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Legal Update
May 2018

Legal developments in construction law

1. Court adds an extra ground for staying adjudication enforcement

A cladding subsubcontractor, Gosvenor, asked the court to enforce an adjudication award against Aygun, the subcontractor that had employed it. Aygun was unsuccessful in resisting Gosvenor's application, despite making allegations of fraud, as the court ruled that those allegations could and should have been made in the adjudication. Aygun also asked the court, however, to stay enforcement. In granting the stay the court added another principle to the list of principles governing the court's discretion, when considering a stay of enforcement, as set out Wimbledon Construction Company 2000 Ltd. v Vago. The new principle, (g), is:

"If the evidence demonstrates that there is a real risk that any judgment would go unsatisfied by reason of the claimant organising its financial affairs with the purpose of dissipating or disposing of the adjudication sum so that it would not be available to be repaid, then this would also justify the grant of a stay."

The court added some important comments, noting that such a feature is only likely to arise in a very small number of cases, and in exceptional factual circumstances. In the vast majority of cases, the existing ***Wimbledon v Vago*** principles will suffice. A high test will be applied as to whether the evidence reaches the standard necessary for the principle to apply, the standard being broadly the same as that necessary to justify granting a Freezing Order. Mere assertions and isolated discrepancies on statutory accounts will not be sufficient. The additional principle is not designed to prevent a claimant from dealing with the adjudication sum in the ordinary course of business, or make evidence of what a claimant might be intending to do in the future, in the ordinary course of business, relevant or admissible under this head, as the purpose of adjudication decisions being summarily enforceable would be frustrated if a winning party in adjudication had to place any payment in an account, and not use it, to avoid the risk of a stay of execution being ordered.

Gosvenor London Ltd v Aygun Aluminium UK Ltd [2018] EWHC 227

2. Interpretation of 'Defect' leaves tunnel contractor with bill for over £100million

A power station headrace tunnel suffered a catastrophic collapse a few months after take over by the employer and well before the defects period had expired. The cost of the remedial works contract, which involved another contractor constructing a bypass tunnel, came to about £137 million, and the Scottish courts had to decide who should pay for the works. Under the contract, based on NEC2, a collapse after takeover was at the employer's risk unless due to a *'Defect'* existing at takeover. So did a *'Defect'* exist at takeover?

A *'Defect'* was defined as a part of the works not in accordance with the Works Information, or part of the works designed by the Contractor not in accordance with the applicable law or with the Contractor's design accepted by the Project Manager.

The Works Information required the tunnel to have a *'design life'* of 75 years and the contract provided its own definition of *'design life'*, that the tunnel was to provide *'reliable service without requirement for major refurbishment or significant capital expenditure...'* for the specified period of 75 years. Which, in the view of the majority of the court, entitled the employer to expect that, at hand over, the tunnel would be designed and built to a standard where it could be expected that it would provide reliable service for 75 years without requiring major refurbishment or significant capital expenditure. Implementation of

that design, having regard to the ground conditions actually encountered, was also directly relevant. If it was discovered, during the two year defects period, that the tunnel did not have a 75 year design life, then it was not in accordance with the Works Information and there was a *'Defect'*, as defined. To establish a *'Defect'* all that was needed was to point to the collapse, within months of handover, without any supervening event capable of damaging the tunnel or any other credible explanation.

The contract provided that the Contractor was not liable for *'Defects'* due to its design so far as it proved that it used reasonable skill and care to ensure that it complied with the Works Information. What appears to have gone wrong, however, was in the *implementation* of that design, probably in the failure to identify rock conditions requiring particular types of support, resulting in insufficient support being provided. Whether or not that showed a lack of reasonable skill and care was irrelevant unless the *'Defect'* was one of design but it was not. The *'Defect'* was one of implementation of that design.

And were the works not carried out in accordance with the accepted design so that there was also a *'Defect'* under the second part of the definition? The absence of appropriate protection in relevant areas of the tunnel meant that that part of the works was not in accordance with the contractor's accepted design. The *'Defect'* was not one of design; but in *implementing* the accepted design.

The collapse was therefore at the risk of the contractor, who was, after the court had ruled on other issues, liable for the repairs. Although the contractor had to provide joint names insurance, an implied term arising from that insurance and displacing the contractor's liability to the employer did not help the contractor. The insurance was against loss or damage to the works, by events at their risk prior to issue of the defects certificate, and did not cover breach of contract by the contractor in failing to comply with specific contract obligations to carry out repair or reinstatement works. Lord Glennie noted, however, that the reasoning of the Supreme Court in Gard Marine and Energy Ltd v China National Chartering Company Ltd on the displacement of contractual liability by joint names insurance is 'compelling'.

SSE Generation Ltd v Hochtief Solutions AG at:
https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2018csih26.pdf?sfvrsn=0

3. When the courts can, and cannot, fill gaps in a contract

Sometimes a party to a contract will claim that it cannot be enforced because it is void for uncertainty. But that is a serious outcome, so how do the courts approach the issue?

In ***Openwork Ltd v Forte*** the Court of Appeal said that, although the case law indicates that cases in which contractual provisions are challenged as being void for uncertainty are to be decided on their own facts, and that courts should not transpose a decision on a term in one case to a term in another, there is clear guidance as to how courts should approach an argument that a contractual provision is too uncertain to be enforced.

The court should strive to give some meaning to agreed contractual clauses if at all possible. As noted in another case, the court's role in a commercial dispute is to give legal effect to what the parties agreed, not to throw its hands in the air and refuse to do so because the parties have not made its task easy. To hold that a clause is too uncertain to be enforceable is a last resort. And, as stated in a textbook on contract interpretation, a contract provision will only be void for uncertainty if the court cannot reach a conclusion as to what was in the parties' minds or where it is not safe for the court to prefer one possible meaning to other equally possible meanings.

Openwork Ltd v Forte [2018] EWCA Civ 783

4. Government consultation on cladding regulation changes

The government followed up recommendations in Dame Judith Hackitt's interim report on Building Regulations and fire safety with a consultation on proposed amendments to the guidance on desktop studies set out in Approved Document B. The amendments to Appendix A clarify the existing text, create new requirements for desktop studies and provide guidance on use of all desktop studies to meet

Part B requirements (which cover fire safety), including cladding and external insulation. An alternative approach would be to prohibit the use of desktop studies, either for all fire test classifications or specifically for those relating to the BS 8414 full scale cladding test. Before making that decision the government says that it needs to better understand the impacts of these options.

The government's response to the consultation, which closed on 25 May, will also take into account findings and recommendations in Dame Judith Hackitt's final report.

The Government has also commissioned the British Standards Institution (BSI) to draft a standard for the extended application of BS 8414 results. This will provide detailed rules for assessments relating to cladding systems, in support of the new proposed requirements. Once the new British Standard is introduced for cladding systems, following it would be the expectation.

See: *https://www.gov.uk/government/news/government-consults-on-proposals-to-toughen-rules-on-building-safety* and *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/698899/Desktop_Studies_Consultation.pdf*

5. Retention Bill wording published but date of next reading put back

The wording of the Private Member's Bill on retention deposit schemes introduced by Mr Peter Aldous MP has been published but the date when it is expected to have its second reading has been put back from 27 April to 15 June.

See: *https://services.parliament.uk/bills/2017-19/constructionretentiondepositschemes.html*

6. New 2018 suite of RIBA Professional Services Contracts

In June the RIBA is set to publish a new suite of Professional Services Contracts to replace the current RIBA Agreement documents, in digital and print formats.

7. GDPR now in force

The new European General Data Protection Regulation came into force throughout the European Union on 25 May 2018. It replaces existing data protection laws throughout Europe and introduces significant changes and additional requirements that will have a wide-ranging impact on businesses around the world, irrespective of where they operate.

For a reminder of the details of the changes and additional requirements see: *https://www.mayerbrown.com/experience/eu-general-data-protection-regulation/*

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