Construction Act changes loom in 2018

In this review of the main events of 2017 **James Doe** and **Emma Kurtovich** of **Herbert Smith Freehills LLP** focus on key developments in issues such as extensions of time and concurrent delay. Looking ahead, as well as litigation arising from the Grenfell Tower disaster, they expect a continued emphasis on increasing transparency and news of possible *HGCRA 1996* changes.

In this recap of the 2017 year, we identify some of the interesting trends that we have seen across contracts and in case law, as well as look ahead to what the industry may expect in 2018.

Extensions of time and concurrent delay

Extensions of time and concurrent delay are always a source of interest and debate and 2017 was no exception.

Delay and Disruption Protocol

In February 2017, the Society of Construction Law (SCL) released the Second Edition of the Delay and Disruption Protocol (the Protocol).

The SCL did not carry out a wholesale review of the First Edition, but rather focussed on eight key issues which included the 'menu and descriptions of delay methodologies' and 'global claims and concurrent delay – in light of recent case law.'

The result is an updated protocol which reflects current thinking, including that there is no longer a preferred delay analysis methodology.

Carillion Construction Ltd v Emcor Engineering Services Ltd [2017] EWCA Civ 65

In 2017, many of us were introduced to the concept of a 'non-contiguous extension of time.'

The orthodox position is that when a matter giving rise to an extension of time (a 'Relevant Event') occurs after the contractual completion date, the length of that extension of time is added to the contractual date for completion. This is referred to as a contiguous extension of time. This may give rise to anomalies, including that the extended completion period will often have expired by the date of the Relevant Event, and a party may be liable to pay damages for a period of delay for which it is not responsible (ie the period of delay caused by the Relevant Event).

A non-contiguous extension of time commences at a later date, typically from the date that the impact of the Relevant Event is felt.

Carillion argued for a non-contiguous extension of time as, if the extension of time was contiguous, Emcor would be exempt from liability in a period in which it was in culpable delay.

The Court of Appeal rejected this argument following a review of the natural meaning of the extension of time clause. The natural meaning of the phrase 'extension of time' is a reference to the period allowed for the works being made longer from the contractual completion date, and not the creation of a separate period of delay.

It would appear at least possible for parties to include provision for a non-contiguous extension of time in their contracts provided that the wording used in the contract is sufficiently clear to displace the orthodox position.

North Midland Building Ltd v Cyden Homes Ltd [2017] EWHC 2414 (TCC)

This case, which was decided in October 2017, dealt with a JCT Design and Build form which had been amended to provide that:

> '... any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account.'

The court was firmly of the view that the amendment should be interpreted according to the objective meaning of the words. In this case, the parties had chosen to allocate the risk of

concurrent events to the contractor. The court described the wording of the amendment as 'crystal clear.'

This case should put to an end the concern that such clauses are not permitted as they contravene the prevention principle. Fraser J stated:

> '... There is no rule of law of which I am aware that prevents the parties from agreeing that concurrent delay be dealt with in any particular way ... [Counsel for the Claimant] could not direct me to any.'

Primacy of contract terms

Over recent years there has been a move towards interpreting contracts with reference to the surrounding factual matrix and the intention of the parties (thus taking some of the emphasis off the express terms of the contract).

However, this year the courts appear to have slightly retreated from this position in favour of applying the express language of the contract.

MT Højgaard A/S v E.On Climate & Renewables UK Robin Rigg East Ltd [2017] UKSC 59

The case concerned a contract for the design, fabrication and installation of the foundations for turbines for the offshore wind farms at Robin Rigg in the Solway Firth.

As part of the tender documents, E.ON issued certain Technical Requirements (TRs), which included the requirement for MTH to comply with an international standard for the design of wind turbine structures called J101. Shortly after completion of the works, the foundations started to fail due to a deficient design which was based on a fundamental error in an equation contained in J101.

The parties entered into proceedings to determine liability.

There were various design obligations that E.ON relied on to bring its claim including:

- clause 8.1(x) which stated that: 'The Contractor shall ... design, manufacture, test, deliver and install and complete the Works so that each item of Plant and the Works as a whole shall be ... fit for its purpose as determined in accordance with the Specification using Good Industry Practice';
- Paragraph 3.2.2.2(i) of the TRs which required MTH to prepare the detailed design of the foundations in accordance with J101; and
- Paragraph 3.2.2.2(ii) of the TRs which stated that: 'The design of the foundations shall ensure a lifetime of 20 years in every aspect without planned replacement.'

The Supreme Court held that, having agreed to an output objective (ie that the foundations shall be fit for the purpose of safely transmitting loads for a period of 20 years), the contractor could not say that the employer's approval or specification of a design exonerated it from liability or limited its liability to a duty to exercise reasonable skill and care.

The judgment highlights the importance attached to documents forming part of a contract, including the technical schedules, in interpreting the contractor's obligations. The contractor's obligations may be expressed in the contract terms as subject to the lower standard of reasonable skill and care, but even if only a single fitness for purpose or 'strict' obligation slips into the contract documents, it may have the effect of applying such higher standard.

Changes to FIDIC and NEC Contracts

At the FIDIC International Contract Users Conference in London late last year, FIDIC issued a pre-release of the Second Edition Yellow Book (Plant and Design-Build), and the final version of the FIDIC suite is expected to be released on 5 December 2017. The proposed changes are extensive.

NEC4 was released in June 2017. However, unlike the Second Edition of FIDIC's Yellow Book, NEC's stated aim for NEC4 is 'evolution not revolution'.

Both the NEC4 and FIDIC Second Edition have increased the focus on transparency throughout the term of the contract so that matters that may potentially impact the time and cost of a project are identified, assessed, and resolved before escalating to formal disputes.

New cl 8.4 in the FIDIC Second Edition Yellow Book sets out the requirement for either party (as opposed to just the contractor) to inform the engineer of any known or probable future event which may, among other things, adversely affect the works, increase the contract price or cause a delay. This advance warning mechanism is similar to the early warning mechanism contained at cl 15 of NEC4, although the FIDIC contract does not impose any sanctions if either party fails to provide advance warning.

The programming requirements set out at sub-cl 8.3 of the Second Edition Yellow Book have also increased. For example, there is now a requirement that the programme include all activities:

> '... logically linked and showing the earliest and latest start and finish dates for each activity, the float (if any) and the critical path(s).'

In the NEC contracts, the accepted programme is used as the basis for assessing the time implications of compensation events. Clause 31 of NEC4 now states that if the project manager does not accept or reject the programme within two weeks of it being submitted by the contractor, and fails to respond for a further week after the contractor provides further notification, the contractor's programme will be treated as accepted. The failure to respond will also be a compensation event.

NEC4 has also introduced a Dispute Avoidance Board (DAB) as Option W3. The DAB is a standing board meaning that it is established at the outset of the contract, and it becomes familiar with the project including by regular site visits. Parties refer issues to the DAB before they become disputes and the DAB makes recommendations as to their resolution so as to reduce the number of matters taken to formal dispute.

In light of the ***Højgaard*** decision referred to above, it is also worth noting the different approach to fitness for purpose taken by the Second Edition Yellow Book and NEC4.

The Second Edition FIDIC Yellow Book contains an express fitness for purpose obligation (cl 4.1). There is no equivalent fitness for purpose obligation in NEC4. If Option X15 in NEC4 is adopted, the only standard that will apply to a contractor's design work is that the contractor use the skill and care normally used by professionals designing works similar to the contract works. This approach therefore reduces the risk identified in the ***Højgaard*** decision of competing design standards.

Adjudication

Pursuant to the *Housing Grants, Construction and Regeneration Act 1996* (the *HGCRA 1996*) the failure to respond to an interim application by serving a valid pay-less notice may result in the employer having to pay the full amount of an application, notwithstanding that it may have a credible defence to the amounts referred to in the application.

Given the potentially drastic consequences of such a finding, there continues to be litigation around the validity or otherwise of interim payment applications and pay-less notices.

Surrey and Sussex Healthcare NHS Trust v Logan Construction (South East) Ltd [2017] EWHC 17 (TCC)

In this case, the court held that there is a high threshold to be met by any contractor who seeks to take advantage of the 'draconian' provisions of the *HGCRA 1996*. It must be clear that the contractor has served a proper payment application.

The test for a pay-less notice is somewhat less stringent. In short, the court confirmed that the pay less notice must simply set the 'agenda' for a subsequent adjudication as to the proper valuation of the interim certificate.

What to expect in 2018

In 2018, we expect that there will continue to be a number of cases arising out of the statutory adjudication regime, and particularly the standards applicable to pay-less notices. We also expect that there will be a number of cases relating to fire safety following the Grenfell Tower disaster.

The Grenfell Tower disaster may also drive changes to legislation as the government has commissioned an independent review of the Building Regulations 2010, SI 2010/2214. The purpose of this review (being led by Dame Judith Hackitt) is to consider the effectiveness of current building and fire safety regulations as well as provide assurance to residents that the buildings they live in are safe. The final report is due in Spring 2018 and may result in changes to the current regulatory system as regards building and fire safety.

In 2018 we also expect to hear the outcome of consultations launched by the Department for Business, Energy and Industrial Strategy on the reform of the *HGCRA 1996* and a review of common practices of cash retention under construction contracts and the challenges faced by the industry in relation to the same. The responses to these consultations (both due to be submitted by 19 January 2018) will allow the government to decide whether any 'further intervention' is needed.

Of course, the effect that Brexit will have on the construction industry (and specifically any deal that the UK government can secure) remains unclear and this will no doubt remain a talking point throughout 2018. **CL**