MAYER·BROWN

Legal Update
November 2016

Legal developments in construction law

1. Adjudicator's million pound error fails to stop enforcement of decision

In deciding a dispute about the inflation adjustment to payments under a contract for road maintenance over many years, an adjudicator made an error in the arithmetic. The error was somewhere between £1.9 and £2.4 million but the judge said no criticism could be made of the adjudicator, who had to deal, under considerable time pressure, with very complicated calculations, for making it. Did that error, however, prevent the decision being enforced?

The "right" answer in adjudication, said the judge, is secondary to the parties having a rapid answer. As stated many times, adjudicators' decisions will be enforced by the courts, regardless of errors of fact or law. Adjudication is a temporary resolution of any dispute and dissatisfied parties should take steps finally to resolve the substantive dispute, rather than waste time and money opposing enforcement. And the part of the decision containing the error could not be severed. That would amount to correction of a mistake of fact and the court will not embark on such an exercise. The test is whether what the adjudicator decided is something that was within their jurisdiction to decide.

There was also argument about interpretation of a previous adjudicator's decision but, as the parties had effectively agreed that the language adopted by that adjudicator represented their agreement, the judge considered that the usual principles of contractual interpretation applied.

Amey Wye Valley Ltd v The County of Herefordshire District Council (Rev 1) [2016] EWHC 2368

2. Court of Appeal cannot fix shortfall in interim payment regime

A construction contract provided for 23 interim payments, up to the contract completion date, but no more. The contract overran and, earlier this year, the court was asked to decide if there was a contractual right to make, and be paid in respect of, a further interim application (or subsequent applications). The court said there was no such right but did the Court of Appeal agree?

It did. The words used in the contract made it clear that the parties were only agreeing a regime of interim payments up to the contractual date for practical completion. It was impossible to deduce from their payment arrangement what would be the dates for valuations, payment notices, Pay Less notices and payments after that date, which were essential matters, and this was a classic case of one party making a bad bargain. The court will not, indeed cannot, use the canons of construction to rescue one party from the consequences of what it has clearly agreed and in this case there was no ambiguity.

Nor could a term providing for extra interim payments be implied. In particular, it was not obvious what the proposed term would say or what would be the critical dates for serving notices. The term was also not necessary to secure business efficacy and it could not be said that the contract would lack commercial or practical coherence without it. And the contract provided an adequate mechanism for quantifying interim payments so that the parties' contract, although unusual, satisfied the requirements of section 110 of the Construction Act.

Balfour Beatty Regional Construction Ltd v Grove Developments Ltd [2016] EWCA Civ 990

3. Court says Construction Act and Scheme concerned with cash flow, not contract sum

An adjudicator awarded a joinery subcontractor payment in full of its final account application, as the main contractor had failed to serve a valid payment notice or pay less notice. In a second adjudication, however, the main contractor obtained a declaration as to the true value of the final account and an order for repayment of the amount overpaid. The joinery subcontractor resisted enforcement, saying that the dispute as to the value and payment of the final account was decided in the first adjudication and could not be re-adjudicated, so that the decision in the second adjudication was a nullity.

Subject to the contract terms, where, under the Construction Act provisions, there is a "*notified sum*" in respect of an interim payment, usually there is no contractual basis for re-opening the contractor's entitlement to that payment. Any errors can be corrected in subsequent interim or final valuations and an adjudication decision as to the "*notified sum*" payable rules out a challenge to the interim payment on valuation grounds in a subsequent adjudication.

In rejecting the subcontractor's challenge, the court said, however, that the Construction Act and Scheme are concerned only with cash flow and not the contract sum. Where the "*notified sum*" determined in adjudication is in respect of a final payment (and unless the contract says that it is conclusive as to the amount due), the "*notified sum*" must be paid but either party can have the ultimate value determined in a subsequent adjudication, litigation or other form of dispute resolution. The contract does not need to set out any specific mechanism for that final accounting exercise; payment of any final sum due to either party is based on enforcement of the contractual bargain.

Kilker Projects Ltd v Purton (t/a Richwood Interiors) [2016] EWHC 2616

4. February 2017 date set for new ADM contracts

A new set of contracts, the Architect's Design and Management (ADM) suite, published by the ACA, is to be released in February 2017.

It is intended for use on small to medium sized projects and where the client may have limited experience of development and is keen to work closely with the architect. The construction team are all directly employed by the client and the suite has a common contractual structure for consultants and contractors.

5. APPG looking at evidence on potential Brexit impact on construction skill pool

The All Party Parliamentary Group for Excellence in the Built Environment is conducting an inquiry into the impact of Brexit on future skills needs in the construction industry and the built environment professions. It has called on organisations, businesses and individuals to submit evidence on how Brexit could potentially impact on the skill pool; what government could do to mitigate this impact and what the industry could itself be doing to increase the talent pool. It is seeking clear evidence to identify the extent of workers employed from overseas, the benefits they bring to the construction industry and evidence of schemes that are training and attracting young people into the sector.

See: http://cic.org.uk/news/article.php?s=2016-10-26-appg-for-ebe-inquiry-call-for-evidence

6. And now - the JCT 2016 Standard Building Contracts

More JCT 2016 contracts have arrived - these versions in the Standard Building Contract family:

- With Approximate Quantities
- With Quantities
- Without Quantities
- Guide
- Sub-Contract Agreement
- Sub-Contract Conditions
- Sub-Contract with sub contractor's design Agreement
- Sub-Contract with sub contractor's design Conditions
- Sub-Contract Guide

And these collateral warranties:

From a Contractor for:

- a Funder; and
- a Purchaser or Tenant.

From a Sub-Contractor for:

- a Funder;
- a Purchaser or Tenant; and
- the Employer.

Free downloads are also available, for the 2016 Standard Building Contract and subcontract, of the:

- Model forms for the Rights Particulars; and
- Fluctuations Options B & C.

For updates sign up to the JCT Network.

See:

http://www.jctltd.co.uk/category/standard-building

http://www.jctltd.co.uk/category/collateral-warranties

and

http://www.jctltd.co.uk/useful-documents

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