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Legal Update
April 2017

Legal developments in construction law

1. Scottish court says slip rule would not save items adjudicator omitted in error

An adjudicator made a mistake in carrying over a figure in the calculations in his decision. One of the parties pointed this out and the adjudicator promptly issued an amended decision, correcting the error and also including, in the calculations, two items previously omitted. The slip rule introduced in the amended Scheme for Construction Contracts (in England and Wales and Scotland), allows correction of *"... a clerical or typographical error arising by accident or omission..."* but the Scottish court ruled that it did not apply. Could a similar slip rule, however, be implied and, if it could, would it permit the inclusion of the items that had been left out?

On the basis that there might be scope for implication of a term similar to the amended Scheme slip rule, the court decided that it would not apply to the inclusion of the items originally omitted. It noted that the rule's scope is relatively narrow and it is not directed to pure omissions. A *"clerical or typographical"* error indicates an error in expression or calculation of something in the decision, not an error going to the reason or intention forming the basis of that decision and *"accident or omission"* points to correction of slips or mistakes in expression, rather than changes to the reasoned or intended basis of the decision. If the slip rule allowed corrections of pure omissions or giving effect to second, rather than first, thoughts or intentions, it could seriously undermine the interim finality of Scheme adjudications.

The court also found that the adjudicator had not addressed all but one of the substantive defences and had therefore failed to exhaust his jurisdiction in respect of these. This failure was material as each defence afforded a complete defence to the relevant claim, which made the decision or, if severable, the relevant parts of it, unenforceable.

NKT Cables A/S v SP Power Systems Limited at:

https://www.scotcourts.gov.uk/search-judgments/judgment?id=29772ca7-8980-69d2-b500-ff0000d74aa7

2. The case of the arbitrator who was kept in the dark

The court has power, under s.68 of the 1996 Arbitration Act, to set aside or remit an arbitrator's award if there is *"serious irregularity"* which the court considers has caused, or will cause, *"substantial injustice"*. But what does *"serious irregularity"* mean? The Act lists the possibilities, one of which is an award obtained by fraud or in a way contrary to public policy.

A party to an arbitration deliberately withheld from the arbitrator material that was completely inconsistent with key issues in its case. In the court's view it was highly likely that the correspondence in question would have been material to the outcome of the arbitration, since it was contrary to the party's case. And where the key issue was one that would potentially be affected by the material not put before the arbitrator it followed that the other party suffered a substantial injustice – namely the wrong result. In any event, the arbitrator made a costs order against that party, which must have been affected by the outcome of the application.

The court therefore remitted to the arbitrator the parts of the award that were challenged so that he could consider his award in possession of the full facts.

Celtic Bioenergy Ltd v Knowles Ltd [2017] EWHC 472

3. When a court might not enforce an adjudicator's wrong decision...

If an adjudicator's decision is within their jurisdiction and broadly in accordance with the natural justice rules, the decision will be enforced. There are, however, two narrow exceptions, where there is an admitted error which the court can correct, and where a case involves the proper timing, categorisation or description of a payment application or notice or payless notice. In *Hutton v Wilson* Mr Justice Coulson noted, in considering the second category, the *"proliferation"*, since 2015, of *"smash and grab"* adjudication claims, based on alleged failures to serve

proper or timely payment applications and notices and pay less notices. In a number of these cases, the defendant had issued a claim, under Part 8 of the Civil Procedure Rules, challenging the adjudicator's decision and seeking a final determination in a court declaration. They all involved a significant degree of agreement between the parties and a tacit understanding that the parties' rights and liabilities turned on whether the particular notice had been served in time and/or was a valid application for payment or payment/pay less notice. But what if there is no such degree of agreement?

The judge set out the approach that must then be adopted, which supersedes the TCC Guide's guidance in paragraph 9.4.3. The defendant resisting summary judgment must issue a CPR Part 8 claim setting out the declarations sought or, at the very least, indicate in a detailed defence and counterclaim the final declarations it seeks. They must be able to demonstrate that there is a short, self-contained, issue in the adjudication which they continue to contest, with clear cut consequences, that requires no oral evidence, or elaboration beyond what can be provided during the enforcement hearing and which, on a summary judgment application, it would be unconscionable for the court to ignore. In practice that means, for example, that the adjudicator's calculation of relevant time periods is obviously wrong, or that their categorisation of a document as, say, a payment notice is not, on any view, capable of being described as such a document.

In the judge's view, many applications currently made on this basis by disgruntled defendants and which are not the subject of the agreed process are an abuse of the court process. A defendant who unsuccessfully raises this sort of challenge on enforcement will almost certainly have to pay the claimant's costs of the entire action on an indemnity basis. But if the claimant does not agree to the defendant's proposal to deal with the issue on enforcement and the court concludes that the issue does fall within the limited exception, it is the claimant who runs the risk of being penalised in costs.

Hutton Construction Ltd v Wilson Properties (London) Ltd [2017] EWHC 517

4. More JCT 2016 contracts

Another wave of JCT 2016 contracts has arrived:

- Framework Agreement;
- Major Project Construction Contract;
- Major Project Construction Sub-Contract;
- Measured Term Contract;
- Prime Cost Building Contract;

  (Each with a separate Guide.)
- Constructing Excellence Contract;
- Constructing Excellence Contract Project Team Agreement;
- Pre-Construction Services Agreement (General Contractor);
- Pre-Construction Services Agreement (Specialist);
- Consultancy Agreement (Public Sector); and
- Repair and Maintenance Contract;
- Adjudication Agreement;
- Adjudication Agreement Named Adjudicator.

See: *https://corporate.jctltd.co.uk/products/*

5. New payment reporting duty in force

The new regulations requiring large companies and LLPs to report on their payment practices, policies and performance came into force on 6 April.

See; *http://www.legislation.gov.uk/uksi/2017/395/pdfs/uksi_20170395_en.pdf*; and

http://www.legislation.gov.uk/uksi/2017/425/pdfs/uksi_20170425_en.pdf;

and the explanatory memoranda:

http://www.legislation.gov.uk/uksi/2017/395/pdfs/uksiem_20170395_en.pdf and

http://www.legislation.gov.uk/uksi/2017/425/pdfs/uksiem_20170425_en.pdf.

6. Public sector common minimum construction standards updated

The government 2012 Construction Common Minimum Standards for the Built Environment have been updated. The document does not introduce any additional standards but it does summarise existing government policy and relevant standards intended to represent the minimum normal threshold for the application of existing government policies.

The standards apply to central government, including departments, executive agencies and the non-departmental public bodies for which they are responsible. Departments are expected to take reasonable measures to ensure that the standards are also adopted throughout the wider public sector, where responsibility for expenditure of public funds has been devolved. The standards do not cover all legislative requirements, which are mandatory. Compliance with these standards is considered to represent cost effectiveness but practical application by individual procurers should be considered on a project-specific basis, within the context of practicality, achievability and value for money. Procurers are expected to comply with the standards unless it can be clearly demonstrated that one or more of them fall outside the criteria.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/600885/2017-03-15_Construction_Common__Minimum_Standards__final___1_.pdf

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