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Legal Update
February 2017

Legal developments in construction law

1. It might tick the boxes for a pay less notice but was it meant to be one?

If an employer fails to serve a pay less notice in response to a contractor's default payment notice, there can be serious consequences. Because of this the courts have said that a default payment notice must, in substance, form and intent, be an interim application and free from ambiguity. But what about a pay less notice? Do the same requirements apply?

The Quantity Surveyor named in a building contract received the contractor's '*Interim Payment Notice*' and then issued a Final Certificate, which stated the sum considered due and was accompanied by a detailed breakdown. The court said the payment notice was valid but was the Final Certificate, plus the supporting material, a valid pay less notice? They met the contractual requirements for a pay less notice but the key question for the court was whether, read together, they were intended to constitute a pay less notice.

The court, ruling that they did constitute a pay less notice, said that it is not necessary for a pay less notice to have that title or to make specific reference to the contractual clause in order to be valid. The question is whether, viewed objectively, it had the requisite intention to fulfil that function.

Surrey and Sussex Healthcare NHS Trust v Logan Construction (South East) Ltd [2017] EWHC 17

2. Contract clause times out emailed pay less notice

A pay less notice had to be served by 14 August. It was emailed to the contractor at 9.50pm on Friday 12 August and arrived the same evening. So it was in time – or was it?

The Construction Act contains provisions for calculating dates by which actions, such as serving a pay less notice, have to be taken, but it does not deal with service by email and fixing the date by which an emailed notice is deemed served. This is left for the parties to agree and, in this case, the contract said that service by email by 4.00pm on a Business Day would take effect on that day. Otherwise, service would take effect on the next Business Day, which was Monday 15 August and thus too late. By default, the employer consequently had to pay the '*notified sum*' identified in the contractor's application.

The employer sought a stay of enforcement based on its own inability to pay the judgment sum, and the contractor's alleged inability to repay it if it was subsequently found not to be due. Applying previous case law, the court refused the stay, noting that it will be rare and exceptional for the court to stay the execution of a judgment sum based on the defendant's inability to pay. The circumstances in this case were not exceptional and the evidence before the court did not indicate that the contractor would be unlikely to be able to re-pay the judgment sums, if subsequently found to be repayable to the employer.

Kersfield Developments (Bridge Road) Ltd v Bray and Slaughter Ltd [2017] EWHC 15

3. Court upholds subcontractor's loss and expense liability cap

A subcontract clause dealing with subcontractor failure to complete on time capped the subcontractor's liability for '*direct loss and/or expense and/or damages*' at 10% of the subcontract order. The main contractor argued, however, that some of its delay and disruption claims, which it said arose under another subcontract clause, that applied where the subcontractor materially affected progress of the main contract works, were not caught by the cap. So what claims did the cap catch?

The court said that a liability cap in a commercial contract should generally be treated as an element of the parties' wider allocation of benefit, risk and responsibility. No special rules apply to its interpretation but, to be effective, it must be clear and unambiguous. In the court's view, the natural meaning of the clause was plain; it capped the subcontractor's liability for the main contractor's financial claims (whether described as loss, expense or damages) as a result of delay and disruption caused by the subcontractor, howsoever they arose, at 10% of the sub-contract sum. That was part of the commercial allocation of risk and responsibility and the cap was not limited to claims under particular clauses or inapplicable to claims for breach of implied terms.

McGee Group Ltd v Galliford Try Building Ltd [2017] EWHC 87

4. Government guidance on new payment reporting duty

The government has published guidance on the new requirement that comes into force this April, for large companies and LLPs to report, twice a year, on their payment practices and performance. The report must include the average time taken to pay supplier invoices.

See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/587465/payment-practices-performance-reporting-requirements.pdf

5. New ACE Agreements

The ACE has published:

- Professional Services Agreement 2017;
- Sub-Consultancy Agreement 2017;
- Schedule of Services Civil and Structural Engineering Lead Consultant; and
- Schedule of Services Civil and Structural Engineering Single Consultant or Non-lead Consultant.

New Schedules for Mechanical and Electrical Design are to follow.

See: http://acenetmail.co.uk/2OF7-DI38-231KOW-MVA4/cr.aspx

6. Government sets out plans for housing

The government has issued its housing white paper, setting out its plans to build more houses. Its proposals are listed under four headings:

- Planning for the right homes in the right places;
- Building homes faster;
- Diversifying the market; and
- Helping people now.

The government has also opened a consultation on a range of specific planning proposals, including the principle of a new, standardised way of calculating housing demand to reflect current and future housing pressures. Every local area will need to produce a realistic plan and review it at least every five years.

See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/590463/Fixing_our_broken_housing_market_-_accessible_version.pdf

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

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