MAYER·BROWN

Legal Update
October 2015

Legal developments in construction law

1. Application, application, application (for payment) – but is it?

Since the Construction Act was amended, failure to serve the right notices at the right time can have serious consequences. The payment application, however optimistic (unless fraudulent), has to be paid in full. But only if the application has been properly made. Mr Justice Akenhead drove the message home in ***Henia v Beck***.

He said that the interim application under the contract wording in question should be considered in the same light as a certificate. If there were to be potentially serious consequences flowing from it being an interim application, it must be clear that it was what it purported to be, so that the parties knew what to do about it and when. An application had to comply with the relevant contract clause, and had to be clear and unambiguous that an application relating to a specific due date was being made. The application in question did not.

The judge also ruled on the interpretation of the contract provisions dealing with the issue of a pay less notice which, he said, were consistent with, and effectively reflected, the Construction Act drafting. He said that the pay less notice could not only raise legitimate set-offs and deductions specifically permitted by the contract but also deploy the employer's own valuation of the works.

The judge also offered his view on a final point that he did not need to decide, that a failure on the part of the contract administrator to operate the extension of time provisions did not prevent the employer from deducting liquidated damages, where the contract conditions for making such a deduction had been met.

Henia Investments Inc v Beck Interiors Ltd [2015] EWHC 2433

2. The work is done but does that mean there was a contract?

A *"construction contract"* may no longer need to be in writing but there still needs to be a contract. Working out whether there was an oral contract may not be easy but does the fact that the works have been carried out help? A subcontractor carried out works at the Dorchester Hotel and the main contractor made a number of payments but, when the subcontractor submitted its final account, the contractor failed to respond with a pay less notice and the subcontractor obtained an adjudication award in its favour. The main contractor claimed, however, that there was no concluded contract and that the adjudicator consequently had no jurisdiction to decide the dispute.

The court said that, where works have in fact been carried out, it may readily find that there was an intention to create legal relations. Even if there was insufficient certainty about the agreement of a price or pricing mechanism, the court will readily infer that the person carrying out the works is entitled to be paid on a quantum meruit basis rather than reaching the more drastic position of denying the existence of a contract altogether.

It seemed clear *"beyond argument"* to the judge that there was in fact a contract in place. There was substantial *"performance"* on both sides, with the subcontractor carrying out the works and the main contractor making payments amounting to £654,000. While it is theoretically possible for parties to carry out works and to receive payments without having entered into a legally binding agreement, it was unrealistic to suggest that is what had happened, for a number of reasons, including a clear acknowledgement, by a key employee of the main contractor, that there was an agreed original scope of works with an agreed contract value, to be supplemented by subsequent variations. The adjudicator's award was therefore enforced.

Purton (t/a Richwood Interiors) v Kilker Projects Ltd [2015] EWHC 2624

3. An arbitrator knows best – at least on the facts

FIDIC Red Book Sub-Clause 2.4 entitles a contractor to request *"reasonable evidence"* of the employer's arrangements to pay the contract price. An employer for a new hospital in Tobago was asked for this financial reassurance but, despite *"without prejudice"* advice from the Ministry of Health that funds were available, it failed to confirm, when asked, that the Cabinet had approved the funds. The contractor suspended work and later terminated the contract. In the ensuing arbitration, the arbitrator ruled that the employer had not provided the required *"reasonable evidence"* and the contractor was consequently entitled to terminate. The Court of Appeal of Trinidad and Tobago disagreed with the arbitrator's decision and allowed the employer's appeal, but could it do that?

No, said the Privy Council. Where parties choose arbitration for disputes, it is well established that the courts should respect their choice and recognise that the arbitrator's findings of fact, assessments of evidence and formations of judgment should be respected, unless they can be shown to be unsupportable. The fact that a judge takes a different view from the arbitrator is no basis for setting aside or varying the award. Different considerations apply, however, when it comes to issues of law, where courts are often more ready (and in some jurisdictions much more ready) to step in.

On a separate issue, the Privy Council also decided that FIDIC Red Book Sub-Clause 2.5 was effective to shut out any claims (including, but not limited to, set-offs or cross-claims) that had not been properly made under the clause.

NH International (Caribbean) Ltd v National Insurance Property Development Company Ltd (Trinidad and Tobago) [2015] UKPC 37

4. New expert panel to make planning go faster

The government has set up an eight-strong panel, drawn from local authorities, a developer, the law, planning consultants and the Planning Inspectorate, together with an MP, to advise on ways to speed up local plan making.

The panel's remit is broad, covering any aspect of the local plan-making process that they feel is relevant and calling on relevant experts as appropriate. It is due to report in the new year.

https://www.gov.uk/government/news/brandon-lewis-launches-expert-panel-to-speed-up-development

5. UK business with £36 million plus turnover? Modern slavery reporting on the way

Under the Modern Slavery Act 2015, all commercial organisations carrying on business in the UK with an annual turnover exceeding £36m will have to report on the steps they have taken to ensure there is no modern slavery in their business or supply chain. Companies affected will also need to update their websites.

This requirement came into force on 29 October 2015, but does not apply to a financial year of a business ending before 31 March 2016.

http://www.legislation.gov.uk/ukpga/2015/30/section/54/enacted

6. And now we have a National Infrastructure Commission

The government has announced new building initiatives, including the setting up of a National Infrastructure Commission.

The NIC is beginning work immediately in an interim form, before being made permanent by legislation. Its remit is to consider future infrastructure of national significance. It will deliver a long-term plan and assessment of national infrastructure needs early in each parliament, setting out what a government is expected to do over the next five years. It will be overseen by a small board, appointed by the Chancellor, and able to commission research and call for evidence from public sector bodies and private sector experts.

The NIC's initial focus will be on transforming the connectivity of northern cities, including HS3, the priorities for future large-scale investment in London's public transport infrastructure and the most efficient way to ensure energy infrastructure investment can meet future demand. It will not re-examine existing government infrastructure commitments, Heathrow and airports in the South East or the work of the Airports Commission and it will not re-open regulatory price controls.

https://www.gov.uk/government/news/chancellor-announces-major-plan-to-get-britain-building

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