MAYER·BROWN

Legal Update
March 2016

Legal developments in construction law

1. Interim payment dates – have you got enough?

A design and build contract for a hotel and serviced apartments contained a schedule of 23 agreed interim valuation and payment dates, up to contract completion. The works, however, overran and the contractor issued another interim application, no 24, for £23,166,425. The developer said the contractor had no contractual right to issue, or be paid, in respect of interim application 24. But did the default provisions of the Scheme save the application?

The Construction Act gives an entitlement to instalment or stage payments, if the work is going to last 45 days or more, but section 109(2) says the parties are free to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due. Which means, said the court, that the parties can agree stage payments by reference to stages concluded at highly irregular intervals and of highly variable amounts. They could agree *any* amount *and* any interval or even that the amount of a payment should be nil. Just because the agreement did not provide for interim payments covering all of the contract work was no reason to import the Scheme's provisions so as to generate interim payments in respect of the work not covered by the agreement. The parties had agreed on the 23 stage payments, and no more, and thus the amounts and intervals of the stage payments, so there was no room for the Scheme to apply. The contractor therefore had no contractual right to make, or be paid, in respect of interim application 24 (or any subsequent interim application).

Grove Developments Ltd v Balfour Beatty Regional Construction Ltd [2016] EWHC 168

2. Subcontractor's claims time limit clause struck down as unreasonable

A ground works subcontractor attempted to include, in its subcontract for the design and installation of vibro compaction, a clause (12(d)) requiring notification of claims within 28 days of any alleged defect appearing, or of the occurrence (or non-occurrence) of the event complained of, and stating that claims were barred unless so notified within a year of completion of the works. The court decided that the clause was not included in the subcontract but also considered whether, if it had been, the subcontract order was on the subcontractor's *"written standard terms of business"*, so that the Unfair Contract Terms Act applied, and whether the clause then passed the Act's test of reasonableness.

The court ruled that, for the Act to apply, it is unnecessary for the whole contract to be *"on the other's written standard terms of business"*. Clause 12(d) was one of the subcontractor's standard terms. If, therefore, it was incorporated into the contract at the subcontractor's insistence, the main contractor would have had to deal on the subcontractor's written standard terms of business and clause 12(d) must then satisfy the Act's requirement of reasonableness.

In the court's view it did not satisfy this requirement. The clause 12(d) 28 day period started running with *"the appearance of any alleged defect"* or *"the occurrence (or non-occurrence...) of the event complained of"* but, in practical terms, any defect in the ground compaction work would never be visible because it would be concealed by the structure above it and would manifest itself in the form of some distress to the building's structure, probably cracking of the floor slab or a wall. Defects in ground compaction work and piling do not appear until some time after the work has been carried out, generally

after substantial loading is applied, and, in the court's experience, it was rare for a failure of ground or piles to manifest itself in months, rather than years. This type of failure is also almost invariably progressive, starting with small cracks which may not be readily visible and which may occur in an area seldom visited, or where the cracking can be difficult to see. In addition, the main contractor in this situation will not be the user of the building. It was therefore not reasonable to expect, when the subcontract was made, that compliance with the 28 day time limit would, at least in most cases, be practicable.

Commercial Management (Investments) Ltd v Mitchell Design and Construct Ltd & Anor [2016] EWHC 76

3. Court gives arbitrator red card for apparent bias

Like matrimony, a challenge to an arbitrator on grounds of bias, is not to be undertaken lightly. But when it is, what is the test for apparent bias? In a recent application to the court to remove a well-known arbitrator under s.24 of the 1996 Arbitration Act, on the basis that *"circumstances exist that give rise to justifiable doubts as to his impartiality"* the court summarised the law relating to the test for apparent bias under s.24. Would the fair minded and informed observer, in possession of all relevant facts, aware of how the legal profession operates and having considered the facts, conclude that there was a real possibility that the tribunal was biased? This observer reserves judgment until they have seen and fully understood both sides of the argument; their approach must not be confused with that of the complainer. The observer takes a balanced approach and appreciates that context is an important consideration. Regular appointment or nomination by the same party/ legal representative may be relevant, particularly if it raises material financial dependence questions and the observer may need to consider the tribunal's explanations as to their knowledge or appreciation of the circumstances.

The court decided that five of the seven grounds put forward, considered cumulatively, raised the real possibility of apparent bias and that the grounds for removal of the arbitrator had been established. Included in the court's reasoning was the relationship between the arbitrator and the firm of claims consultants which had successfully sought his appointment in the arbitration. Over the previous three years 18% of the arbitrator's appointments and 25% of his income as arbitrator/adjudicator derived from cases involving the firm, which, though not appointing an arbitrator/adjudicator directly, were able to, and did, influence appointments, both positively and negatively, as highlighted in another recent case. Also significant was the firm's appointment "blacklist". The arbitrator/adjudicator's conduct of the reference might lead to them falling out of favour, being placed on that list and effectively excluded from further appointments involving the firm. That was important for anyone whose appointments and income were dependent on the firm's cases to a material extent. Of further concern was the arbitrator inappropriately "descending into the arena", at a meeting (and failing, subsequently, to acknowledge this conduct as inappropriate) and his witness statement, which showed that he did not recognise the relevance of the relationship information or the need for disclosure. This lack of awareness demonstrated a lack of objectivity and an increased risk of unconscious bias.

Cofely Ltd v Bingham & Anor [2016] EWHC 240

4. JCT 2016 edition

The 2016 edition of JCT contracts is scheduled for publication later this year, starting with the Minor Works contracts. Key changes include:

- incorporating provisions (with updating) from the JCT Public Sector Supplement; and
- provisions relating to CDM;
- reflecting the Public Contracts Regulations 2015;
- changes to reflect fair payment principles and to simplify and consolidate the payment provisions, including a new procedure for prompt assessment of loss and expense claims;
- provisions for the grant of performance bonds and parent company guarantees;
- including, as an alternative to warranties, provisions for the granting of third party rights by sub-contractors;
- enabling alternative solutions to Option C existing structures cover issues; and
- incorporating (where appropriate) the provisions of the JCT 2012 Named Specialist Update.

More details of the changes are promised nearer to publication dates.

See: http://corporate.jctltd.co.uk/jct-2016-edition-new-features-announced/

5. Government consults on Housing Bill planning provisions

The government is consulting on implementation of the Housing and Planning Bill planning provisions and other planning measures. The consultation includes proposals for councils to compete to process planning applications and to be able to offer fast track application services. Applicants would have the option of submitting their plans to the local council, to a competing council or to a government approved organisation that would process applications up to the decision. The consultation also proposes making future increases in councils' fees for processing planning applications dependent on their performance in terms of speed and quality of decisions. Further details on how the pilots will run will be published after the consultation has closed.

Other measures in the consultation include how a new planning "permission in principle" approach will work in practice, how councils will run brownfield land and small sites registers, speeding up the neighbourhood planning process, improving handling of planning applications with new thresholds for designating councils as poor performers and extending permitted development rights for free schools. A separate consultation seeks views on more housebuilding in London through allowing taller buildings, subject to conditions.

The consultation closes on Friday 15 April 2016.

See: https://www.gov.uk/government/news/fast-track-applications-to-speed-up-planning-process-and-boost-housebuilding

6. New government guidance targets inappropriate procurement boycotts by public authorities

The government has issued new guidance intended to stop inappropriate procurement boycotts by public authorities, except where the government has put in place formal legal sanctions, embargoes and restrictions. The guidance applies to all contracting authorities, including central government, executive agencies, non-departmental public bodies, wider public sector, local authorities and NHS bodies. There are remedies available through the courts for breaches of the UK's procurement rules, such as damages, fines and ineffectiveness (contract cancellation) and the European Commission can also bring legal proceedings against the UK government for alleged breaches of EU law by a UK contracting authority. The government states that it will always involve the relevant contracting authority in these proceedings.

The policy note also records that the government expects its authorities to deal with bids from *"third countries"* (i.e. not part of the EU or World Trade Organisation Government Procurement Agreement (GPA) or other international free-trade agreements with the EU))in the same way as EU or GPA countries.

See: https://www.gov.uk/government/news/putting-a-stop-to-public-procurement-boycotts

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