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Legal Update
July 2015

Legal developments in construction law

1. Just when you thought it was safe to rely on an adjudication award...

A contractor claims £822,482 damages, plus interest, for breach of contract and in tort, from a company that carried out an asbestos survey. An adjudicator awards £490,627, plus interest, which the asbestos company pays. The contractor does nothing more about its claim and the 6 year limitation periods for its contract and tort claims expire. About a year later, the asbestos company starts court proceedings to recover what it paid to the contractor. The contractor counterclaims for the £333,855 balance of its claim and the asbestos company says that claim is too late. But was the asbestos company entitled to bring its claim and was it too late?

The Supreme Court said it was a necessary legal consequence of the Scheme, implied by the Construction Act into the parties' contractual relationship, that the asbestos company must have a directly enforceable right to recover any overpayment consequential on the adjudicator's decision, once there has been a final determination of the dispute. Either by contractual implication or, if not, then by virtue of an independent restitutionary obligation, repayment must to that extent be required and the court must, in addition, have power to order the payee to pay interest on the overpayment.

Since the asbestos company's cause of action arose from payment and was only for repayment, it could (whether analysed in implied contractual or restitutionary terms) be brought at any time within six years after the date of payment (which it had been). The contractor could not pursue the balance of its original claim (as the limitation periods had expired) but it could rely on all aspects of its original claim in the court proceedings.

Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc [2015] UKSC 38

2. Construction programme - contractually binding?

Two programme documents of a main contractor were included in documents attached to an executed subcontract for steelwork and cladding. A Scottish court decided that they were '*Sub-Contract Documents*' which, with other documents, '*regulated*' the parties' rights and duties. But did they provide a *contractually binding* programme for the subcontract?

The court's view was that it would be unusual for contracting parties to tie themselves into an arrangement where any departure from the programme would be a breach of contract by one or both and the court decided they had not done so. One of the two programme documents, IRS4, was not a subcontract programme and the two documents had inconsistent dates. Although the subcontractor's own programme was not a '*Sub-Contract Document*', warranties in respect of it gave relevant rights to the main contractor and the sequence of construction was clear to all concerned, without the undesirable and uncommercial potential consequences of making every programme detail a contractual requirement. A reasonable person with the background knowledge available to the parties at the time of entering into the subcontract would not conclude that the parties intended the two programme documents to be contractually binding, but would rather conclude that IRS4 was included in the '*Sub Contract Documents*' simply to affirm the level by level, sector by sector approach to be adopted on the project by, among others, the subcontractor.

Martifer UK Ltd v Lend Lease Construction (EMEA) Ltd [2015] CSOH 81

3. Lack of proper interim application sinks contractor's £1.5 million windfall claim

A contractor's interim application 15, for over £1.5 million, was met with an employer's prompt payless notice. Eight days later, the contractor sent in the same claim, updated by the addition of a small variation valued at £6,643.25. The employer was puzzled by, and questioned, the status of the updated claim but did not serve a payless notice. In a subsequent adjudication, the contractor said that the claim was interim application 16 (though misdescribed as 15). The adjudicator agreed and awarded the contractor £908,695.61 (after taking into account the balance outstanding on a previous adjudication). But was the contractor's application a valid payment claim or payment notice and, even if the adjudicator's decision was wrong, could the court intervene?

The court said that, if an issue is short and self-contained, requiring no oral evidence or other elaboration other than what can be provided in a relatively short interlocutory hearing, the defendant may be entitled to have the point decided by way of a claim for a declaration. It needed to be emphasised, however, that the procedure would rarely be used, because it is very uncommon for the issue to be capable of being so confined.

The court then ruled that the contractor's claim documents were not an interim payment application or a valid payee's notice. Contractors seeking the benefit of the default provisions of the amended Construction Act must set out their interim payment claims with proper clarity. If an employer's failure to serve a payless notice in time may make them liable in full for the amount claimed, they must be given reasonable notice that the payment period has been triggered in the first place. To decide otherwise on the facts of the case would encourage a contractor to make fresh claims every few days in the hope that, at some stage, the employer or their agent will take their eye off the ball and fail to serve a valid payless notice, thus entitling the contractor to a wholly undeserved windfall.

Caledonian Modular Ltd v Mar City Developments Ltd [2015] EWHC 1855

4. 1 October launch target for Consumer Rights Act

The majority of the Consumer Rights Act, that replaces some well-known business-to-consumer legislation on the sale of goods, supply of goods and services and unfair terms, is scheduled to come into force on 1 October 2015.

The changes made include a wider definition of '*consumer*', the setting out of a consumer's rights when there is a breach of a contract to supply goods, digital content or services, and provisions as to unfair terms.

See: http://www.legislation.gov.uk/ukpga/2015/15/contents/enacted

5. More London housing zones

Four new London housing zones have been announced, in the boroughs of Havering, Enfield, Redbridge and Tower Hamlets, which together are set to deliver over 12,000 new homes, nearly 3,500 of which will be affordable housing.

Included in the new zones will be new rail stations, primary schools, retail and entertainment precincts and a park.

See: https://www.london.gov.uk/media/mayor-press-releases/2015/06/mayor-of-london-announces-four-more-housing-zones-to-fast-track

6. Government in push for more apprentices

The Government is to enshrine in law its commitment to create 3 million apprenticeships by 2020. Apprenticeships are to be given equal legal treatment as degrees and public sector bodies will be set targets to help reach that 3 million figure.

The Skills Minister will legally protect the term 'apprenticeship' through the Enterprise Bill, which is to be introduced to Parliament this autumn.

See: https://www.gov.uk/government/news/government-kick-starts-plans-to-reach-3-million-apprenticeships

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