Reports from the courts

In our regular round up of the court judgments of most interest to construction from Will Buckby and Andrew Croft of Beale & Company the TCC agrees with a Disputes Review Board decision in rejecting an appeal; and one where the judge recommended an extension of adjudication to contracts involving residential occupiers.

AMEC Group Ltd v Secretary of State for Defence
[2013] EWHC 110 (TCC); TCC; Coulson J

AMEC Group Ltd (AMEC) was engaged by the government under a design and build contract relating to a nuclear submarine facility. The contract contained a ‘Guaranteed Maximum Price’ (GMP) clause, which stated that the GMP was approximately £140m. The GMP was subject to a pain/gain mechanism such that if the costs incurred were below the GMP any savings would be shared and any costs over the GMP, up to a limit of the GMP plus £50m, would be borne by AMEC.

Various issues caused the price of the project to rise and a dispute arose as to what happened after the limit of the £50m of additional costs (over the £140m) was reached. AMEC argued that it was entitled to all its further costs. The Secretary of State’s primary argument was that AMEC was entitled to no further payment and its secondary argument was that AMEC was only entitled to ‘actual costs’.

AMEC commenced court proceedings to challenge the DRB’s decision and to seek leave to appeal under s 69 of the Arbitration Act 1996 on the ground that the DRB had erred on a point of law and their decision was either ‘obviously wrong’ or concerned a question of public importance and was open to ‘serious doubt’.

Held
Coulson J refused to grant AMEC permission to appeal.

The court agreed with the DRB’s majority view as to the construction of the GMP clause, on the basis that it was clear from the contract as a whole that the pricing regime was dependent upon the ascertainment of actual costs. Additionally, AMEC’s interpretation would lead to some ‘odd results’, for example it would be entitled to recover all its costs incurred for remedying its own breach of contract.

Coulson J also concluded that this case did not concern a question of public importance, largely on the basis that it was ‘a one-off contract’; since the contract was concluded, only two or three contracts had been let where the liability for overspend similarly shifted from one party to another.

Significance
Although GMP contracts are relatively unusual, target cost arrangements and pain/gain mechanisms are becoming increasingly common. In particular, pain/gain mechanisms are central to alliancing agreements, which are currently being promoted by the UK government. Pain/gain mechanisms embody the underlying ethos that the alliance members ‘win together and lose together’ as they are collectively incentivised to deliver the project as cost effectively as possible.

This decision emphasises the need for pain/gain mechanisms to be carefully drafted and to make provision for even the most unexpected of cost overruns to avoid one party being responsible for potentially significant losses. If the contractor’s liability for cost overruns is expressly limited the agreement should
make clear to what extent it will be entitled to payment once that limit is reached.

**Westfields Construction Ltd v Lewis**

[2013] EWHC 376 (TCC); TCC; Coulson J

In February 2012 Westfields Construction Ltd (Westfields) and Mr Lewis entered into a contract for the refurbishment of a flat in London. The contract comprised Westfields’ quote and a confirmation email following a site meeting. The parties had first discussed the works in September 2011, at which point Mr Lewis occupied the property, but suggested that he intended to rent it out once the works had been completed and this was confirmed in an email in January 2012.

Mr Lewis subsequently moved out of the property and in September 2012 a dispute arose after Mr Lewis failed to make payment of Westfields’ valuation, which Westfields referred to adjudication.

Section 106 of the **Housing Grants, Construction and Regeneration Act 1996** (HGCRA 1996) states that Pt II of the HGCRA 1996, including the right to adjudicate, does not apply to a construction contract with a ‘residential occupier’. The exception applies if the construction contract relates to operations on a dwelling which one of the parties occupies or intends to occupy as his residence. Mr Lewis objected to the adjudicator’s jurisdiction because he claimed that he intended to occupy the property after completion of the works and therefore fell within the exception. Mr Lewis also claimed that the exception applied because he occupied the property at the time the contract was concluded.

**Held**

Coulson J agreed with the adjudicator’s finding that Mr Lewis was not a residential occupier and therefore held that the adjudicator had jurisdiction, and thus ordered Mr Lewis to pay the sum awarded by the adjudicator.

Much of the basis of the judgment rested on the relevant facts and in particular Coulson J’s conclusion that Mr Lewis was ‘alarmingly cavalier with the truth’ and a ‘thoroughly unimpressive witness’. The evidence, including discussions pre and post-contract regarding Mr Lewis’ intention to rent the property out; and the fact that Mr Lewis had purchased a flat in Knightsbridge before the works commenced clearly contradicted Mr Lewis’ statements.

Coulson J stated that in this case a failure to demonstrate an intention to occupy was fatal to any reliance on the residential occupier exception, which will not be engaged simply because the relevant party occupied the property at a ‘single snapshot of time’ – it requires ongoing occupation, ie the occupier must remain at or intend to return to the property. It would be a nonsense for it to apply to someone who occupied the property at the time the contract was concluded, but then moved out of the property in order to rent it out or sell it. In any event, on the facts it was held that Mr Lewis was not even in occupation at the time the works commenced.

**Significance**

This judgment confirms the limited scope of the residential occupier exception. As Coulson J highlighted, it was included to protect ‘ordinary householders’ from an untried system of dispute resolution and will not apply simply because the relevant party occupied the property before the works commenced.

Indeed, Coulson J queried whether this, or any of the exceptions to adjudication, should continue to apply, as all parties should be able to enjoy the benefits of adjudication, which ‘is generally thought to have worked well and it has certainly reduced costs’. Some may disagree with this assessment and it will be interesting to see whether the government will take any steps to act on the court’s recommendation. CL