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Legal developments in construction law

1. Settling an employer's claim; what does a main contractor have to do to recover a contribution from a subcontractor?

If a main contractor settles a claim by an employer and wants to recover a contribution from a subcontractor, what does it have to prove? Must it prove its own liability to the employer? In ***Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd***, the court noted that case law says it does not, but that it can seek recovery by proving that:

- the employer's claim was not so weak that no reasonable party would take it sufficiently seriously to negotiate any settlement that involved making a payment;
- the settlement amount paid was reasonable, having regard to the strength of the claim, being within the range of settlements which reasonable parties in the main contractor's position might have made in all the circumstances;
- the subcontractor's breach of duty caused the loss incurred in satisfying the settlement; and
- (as will generally be the case) where a subcontractor is in breach of contract and a claim by the employer is in the parties' reasonable contemplation, the possibility of a reasonable settlement of the claim was also within the reasonable contemplation of the parties to the subcontract.

The court also noted that the Civil Liability (Contribution) Act 1978 provides a statutory basis for no longer requiring the main contractor to prove its own liability to the employer, but warned that the main contractor still has to prove the subcontractor's breach of contract.

While, however, it may be proportionate not to require a main contractor who has settled the employer's claim to provide strict proof of its liability to the employer, but only the reasonableness of its settlement, conversely, in the court's view, once a case has been pleaded and tried on the basis that such proof was required, it is not proportionate to require the matter to be reopened and proved on a different basis because of a post-trial settlement (as had happened in this case). And, while not essential to the court's decision, its view was that the case law did not, in any event, prevent a main contractor from avoiding the shortcut of seeking to prove the reasonableness of the settlement and instead seeking simply to prove its liability to the employer and then, in turn, its claim for contribution.

The judge added that, even where a contribution claim is not pursued on the basis of a settlement, it might be capped by the settlement terms in the event that the main contractor successfully mitigated its loss by settling the employer's claim at a discount. The burden of pleading and proving that the main contractor's loss was successfully mitigated, and therefore the quantum of the avoided loss, would, however, be on the subcontractor.

Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd & Anor (Judgment No. 2) [2023] EWHC 1142

2. Adjudication award to be enforced – can another award be set off against it?

The courts take a robust approach to adjudication enforcement and there are only limited circumstances where they will refuse an application for summary judgment. One of those circumstances is where, in the court's discretion, it is appropriate to permit a set off or withholding.

No set off or withholding against the amount that an adjudicator directs should be paid by one party to the other is generally permitted. Where parties to a construction contract engage in successive adjudications, at the end of each adjudication (unless there are special circumstances) the losing party must comply with the adjudicator's decision and cannot withhold payment on the ground of their anticipated recovery in a future adjudication on different issues. Otherwise no adjudicator's decision would be implemented as each award would take its place in the running balance between the parties, contrary to the policy of the Construction Act.

In ***FK Construction Ltd v ISG Retail Ltd*** the court noted that there are, however, at least three limited exceptions to the general position:

- the first, "relatively rare", exception is where there is a specified contractual right to set off which does not offend against the statutory requirement for immediate enforcement of an adjudicator's decision;
- a second exception may arise where it follows logically from an adjudicator's decision that the adjudicator is permitting a set off to be made against the sum otherwise decided to be payable; this will require an analysis of the decision;
- a third exception may arise (in an appropriate case and at the discretion of the court), where there are two valid and enforceable adjudication decisions involving the same parties whose effect is that monies are owed by each party to the other.

The court had to consider this last exception and, in ruling that it did not apply, noted the steps to be considered before deciding to permit a set off, in summary:

- it is necessary to determine whether both decisions are valid; if they are not, or the court cannot determine they are valid, it is unnecessary to consider the next steps;
- if both are valid, it is then necessary to consider if both are capable of being enforced or given effect to; if not, the question of set off does not arise;
- if it is clear that both are so capable, the court should enforce or give effect to them both, provided that separate proceedings have been brought by each party to enforce each decision;
- how each decision is enforced is a matter for the court.

The court in this case said that it is important that parties are not encouraged to raise arguments over potential set off and withholding as a means of seeking to defeat (or mitigate the effects of) otherwise legitimate enforcement proceedings, except in the very limited circumstances identified.

It also noted that the suggestion made that an adjudication decision in relation to one construction project can be set off against an adjudication decision in relation to another construction project was entirely novel. The court did not, however need to decide the point.

FK Construction Ltd v ISG Retail Ltd [2023] EWHC 1042

3. Judge cites Court of Appeal warning on the meaning of an express good faith clause

There have been a number of cases in recent years on good faith obligations and what they mean. In ***Connoisseur Developments Ltd v Koumis*** the court cited the Court of Appeal warning, in ***Re Compound Photonics Group Ltd, Faulkner v Vollin Holdings Ltd***, on the meaning of a good faith clause, where the Court re-iterated that it depends on a construction of the clause in question, applying normal principles of contractual construction. They also said, however, that there are no "minimum standards" necessarily implied into every such clause and the lead judgment noted that:

- the first, and most important, point to emphasise is that, like any question of interpretation of a contract, an express clause in a contract requiring a party to act in "good faith" must take its meaning from the context in which it is used;
- when considering the interpretation and meaning of an express good faith clause in context, cases from other areas of law or

commerce, which turn upon their own particular facts, may be of limited value and must be treated with considerable caution;

- shorn of context, the words "in good faith" have a core meaning of honesty. Introduce context, and it calls for further elaboration. The term is to be found in many statutory and common-law contexts and, because they are necessarily conditioned by their context, it is dangerous to apply judicial attempts at definition in one context to that of another;
- apart from the very obvious point that the core meaning of an obligation of good faith is an obligation to act honestly, it is very far from obvious why it is logical or appropriate to attempt to analyse other cases, decided on other facts, in order to deduce a number of further "minimum standards" of conduct that a defendant must be taken to have agreed to comply with in every case in which a good faith clause has been used in a contract;
- while the concepts and ideas advanced in other cases might well be useful analytical tools in the process of interpretation of a particular contract, in the Court's view it is not appropriate simply to apply them in a formulaic way in every case, irrespective of the context and the other terms of the agreement in issue.

Connoisseur Developments Ltd & Ors v Koumis [2023] EWHC 855 (Ch)

4. HSE launches construction site dust control inspections

The HSE is targeting construction sites across Great Britain with inspections throughout May, June and July, focussing on respiratory risks from exposure to dust, checking that employers and workers know the risks, plan their work, and are using the right controls. The initiative is supported by HSE's 'Dust Kills' campaign, which provides free advice to businesses and workers on the control measures required to prevent exposure to dust.

Although the primary aim of the inspection initiative is to ensure that workers' health is being protected, if safety risks or other areas of concern are identified, inspectors will take the necessary action to deal with them.

See: https://press.hse.gov.uk/2023/05/11/hse-targets-construction-workers-lung-health-with-nationwide-inspection-campaign/

5. CIC publishes second edition of CIC low value model adjudication procedure

The Construction Industry Council has published a new second edition of its Low Value Disputes Model Adjudication Procedure. The changes made in this edition, which is available for free download on the CIC website, include an increase in the overall dispute value from £50k to £100k.

See: CIC publishes Second Edition Low… | Construction Industry Council

6. HSE new social media campaign to answer common questions and issues about the new building safety regime.

Over the coming months, the HSE is running a new social media campaign 'Did you Know?' which is to answer some of the common questions and issues being raised about the new building safety regime. The HSE has started with these facts around the building registration process:

- You need to complete your registration application and provide the Key Building Information for your building by 1 October 2023.
- You can complete your registration application now and submit your KBI later. There is no additional fee.
- Unless you personally own the building, the Principal Accountable Person is more likely to be an organisation than an individual.
- In the registration portal the HSE asks you about floors rather than storeys, as this will help you measure the building height to the right point.
- You shouldn't need to commission a new survey to complete your KBI. Building height can be estimated in metres where it clearly has 7 or more floors
- If you have two or more structures that are attached, you need to apply the "independent section" test to see if they count as one building or should be registered separately. If this applies to you, the HSE advises waiting for guidance due to be published by the government, before starting your application.
- The Building Safety Regulator will publish the key building information in the Register of higher-risk buildings.

See: Applying to register a high-rise residential building - GOV.UK (www.gov.uk)

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