ADDLESHAW GODDARD

MILESTONE PAYMENTS AND COMPLIANCE WITH THE CONSTRUCTION ACT

- What is the meaning of "sign-off" as a trigger for payment in a construction contract and is it compliant with the Construction Act?

- What approach are the courts taking to the incorporation of the Scheme for Construction Contracts when payment provisions are non-compliant?

WHAT'S IT ABOUT?

The recent Court of Appeal case, **Bennett (Construction) Ltd v CIMC MBS Ltd (formerly Verbus Systems Ltd)**, explored the court's commitment to honouring the payment regime agreed between parties in a construction contract whose provisions do not satisfy the requirements of the Housing Grants, Construction and Regeneration Act 1998 (**Act**).

CIMC was sub-contracted by Bennett to provide design and installation of pre-fabricated bedroom units. The contract replaced the standard interim valuation payments with five milestone payments, three of which were subject to "sign-off" (which was not defined) of the units. A dispute arose following suspension of the sub-contract works over non-payment.

In the TCC, Bennett argued that the absence of sign-off of the units meant that payment was not triggered. CIMC successfully argued that the milestones requiring sign-off were non-compliant with s.110(1)(a) of the Act, which requires that every construction contract shall provide an "adequate mechanism for determining what payments become due under the contract, and when". The TCC replaced the contractual milestone payments with the payment provisions in Part II of the Scheme for Construction Contracts (**Scheme**) and CIMC was entitled to payment. This replacement created a payment regime which was significantly different to the one which the parties had agreed in their contract.

The appeal concerned two particular issues. The first was whether a payment regime requiring "sign-off" of stages of work before payment was triggered was compliant with the Act. The second issue concerned the mechanism by which the Scheme is incorporated into a contract when a payment regime is non-compliant with the Act. On the first issue, the CA disagreed with the TCC's decision and held that the contract did provide an adequate payment mechanism.

WHY DOES IT MATTER?

Following a review of the contract the Court concluded that the requirement for "sign-off" was to be assessed objectively – the relevant units had to reach a stage where a particular element could be signed off and no actual physical sign-off was required. Coulson LJ also commented that even if physical sign-off had been required it would not have made any meaningful difference to the payment provisions. CIMC was only entitled to payment when the units were in a state in which they were capable of being signed off.

Due to its "wider importance" to the construction industry, Coulson LJ also considered how the Scheme would have applied if the payment terms had been found to be non-compliant with the Act. The CA confirmed that it was settled law that the payment provisions in the Scheme are only implied if and to the extent that the contract is non-compliant. Coulson LJ considered an approach that "does the least violence to the agreement between the parties…should be central to the court's considerations." The case demonstrates the high threshold for the Scheme to apply where payment provisions are non-compliant with the Act.

NOW WHAT?

During the negotiation of contracts, it is vital to ensure that payment provisions are clear and reflect the parties' agreement. Coulson LJ makes clear that the courts will strive to honour a "workable payment regime" and replacing existing payment terms "*could only happen where the regime which had been agreed was so deficient that wholesale replacement was the only viable option.*"

This case also highlights the need to be precise as to the requirements for payment to become due and to avoid undefined terms which are open to interpretation, such as 'sign-off'.

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