and cost risk management than is usual on more simple projects. It is written for use with the 2015 subcontract and consultancy appointment.

See: http://www.ciob.org/insight/time-and-cost-management-contract-suite

6. Government seeks nominations for housebuilding Red Tape hit list

The government is asking all those involved in building homes, including developers, planners and trade associations, to identify '*ineffective rules and heavy-handed enforcement that stop them building homes*'. The key starting points for its new Cutting Red Tape review are based on the Task Force's priorities, roads and infrastructure rules for new housing developments, environmental requirements, particularly EU rules, and rules affecting utilities. The government is also keen to look at the CDM Regulations changes, as well as any EU rules being implemented too strictly. The review will look at the way the law is enforced, as well as whether the rules themselves are proportionate and fit for purpose and the responses will lead to the government taking concrete steps to remove burdens on business.

https://www.gov.uk/government/news/cutting-red-tape-review-will-give-construction-industry-the-foundations-to-get-britain-building

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