MAYER·BROWN

Legal Update
November 2017

Legal developments in construction law

1. Concurrent contractor delay cancels out act of prevention

Acts of prevention, actions of the employer that delay the contract completion date, may entitle the contractor to an extension of time. But what if there is concurrent delay by the contractor? Does the contractor still receive an extension of time?

The contract wording in *North Midland v Cyden Homes* was, in the court's view, *"crystal clear"* in denying the contractor an extension of time for an act of prevention where the contractor was itself in concurrent delay. And, although it was unnecessary to do so, the judge also considered the case law on the relationship between acts of prevention and causation. He said it might assist in avoiding similar misunderstandings in future cases.

The judges in two previous cases had reached the same conclusion that, for the prevention principle to apply, the contractor must be able to demonstrate that the employer's acts or omissions had prevented the contractor from achieving an earlier completion date and that, if that earlier completion date would not have been achieved anyway, because of the contractor's own concurrent delays, the prevention principle would not apply. The judge in this case said that, if he had to decide the point, he would apply and follow the same reasoning.

North Midland Building Ltd v Cyden Homes Ltd [2017] EWHC 2414

2. Architects' budget overrun gives client damages to start again

Mr Dhanoa, a businessman, hired, through Riva Properties Limited, one of his companies, an internationally renowned firm of architects to design a scheme for a 5 star 500 bed hotel at Heathrow. The architects were told that his budget was £70 million, subsequently increased to £100 million. The scheme design produced was, however, costed at £195 million but the architects advised Mr Dhanoa that the cost could be value engineered down to £100 million. That was impossible but the architects did not tell him. The project did not proceed and four of Mr Dhanoa's companies sued the architects.

Mr Justice Fraser ruled that they were in breach of contract, in failing to carry out Stages A & B of the appointment which referred, respectively, to: *"Identification of Client's requirements and of possible constraints on development..."* and *"....Preparation of Strategic Brief by [or] on behalf of the Client confirming key requirements and constraints."* In his view an architect exercising reasonable skill and care must have regard to the RIBA Job Book, which contains many references to cost being a key constraint that must be identified and considered at Stages A and B. The architects were also in breach in negligently advising that their scheme could be value engineered down to £100 million.

As a matter of causation, it was not, however, those breaches but Mr Dhanoa's lack of substantial cash reserves, together with the financial crisis, that caused the hotel scheme not to be built. Alternatively, the inability to obtain funding, caused by the financial crisis, was not a type of harm from which the architects had a duty to keep the claimants harmless. Which meant that Riva's claim for loss of profits from the hotel failed but its claim for expenditure on professional fees was different. Riva Properties was entitled to damages for breach of contract on the

expectation basis, to put it in the position it would have been in, had the architects complied with their contract obligations. As the claimants had to start again from scratch, the sums paid to the architects and other professionals in connection with the £195 million scheme were used as the measure of the expectation loss.

Some of the costs had been paid by other companies of Mr Dhanoa. Did that matter? The court ruled that the architects owed no duty of care to the companies. There was no proximity and it was not fair just and reasonable to impose such a duty; provisions for warranties to be given to another legal entity and for assignment could have, but had not, been operated. The architects argued that Riva Properties could not recover these sums. It had not paid them and so it had suffered no loss but the court said that the fact that they had been paid by other companies did not prevent recovery by Riva Properties, the party that had suffered the substantial loss. The judge was, in fact, not sure that the no loss issue arose at all, as the sums paid were being used as the measure of loss that would be incurred by Riva Properties in engaging services for the successor scheme.

Riva Properties Ltd & Ors v Foster + Partners Ltd [2017] EWHC 2574

3. Every pay less notice needs...a basis of calculation

Under a Scottish construction contract, a pay less notice, like all good pay less notices, had to specify the sum considered due and the basis on which that sum had been calculated. A pay less notice issued by the employer stated that the sum considered due was zero and, in subsequent Scottish court proceedings, the employer said that, as the retained amount was small and a very large amount of work was necessary to remedy defects, it was enough to say that the remedying of the defects would require a sum well in excess of the retained amount. The basis for the zero sum was therefore sufficiently stated. But was it?

The court said that from none of the information provided could the reasonable recipient work out the basis on which the zero figure was calculated. There was no calculation from which to understand how that figure was arrived at. There was no specification from which to make any sense of the figure. There were no figures, and thus no basis substantiating the zero, in the pay less notice or in any of the other documentation on which the employer relied.

So what does a basis of calculation look like? The court considered that a proper basis of calculation would need, at least, to set out the grounds for withholding and the sum applied to each of these grounds with, at least, an indication of how each of these sums was arrived at.

Muir Construction Limited v Kapital Residential Limited at: https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2017csoh132.pdf?sfvrsn=0

4. Government consultation puts retention under the spotlight

The government has started a consultation on cash retention. This follows publication of a government commissioned government research paper, which identified key issues:

- loss of retention monies due to contractor insolvency;
- construction customers, despite the 2011 Construction Act changes, making payment of retention conditional on the performance of obligations under another contract;
- unjustified late and non-payment of retention monies; and
- the suitability and feasibility of wide use of alternative mechanisms to retentions.

The consultation, which closes on 19 January 2018, seeks views and information on:

- the effectiveness of existing prompt and fair payment measures for retentions;
- the independent research and the BEIS Impact Assessment;
- late and non-payment of retentions;
- the appropriateness of a "cap" on retention, and the length of time it can be held;
- the effectiveness of existing alternative mechanisms; and
- the costs and benefits of holding retentions in a deposit scheme or trust account.

See: https://www.gov.uk/government/consultations/retention-payments-in-the- construction-industry

5. So how is the amended Construction Act working? The government is consulting.

The government has also launched a consultation on the effectiveness of the 2011 changes to the Construction Act. It said it would undertake a review five years after the introduction of the changes to establish how effective the changes had been in securing the objectives of:

- increasing transparency in the exchange of information relating to payments;
- encouraging parties to resolve disputes by adjudication, where appropriate; and
- strengthening the right to suspend performance.

The government is particularly interested in the cost of the adjudication process and the extent to which that is disincentivising its use. The consultation ends on 19 January 2018.

See: https://www.gov.uk/government/consultations/2011-changes-to-part-2-of-the-housing-grants-construction-and-regeneration-act-1996

6. Business and Property Courts up and running

The rebranded Business and Property Courts are now operational. Created as a single umbrella for specialist civil jurisdictions across England and Wales, in London these specialist civil jurisdictions form the largest specialist centre for financial, business and property litigation in the world. Business and Property Courts have also been established in the five main centres outside London - Birmingham, Bristol, Cardiff, Leeds and Manchester and will shortly be established in Newcastle and Liverpool. The main centre for the Courts in Wales is in Cardiff, but judges of the courts will sit in other venues in Wales when appropriate and practicable.

Although the various specialist civil work has been brought together under one umbrella, the courts themselves will continue to operate in the same way as at present.

See: https://www.judiciary.gov.uk/wp-content/uploads/2017/09/bpc-advisory-note-13-oct2017.pdf

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