Sloan Plumb Wood

SOLICITORS

Legal Update

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Introduction

Welcome to the Autumn edition of the Sloan Plumb Wood LLP legal update.

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Local Democracy, Economic Development and Construction Act 2009

The Local Democracy, Economic Development and Construction Act 2009 took effect from 1 October 2011 in England and Wales. The Act will apply to all new construction contracts that are entered into in England and Wales other than those that are within the limited exceptions to the Act after 1 October 2011.

It is likely that the main areas in which the Act will have consequences for those involved in the construction industry will be in relation to payment terms and adjudication.

Payment

The Act seeks to develop and build on the general principles set out in the Housing Grants, Construction and Regeneration Act 1996 which was intended to ensure a fair payment system that was supported by a swift means of enforcement in the form of adjudication. The Act seeks to clarify and alter current payment provisions and, in effect, improve and broaden the scope of the existing Statutory provisions.

Payment Notices

The Act introduces a new concept of a "notified sum". This is in effect the sum that the payer will be required to pay to the payee on the due date.

In circumstances where the payer issues a payment notice to the payee (at an appropriate time), the sum set out in that payment notice becomes the "notified sum". Where no payment notice is issued by the payer, the payee's application for payment becomes the "notified sum".

Where there is neither an application nor a payment notice, the payee may issue a default payment notice and the sum set out in that notice becomes the "notified sum".

Subject to the payer issuing a "pay less notice" (see below) the paying party must pay the notified sum by the final date for payment.

Pay Less Notice

The Act also introduces a "pay less notice" which is similar to a withholding notice. The main difference between the new "pay less notice" and the former withholding notice is that the focus of a withholding notice was on providing details of the grounds on which it was proposed that the paying party would withhold monies. Under the new "pay less notice" arrangement, the paying party must set out the basis of its calculation only. It is likely that in practice for the sake of clarity paying parties will continue to set out the grounds on which they intend to pay less together with the basis of calculation but the approach and wording will need to reflect the new provisions.

It is also necessary for the payer to issue the pay less notice by reference to a payment notice so that each pay less notice is related to a payment notice. It is intended that this will stop the practice of issuing a general withholding notice that is then sought to be applied to multiple applications for payment which may be general and unspecific.

The pay less notice should also be separate from a payment notice not a combined payment notice/withholding notice as was possible under the 1996 Act.

Suspension for Non-Payment

In addition to altering the position as to the timing of payments and notices in respect of payments, the Act also alters the position in relation to suspension for non payment by a contractor. The Act provides that a contractor that suspends for non-payment may suspend any and/or all of its obligations under the contract which means that it may suspend either in whole or in part. The suspending party is also permitted to claim the reasonable costs associated with the suspension from the payer which includes any extension of time in respect of the suspension and remobilisation thereafter.

Pay When Certified

The Act also seeks to deal with "pay when certified" clauses which are now not permitted subject to limited exceptions in respect of management contracting. It is likely that main contractors may seek to extend payment periods under sub-contracts to reduce cash flow difficulties that could be caused by these new provisions.

Insolvency

Payment provisions in respect of insolvency are also slightly altered so that the right to withhold payment in the event of payee insolvency only arises where the contract clearly provides that this is permitted and the payee insolvency occurs after the final date for a pay less notice.

Adjudication

Together with efforts to improve payment terms for contractors the Act also seeks to give further scope to parties to use adjudication as a means of resolving disputes.

In particular, there will now be a right to refer to adjudication a dispute in circumstances where the parties do not have a construction contract "in writing". This means that an adjudicator may be appointed in circumstances where the parties underlying contract is partly oral or entirely oral.

This will increase the scope for more disputes to be referred to adjudication and potentially for more jurisdictional points to be taken in enforcement proceedings.

This may also cause problems for adjudicators when they come to attempt to determine the terms that the parties have agreed (or have not agreed) and this may have the unintended effect of increasing time and costs of the adjudication process in some cases.

Slip Rule

Adjudication provisions are further amended to expressly provide a "slip rule" which permits adjudicators to amend or rectify any clerical or administrative errors in their decisions but only provided that those errors must be corrected within 5 days of delivery of the decision to the parties.

Tolent Clauses

As regular readers of our newsletters will know, there has been some debate in the Courts recently regarding the position of so-called "Tolent" clauses. The decision in the English case of Yuanda was discussed in our February 2011 newsletter and that decision was later compared and contrasted with a later decision in a Scottish case of Profile Projects in our June 2011 newsletter.

In any event, notwithstanding the potentially confused position in the courts, the Act seeks to prohibit agreements as to costs in respect of adjudication except in limited instances where:

a) the adjudicator is permitted to allocate his fees and expenses as between the parties provided that this power is agreed in writing between the parties in the contract between them; or

b) the adjudicator is permitted to allocate both the adjudicator's fees and expenses and the parties costs of adjudication provided the parties agree in writing that the adjudicator has that power and that agreement is entered into after the Referral to Adjudication

Accordingly, the agreement in writing cannot be part of the contract between the parties and it is unlikely that parties to an adjudication would agree such a provision at that time.

This is likely to mean an end to "Tolent" clauses in the future. The parties will however remain jointly and severally liable for adjudicators fees and expenses notwithstanding any agreement as to apportionment between them or any apportionment of such fees and expenses decided by the adjudicator.

Changes in the Patents County Court

On 1 October 2011, a new law came into force which introduces a £500,000 limit on the value of Intellectual Property ("IP") claims in the Patents County Court ("the PCC"). This new law affects all IP claims brought in the PCC with the exception of patents and designs disputes (which since the 14 June 2011 are already subject to this cap on value).

The rationale behind this is to allow easier and cheaper access to justice for IP rights owners who have in the past felt unable to protect their IP rights. This is the latest change in the law concerning IP litigation, a number of other amendments have taken place over the last year or so.

To appreciate the significance of these changes it is necessary to consider the PCC and the history to the changes.

The PCC

The PCC was established in 1990 in order to give IP rights owners a less expensive and complex way of enforcing their rights than having to issue proceedings in the Patents Court of the High Court. Despite its name, the PCC deals with many IP claims including trade mark infringement, passing off, copyright and designs as well as patent infringement.

Background to the Changes

In July 2009, the Intellectual Property Court Users' Committee ("IPCUC") published a report focusing on reform of the PCC and the proposals were subsequently adopted in Lord Justice Jackson's report into the Review of Civil Litigation Costs.

As a result of Lord Justice Jackson's report a number of changes were made to streamline PCC procedures on 1 October 2010. For example:

- wherever possible, the PCC will determine the claim solely on the basis of statements of case served by each party and oral submissions;
- the parties have the option to agree to have a decision of the Court made solely on the papers; and
- as a general rule, there is no automatic right to serve further factual evidence.

Significantly, a cap on costs was also introduced. As of 1 October 2010 a maximum of £50,000 of legal costs can be recovered by the successful party for the liability part of a claim and £25,000 of legal costs can be recovered by the successful party in the quantum part of a claim (i.e. the part that deals with valuing the claim). The Court will have further power to limit the amount parties can recover for preparing witness statements or ordering that experiments be carried out.

All these changes were introduced to allow SMEs better access to the Justice System to protect their IP rights as there have been concerns for a number of years regarding the expense of IP litigation.

2011 Changes

As of 1 October 2011, the maximum value of all claims heard by the PCC is capped at £500,000. These claims will be subject to the streamlined procedure in the PCC. Claims valued above £500,000 should be issued in the High Court and are subject to the usual Court Rules with no cap on costs.

The Future?

There is talk of the name of the Court being changed to reflect the fact that the PCC deals with the whole range of IP disputes.

Furthermore the effectiveness of the damages cap will be reviewed in 2014...so watch this space!

Case Law Updates

Adjudication – More than one dispute

Witney Town Council v Beam Construction (Cheltenham) Ltd [2011] EWHC 2332 (TCC) (12 September 2011)

In this case the Council sought declarations that the adjudicator in respect of a dispute between the Council and Beam had acted outside his jurisdiction in deciding a number of disputes referred to him by the parties.

Under the Scheme for Construction Contracts, which the parties expressly agreed applied in this case, save where otherwise agreed between the parties, only a single dispute may be referred to adjudication at any time.

The Council argued that the adjudicator in this case had been asked to consider four separate disputes and in reaching his decision had effectively adjudicated each of those disputes. Beam argued that in essence the dispute between the parties was simply what was due and owing to Beam from the Council.

Mr Justice Akenhead drew the following conclusions from the previous cases on the subject:

(i) A dispute arises generally when and in circumstances in which a claim or assertion is made by one party and expressly or implicitly challenged or not accepted.

(ii) A dispute in existence at one time can in time metamorphose in to something different to that which it was originally.

(iii) A dispute can comprise a single issue or any number of issues within it. However, a dispute between parties does not necessarily comprise everything which is in issue between them at the time that one party initiates adjudication; put another way, everything in issue at that time does not necessarily comprise one dispute, although it may do so.

(iv) What a dispute in any given case is will be a question of fact albeit that the facts may require to be interpreted. Courts should not adopt an over legalistic analysis of what the dispute between the parties is, bearing in mind that almost every construction contract is a commercial transaction and parties cannot broadly have contemplated that every issue between the parties would necessarily have to attract a separate reference to adjudication.

(v) The Notice of Adjudication and the Referral Notice are not necessarily determinative of what the true dispute is or as to whether there is more than one dispute. One looks at them but also at the background facts.

(vi) Where on a proper analysis, there are two separate and distinct disputes, only one can be referred to one adjudicator unless the parties agree otherwise. An adjudicator who has two disputes referred to him or her does not have jurisdiction to deal with the two disputes.

(vii) Whether there are one or more disputes again involves a consideration of the facts. It may well be that, if there is a clear link between two or more arguably separate claims or assertions, that may well point to there being one dispute. A useful if not invariable rule of thumb is that, if disputed claim No 1 cannot be decided without deciding all or parts of disputed claim No 2, that establishes such a clear link and points to there being only one dispute.

Mr Justice Akenhead held that notwithstanding that in this case each different component of what was identified in the Notice of Adjudication was disputed, there was in reality only one dispute between the parties by the time of the Notice of Adjudication and only one dispute which was referred to adjudication. That dispute was about what was due and owing to Beam.

This is helpful guidance as the term in the Scheme that restricts the referral of multiple disputes to adjudication will remain notwithstanding the amendment to the Scheme by the LDEDC Act referred to in more detail above.

Expert Determination - Arbitration

Expert Determination – Arbitration - Wilky Property Holding PLC –v- London & Surrey Investments Limited [2011] EWHC 2226 (17 August 2011)

This dispute concerned the sometimes difficult line between a dispute resolution provision that allowed for expert determination and one that allowed for arbitration. The difference can be important in a number of respects including the right of a party which has entered into an arbitration agreement to require a stay of any court proceedings to allow the arbitration to take place.

Case Law Updates Continued

Expert Determination – Arbitration Continued

LSI had provided property consultancy services to Wilky a property investment company. The agreement provided for a consultancy fee together with a profit share whenever an approved scheme came to fruition. The parties had agreed that any dispute about the calculation of profit share should be decided by an independent expert either agreed between themselves or appointed by the President of the RICS. The profit share claimed in this instance was calculated at between £6.9 and £16.9 million mainly relating to a health centre in Aldershot for the Army and NHS Primary Medical Service.

Wilky objected to the appointment of an expert by the RICS for various reasons including on the ground that a number of the matters fell outside the scope of the expert determination clause. The President of the RICS appointed Mr Derek Pye who decided to proceed with the expert determination on the basis that at least some of the matters raised by LSI were within the scope of the expert determination clause.

Wilky commenced High Court proceedings and LSI's solicitors then contended that the reference to Mr Pye was an arbitration thus entitling LSI to a stay of Wilky's proceedings in the High Court. LSI argued that clause 22 was either an arbitration agreement as it ought to be given a broad interpretation or, if not, it was a contractual agreement to refer the disputes to an independent party and the Court ought to exercise its general power to stay the court proceedings because of the agreement. The Court dealt with the principal question of whether clause 22 was an arbitration agreement and adjourned the remaining issues for a further hearing.

The Judge noted it was rather surprising the Arbitration Act did not attempt to answer the question of "What is an Arbitration". He took the view that the place to start were the terms of the agreement although the description or label applied by the parties was not conclusive as to the character of the process. His view was that parties who have expressly chosen to refer the disputes to an expert should not be taken to have intended a reference to arbitration. Expert determination is very different from arbitration and neither the Arbitration Act 1996 nor any other statutory codes apply to expert determination.

This contract did not use the well known phrase "act as an expert and not as an arbitrator" but the Court did not think that was significant. The power given to the tribunal to decide costs was argued by Wilky to be a point towards expert determination because experts cannot make an order as to the costs of a reference unless the agreement specifically provides whereas an arbitrator has power under Section 61 of the Arbitration Act 1996 to award costs. The general nature of the matters referred were principally issues of computation of the profit share with some elements of valuation also would be suitable to be determined quickly and efficiently by an expert even though clause 22 did encompass general questions of the meaning or effect of the agreement. Whilst it is less obvious that expert determination is the appropriate mechanism for resolution of the general meaning of an agreement the Court thought that point was not conclusive because the clause could permit a lawyer to be appointed as expert.

Overall the Court's view was that clause 22 was not an arbitration agreement so the court proceedings were not subject to an automatic stay under the Arbitration Act.

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