MAYER·BROWN

Legal Update
December 2017

Legal developments in construction law

1. The Construction Act payment regime is not just for.....interim payments?

The payment machinery imposed by the Construction Act targets cash flow and, naturally, interim payments. But does it also apply to payments due following completion or termination? Architects sent a final invoice to their developer client who did not respond with a pay less notice and did not pay. But should the developer have served a pay less notice?

The Court of Appeal ruled that section 111 of the Construction Act applies to both interim and final applications for payment. This was on the basis of the clear words of section 111, which relates to all payments *"provided for by a construction contract"*, not just interim payments, and in the light of the case law. If the developer therefore wished to resist paying the architects' final or termination account, then (subject to a separate repudiation issue) it was obliged to serve a pay less notice.

Adam Architecture Ltd v Halsbury Homes Ltd [2017] EWCA Civ 1735

2. When an emailed notice of arbitration gets personal

A grain company chartered a vessel to carry corn. A relatively junior company employee sent three emails, involving instructions for the vessel not to berth, from his individual email address at the company. Over six months later, a claims adjuster acting for the vessel owners sent a letter before action, in respect of the delay following the instructions, to the same email address. This was followed by correspondence initiating, and then dealing with, an arbitration against the company, both from the claims adjuster and the arbitrator, and all sent to the individual email address. There was no response and the company was unaware of the proceedings until it received the arbitrator's award by post. It challenged the award, claiming the notice of arbitration had not been validly served.

The court drew a distinction between a personal email business address of an individual, and one which is generic. If an organisation has promulgated a generic address, whether on its website or otherwise, the sender can reasonably expect the person opening the email to be authorised internally to deal with its contents if the subject matter falls within the scope of the business activity for which the generic address has been promulgated. Whether an email sent to a personal business email address is good service must yield the same answer as if the document were physically handed to that person. This must depend on the role the named individual plays, or is held out as playing, within the organisation and the correct answer lies in applying agency principles. Companies can only act by natural persons and whether a company is bound by notification to an employee should depend upon the actual authority, express or implied, or ostensible authority, of that employee. The junior employee in question had no such authority and the notice of arbitration had therefore not been effectively served.

Glencore Agriculture BV v Conqueror Holdings Ltd [2017] EWHC 2893 (Comm)

3. A pay less notice is not psychic

A Project Manager under NEC3 issued a payment certificate and the notified sum was paid. No pay less notice was issued. The payee disputed the certificate in adjudication and the adjudicator opened it up and increased the amount due. The payee brought proceedings in the Scottish courts to enforce the decision but the council employer under the construction contract claimed that the adjudicator had failed to address its defence of set off for delay damages. The payee said that the council was not entitled to raise that defence in the adjudication because it had not issued a pay less notice, in response to the payment certificate, to set off the delay damages. Was that right?

The Scottish Court was not persuaded that the adjudicator had addressed the set off defence. He was obliged to give written reasons for his decision. They need not be elaborate or deal with every argument but he had to give at least some brief, intelligible explanation of why the defence of set off was being rejected, which he had not.

A failure by an adjudicator to address a material defence which a party was entitled to state is a failure to exhaust jurisdiction. A court should only hold that there has been such a failure in the plainest of cases: but this was such a case. The claim had a substantial potential value and it was not a prerequisite of relying on the defence in the adjudication that a pay less notice should have been given in response to the payment certificate. On an ordinary reading of s111 a pay less notice need only be given if the payer intends to pay less than the notified sum. If, however, the payer is content to pay the notified sum, there is no basis for a pay less notice. The words *"the notified sum"* in s111(3) could not sensibly be construed as meaning the sum specified in the payment notice or such other sum as an adjudicator may eventually decide is due. Any pay less notice must specify the sum the payer considers to be due on the date that the notice is served. The provisions clearly distinguish *"the notified sum"* and *"the additional amount"* which an adjudicator may decide is due and, ordinarily, liability for payment of each of those sums will arise on different dates.

DC Community Partnerships Limited v Renfrewshire Council at:
scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2017csoh143.pdf?sfvrsn=0

4. IR35: Is it heading for the private sector?

The government is thinking about extending the IR35 off-payroll working rules to the private sector. It says it will consult on how to tackle non-compliance in the private sector, drawing on the experience of the public sector reforms, including through government-commissioned external research due for publication in 2018.

The government is to publish a discussion paper as part of the response to the review of modern employment practices, exploring the case and options for reform to make the employment status tests for both employment rights and tax clearer. It recognises that this is an important and complex issue and will work with stakeholders to ensure that any potential changes are considered carefully.

See (at 3.7 & 3.8):
www.gov.uk/government/uploads/system/uploads/attachment_data/file/661480/autumn_budget_2017_web.pdf

5. VAT reverse charge on the way for construction labour supply

Following the consultation on fraud on provision of labour in the construction sector, the government is to introduce a domestic reverse charge for VAT, in respect of construction labour supply, with effect from 1 October 2019. It will also use HMRC's increased compliance activities to address the fraud identified in the Construction Industry Scheme.

Under the government's proposals the customer in the transaction becomes responsible for accounting for the VAT but the government says it will ensure that sales to the final business or domestic customer are out of scope of the charge and that there will be no threshold.

HMRC is to publish draft legislation, as part of a technical consultation, in spring 2018, finalised legislation and guidance will be published by the end of September 2018 and legislation will be laid before Parliament after 1 April 2019.

See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/663934/Fraud-on-provision-labour-construction-sector_consultation-VAT-otherpolicy-options-responses.pdf

6. January date for MP's bill for scheme to hold retentions in trust

Peter Aldous MP is set to introduce a private member's bill in Parliament on 9 January, to provide for retentions in construction projects to be held in a third party trust scheme.

The government's own consultation on retention concludes just ten days later, on 19 January, and one of the issues on which it seeks views is the costs and benefits of holding retentions in a deposit scheme or trust account. Mr Aldous's bill is not expected to become law.

7. FIDIC Red, Yellow and Silver Books, edition 2, have arrived

In early December the second edition of the FIDIC Red, Yellow and Silver Books was launched at the FIDIC London conference, 18 years on from the first edition. Perhaps unsurprisingly, significant changes have been made. Key features include:

- the five Golden Principles, which are optional, but strongly recommended by FIDIC, for example that the Particular Conditions must not change the balance of risk/reward allocation in the General Conditions and that all time periods for performance must be of reasonable duration;
- more emphasis on dispute avoidance; claims, and disputes and arbitration, are now split into separate clauses, 20 and 21, which deal with claims by both Employer and Contractor, and the renamed DAAB, Dispute Avoidance/Adjudication Board, has a greater role, including an obligation to meet the parties at prescribed intervals;
- more time limits to meet; for example, the condition precedent that a statement of the contractual and/or other legal basis of a claim must be filed within 84 days after the claimant becomes aware, or should have become aware, of the relevant event or circumstance, if the claim is not to lapse;
- an indemnity from the contractor, in respect of any design failure that results in the Works not being fit for their intended purpose, and, if so stated in the Contract Data, an obligation to provide professional indemnity insurance against any such failure;
- more programme requirements, e.g. logic links, a provision concerning concurrent delay and an advance warning clause in respect of future events that might adversely affect the contractor's work or the Works' performance, increase the contract price or delay the Works;
- a new definition of 'Notice'; progress reports and programmes cannot constitute Notices.

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