MAYER | BROWN

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Legal developments in construction law

1. Setting an HGCRA final date for payment – how to (and how not to)

A construction contract provided for the final date for payment to be 21 days following the later of the due date or receipt of the contractor's VAT invoice, but did that comply with s.110(1)(b) of the Housing Grants Act? If it did not, the Scheme would apply and the final date for payment would be 17 days from the due date.

The Act says, in s110(1)(a), that every construction contract shall provide an adequate mechanism for determining what payments become due under the contract, and when, while s110(1)(b) says that the parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.

In ruling that the contract wording in this case was not compliant with the Act, the court noted, following the analysis in ***Rochford Construction Ltd v Kilhan Construction Ltd***, that there is a very obvious and compelling difference between the wording used and the plain intent of s.110(1)(b), when compared with that of s.110(1)(a). On a proper analysis, that is because the only discretion intended to be, and actually given, in the former case is for the parties to agree the length of the time period between the due date for payment and the final date for payment.

If it was open to a paying party to include a provision requiring the fulfilment of some further condition between the due date for payment and the final date for payment, that would have the effect of driving a coach and horses through the wording and the clear intention of this part of the Act, which is to allow the parties:

- a wide discretion as regards when payments become due under a contract, constrained only by the requirement that it be an adequate mechanism and by the specific anti-abuse provisions of s.110(1A) and (1D);
- but, in contrast, a much narrower and more circumscribed discretion as regards the final date for payment - only as to the length of the period between the due date and the final date.

Noting that the potential for abuse in this case was not present to anything like the same extent where, as in this case and another, the only additional requirement was for the contractor to serve a VAT invoice, the judge said that, if the way in which Parliament decided to address this problem is to introduce a blanket prohibition on party autonomy as regards the ascertainment of the final date for payment, save as to the length of the period, it is not for the courts to allow parties to agree terms which go beyond that narrow limit, simply because they do not appear to have the same potential for abuse.

Lidl Great Britain Ltd v Closed Circuit Cooling Ltd (t/a 3CL) [2023] EWHC 2243

2. Payment and pay less notices – can one notice be both?

An employer served what it claimed was a Housing Grants Act payment notice, but it included a substantial deduction for liquidated damages and it appeared to the court that the notice was, in substance, a combined payment notice and pay less notice. Could it be treated as a valid payment notice?

The court confirmed that the notice was in content and substance, as well as in its express description, a pay less notice and not a payment notice. No case law was found to say that a hybrid payment and pay less notice could be treated as a valid payment notice and the court referred to the textbook Coulson's Construction Adjudication, 4th edition, which, commenting on the change between the original and the amended payment provisions of the Act, noted that the original provisions, which entitled a payer to serve a notice, operating as both a payment notice and a withholding notice, had been deleted in their entirety and a payer must serve both the payer's notice and a payless notice in accordance with the new s111 in the periods identified.

The court also noted that any deduction for liquidated damages was to be made in a pay less notice and not in a payment notice. This was by reference to the particular terms of the contract or by reference to the well-known provisions of the Act.

Lidl Great Britain Ltd v Closed Circuit Cooling Ltd (t/a 3CL) [2023] EWHC 2243

3. Adjudication: Not enough time to respond properly? Breach of natural justice?

A maintenance and repair contractor, faced with an adjudication award of £6,565,831.94 for termination losses, resisted enforcement of the award. It claimed that it was unable to properly digest and respond to the material served with the referral, that this was a breach of natural justice which had led to a material difference in the outcome, and that the adjudicator's decision was consequently unenforceable. It did not contend that the dispute was incapable of adjudication but claimed that it should have been provided with a greater opportunity to understand the claim, whether in advance of the notice of adjudication or by agreeing to an extended timetable in the adjudication.

Noting that the case law demonstrates that arguments based on time constraints impacting the ability to respond fairly have enjoyed little success, the court, in rejecting the challenge, summarised the relevant legal position:

- Adjudication decisions must be enforced even if they contain errors of procedure, fact or law;
- an adjudication decision will not be enforced if it is reached in breach of natural justice and the breach is material, in that it has led to a material difference in the outcome, but the court should examine such defences with a degree of scepticism;
- both complexity and constraint of time to respond are inherent in the process of adjudication, and are no bar in themselves to adjudication enforcement. Whilst it is conceivable that a combination of the two might give rise to a valid challenge, where the adjudicator has given proper consideration at each stage to these issues and concluded that they can render a decision which delivers broad justice between the parties, the court will be extremely reticent to conclude otherwise;
- in cases involving significant amounts of data, an adjudicator is entitled to proceed by way of spot checks and/or sampling. The assessment of how this should be carried out is a matter of substantive determination by the adjudicator. An argument that the adjudicator has erred in their approach, in the absence of some particular and material related transgression of natural justice, will not give rise to a valid basis to challenge enforcement. It would, even if correct, merely be an error like any other error which will not ordinarily affect enforcement.

Home Group Ltd v MPS Housing Ltd [2023] EWHC 1946

4. When one adjudication decision bars another – Court of Appeal draws the lines

Just as VAR needs to lay down lines to check for offside in football, the Court of Appeal has set out the rules for deciding when one adjudication decision will bind and stop another adjudication. An adjudicator cannot determine a dispute already decided in an earlier adjudication. The test is whether the dispute in the second adjudication is the same, or substantially the same, as the dispute

decided in the first. It is a matter of fact and degree but, where parties engage in serial adjudication, particularly if the underlying issues are concerned with delay, there is a greatly increased risk of arguments about which side of the line any subsequent dispute might fall.

After reviewing the case law, Lord Justice Coulson set out three over-arching principles to be applied by an adjudicator, or an enforcing court, when considering arguments of overlap.

- The purpose of construction adjudication is not easy always to reconcile with serial adjudication. If the parties to a construction contract do engage in serial adjudication, and then inevitably get drawn into debates about whether a particular dispute has already been decided, the need for speed and the importance of at least temporary finality mean that the adjudicator (and, if necessary, the court on enforcement) should be encouraged to give a robust and common sense answer to the issue. It should not be a complex question of interpretation of documents and citation of authority.
- It is necessary to look at what the first adjudicator actually decided to see if the second adjudicator has impinged on the earlier decision. While it can be relevant to consider the adjudication notice, the referral notice and so on, what matters, for the purposes of s.108 and the relevant paragraphs of the Scheme, is what it was, in reality, that the adjudicator decided and which cannot be re-adjudicated. The form and content of the documentation with which they were provided is of lesser relevance and can be misleading.
- Flexibility is needed. That is the purpose of a test of fact and degree, to prevent a party from re-adjudicating a claim (or a defence) on which they have unequivocally lost, but to ensure that what is essentially a new claim or a new defence is not shut out.

Lord Justice Coulson added that, although it is not an invariable guide, one way of at least testing whether the correct approach has been adopted is to consider whether, if the second adjudication is allowed to continue, it would or might lead to a result which is fundamentally incompatible with the result in the first adjudication. If in that second adjudication, one or other of the parties is asking the adjudicator to do something that is diametrically opposed to that which the first adjudicator decided, then that may be an indication that what they are seeking to do is impermissible.

Sudlows Ltd v Global Switch Estates 1 Ltd [2023] EWCA Civ 813

5. Building Safety Regulator now the building control authority for all HRBs in England

On 1st October, the Building Safety Regulator became the building control authority for all higher-risk buildings in England

See: https://buildingsafety.campaign.gov.uk/making-buildings-safer/building-safety-regulator-news/building-safety-regulator-is-now-the-building-control-authority/

6. BSA: HSE portal and guidance for HRB approval applications

The HSE has provided:

- a portal for making, and managing, a building control approval application for a higher-risk building; and
- guidance to help clients, or someone they authorise, to submit and manage a building control application to the Building Safety Regulator for higher-risk building work or building work to an existing higher-risk building.

See: Manage a building control application for a higher-risk building - GOV.UK (www.gov.uk)

and

Managing building control approval applications for higher-risk buildings - GOV.UK (www.gov.uk)

See also the link in the guidance to the HRB transitional arrangements factsheet, although this provides no new information:

Government response to the consultation on implementing the new building control regime for higher-risk buildings and wider changes to the building regulations for all buildings - GOV.UK (www.gov.uk)

7. Building safety guides for accountable persons

The government has published a number of guides for accountable persons and the principal accountable person of high-rise residential buildings.

See: Building safety guides for accountable persons - GOV.UK (www.gov.uk)

The guides are:

Assessing safety risks in high-rise residential buildings: a detailed guide - GOV.UK (www.gov.uk)

Managing safety risks in high-rise residential buildings: a detailed guide - GOV.UK (www.gov.uk)

Safety management systems for high-rise residential buildings - GOV.UK (www.gov.uk)

- Preparing a safety case report - GOV.UK (www.gov.uk)
- Safety case for a high-rise residential building - GOV.UK (www.gov.uk)
- Preparing a resident engagement strategy - GOV.UK (www.gov.uk)

8. More Building Safety Act provisions in force on 1st October

More Building Safety Act provisions came into force on 1st October 2023. The latest regulations also contain transitional provisions.

See: The Building Safety Act 2022 (Commencement No. 5 and Transitional Provisions) Regulations 2023 (legislation.gov.uk)

9. Government to introduce retention payment reporting

Following a consultation, the government is to take forward legislation to extend payment performance reporting obligations and is to introduce reporting on retention payments for businesses in the construction sector.

See: https://www.gov.uk/government/news/government-takes-action-to-back-small-businesses-and-tackle-late-payments

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