MAYER·BROWN

Legal Update
June 2016

Legal developments in construction law

1. Court tells parties where to put subcontractor's extension of time

Unlike main contracts, which usually have a start and completion date (or dates), subcontracts usually have a period (or periods) for completion. Which prompts the question, if a subcontractor is entitled to an extension of time, where (in the nicest possible way) do you put it? If the subcontract was in delay when the event occurred, do you tack it on to the end of the subcontract period(s) or does it become a stand-alone period separate from the original subcontract period(s)? If the latter, any claim by the main contractor against the subcontractor for loss and expense in respect of the delay period would then be in respect of the period when the subcontract was actually in delay.

In Carillion Construction Ltd v Woods Bagot Europe Ltd, where the subcontract form used was DOM/2, the court ruled that any extension of time under the relevant clause should be added to the end of the current period for completion. This interpretation was practicable and workable and what a reasonable person with all the parties' background knowledge would have thought the clause meant when the contract was entered into.

There were factual scenarios where this interpretation could relieve a subcontractor of liability to an extent that did not truly reflect the consequences of its breach in failing to complete on time but this did not affect what the court considered to be the obvious interpretation of the clause. In any event, these were only potential factual scenarios that would not necessarily arise and the extent to which they could influence the interpretation must consequently be limited. The difficulty with these arguments was that they created a distinction not made in the subcontract between responsibility for delay and contractual liability. The subcontractor was only contractually liable for delay if it failed to complete the subcontract works within the period or periods for completion, so the key issue was what the contract provided in respect of those period(s).

Carillion Construction Ltd v Woods Bagot Europe Ltd & Ors [2016] EWHC 905

2. Offer and acceptance: body language beats sign language

If you want to make sure that an offer is properly accepted to form a contract, you might want to insist it is in writing, and signed by both parties. Which is what a counter offer said in the negotiation of a deal memo for product placement in the US Master Chef TV series and for a licence to use the Master Chef brand. The deal memo was never signed by both parties but they still went ahead as if it had been. Had a contract been formed by conduct, despite the clear wording in the counter offer?

Yes, said the Court of Appeal in ***Reveille v Anotech***. There was clear evidence of acceptance by conduct by the party that did not sign, conduct in which the other party was closely involved. In not signing, the offeree was waiving a prescribed mode of acceptance, set out for its benefit. That was effective so long as there was no prejudice to the other party.

Referring to a number of applicable English contract law rules, the court noted that:

- acceptance can be by conduct, if objectively intended to constitute acceptance;
- acceptance can be of an offer in a draft agreement drawn up between the parties but never signed;
- a party can, by clear and unequivocal words or conduct, waive the requirement of its signature and conclude the contract without it;

- an offeror can waive the requirement of a signature and acquiesce in a different method of acceptance;
- in the court's view it followed that, where the requirement of a signature is intended for the offeree's benefit, and the offeree accepts in some other way, that should be treated as effective unless it can be shown that failure to sign has prejudiced the offeror;
- a draft agreement can have contractual force, although the parties do not comply with a requirement that to be binding it must be signed, if essentially all the terms have been agreed and their subsequent conduct indicates this, although a court will not reach this conclusion lightly;
- the subsequent conduct of the parties is admissible to prove the existence of a contract, and its terms, although not as an aid to its interpretation.

Reveille Independent Llc v Anotech International (UK) Ltd [2016] EWCA Civ 443

3. Does a settlement agreement mean saying goodbye to the right to adjudicate?

Representatives of a subcontractor and its subsubcontractor had a telephone discussion. The subsubcontractor confirmed, the same day, by email, that a *"final account sum"* had been agreed. The subcontractor acknowledged the email and said it would prepare the paperwork and associated information to close out the account. It did not challenge the subsubcontractor's email and, months later, said it was awaiting head office sign off, but then issued a gross valuation very substantially less than the *"final account sum"* allegedly agreed and made no further payments. The subsubcontractor took its claim for the *"final account sum"* to adjudication but the subcontractor asked the court for a declaration that the adjudicator had no jurisdiction. It said that the claim did not arise under the subsubcontract but under the alleged standalone settlement agreement, so that adjudication did not apply. But was that right?

The judge said that, in adjudication cases, the courts should follow the House of Lords' ruling on arbitration clauses, that the parties, as rational business people were likely to have intended any dispute arising out of their relationship to be decided by the same tribunal. A dispute as to whether alleged contract entitlements have been settled in a binding way consequently arises *"under"* the original contract. It would be extraordinary and illogical if the parties or Parliament had intended that an otherwise properly appointed adjudicator would have jurisdiction to deal with a contractor's or subcontractor's payment entitlement except where there was a dispute as to whether that entitlement had been settled. If that was right, unless there was a separate agreement to refer the dispute to adjudication, one could never adjudicate in a construction contract on an interim or final account agreed in some binding way. That made commercial and policy nonsense when such agreements must occur all the time and should be encouraged and supported by retaining the right to adjudicate if there was a challenge to the settlement.

J Murphy & Sons Ltd v W Maher and Sons Ltd [2016] EWHC 1148

4. ACA new Framework Alliance Contract published

The ACA's new Framework Alliance Contract FAC-1 has now been published. It is a multi-party over-arching agreement between any number of framework alliance members, designed for use with any underlying contract form, compatible with NEC3, as well as with ICC, JCT, PPC and FIDIC forms, and said to be suitable for alliances that integrate professional services and supplies. It can also be used with any form of consultant appointment or supply chain agreement.

See: http://acarchitects.co.uk/fac-1-framework-alliance-contract-published-02-june-2016/

5. And June launch date for the first of the JCT 2016 fleet

The first contracts in the 2016 edition of the JCT fleet are being launched this month. They include the Minor Works Building Contract and the with contractor's design version and the Minor Works Sub-Contract with subcontractor's design.

See: http://corporate.jctltd.co.uk/category/jct-2016/

6. Modern Slavery Act to get early update?

A bill to amend the new Modern Slavery Act has started life in the House of Lords. If it becomes law in its current form it will:

- apply the Act to public bodies (bodies governed by public law, contracting authorities and central government authorities);
- require commercial organisations and public bodies to include their yearly slavery and human trafficking statement in their annual report and accounts;
- require the Secretary of State to publish, in an easily accessible place and format, a list, categorised by sector, of all commercial organisations that have to publish the statement;
- amend the Public Contracts Regulations 2015 to require contracting authorities to exclude an economic operator from participation in a procurement procedure where they have established that that operator has not produced a slavery and human trafficking statement as required by the Act.

See: http://www.publications.parliament.uk/pa/bills/lbill/2016-2017/0006/17006.pdf

7. Concession contract threshold set and Housing and Planning Act becomes law

- The threshold for concession contracts has been set, for the purposes of the 2016 Concession Contracts Regulations, with effect from 18 April 2016 until 31 December 2017, at £4,104,394 (€5,225,000);
- The Housing and Planning Act has received Royal Assent. It includes measures designed to unlock brownfield land, requiring local authorities to prepare, maintain and publish local registers of specified land, to ensure that every area has a local plan, to reform the compulsory purchase process and to simplify and speed up neighbourhood planning.

See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/523812/Procurement-Policy-Note-Concession-Contracts-Threshold.pdf and https://www.gov.uk/government/news/landmark-housing-and-planning-bill-receives-royal-assent

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