Construction / Infrastructure Update November 2020

Introduction

In this second Matheson Construction & Engineering update for 2020, we highlight for you some very telling statistics in relation to adjudications held in this jurisdiction in recent times. In addition, we touch briefly on the current state of play in relation to Sectoral Employment Orders and we share with you our insights in relation to a recent UK case concerning calls on performance bonds. For more information, please contact a member of our team listed below.

Adjudications: What do the statistics tell us?

The annual report of the Chairperson of the Construction Contracts Adjudication Panel covering the period July 2019 – July 2020 (the Report) was recently published and provides informative data about the adjudications which took place during that period. Adjudicators are obliged to provide information concerning adjudication to the Construction Contracts Adjudication Service and this feedback gives valuable insight into who is engaging in the adjudication process, the nature and values of adjudications during the last year, the time and cost associated with those adjudications and what decisions have been reached. The key takeaways from the Report are:

54 Numbers

There were 54 applications for the appointment of adjudicator, 46 cases had an adjudicator appointed and 36 of those adjudicators provided feedback on their cases.

44% Location of Adjudications

Some 44% of last year's adjudications took place in Dublin with the balance being held across six different counties and two in London.

75% Nature

The majority of cases, indeed almost three quarters, concerned subcontractors pursuing main contractors for payment.

Even Split Value

Cases were split relatively evenly across value ranges of €10,000 - €30,000 (10 cases), €100,000 - €500,000 (10 cases) and €500,000 - €5m (12 cases).

Decisions

Claimants were successful in approximately 40% of cases whilst respondents were successful in approximately 17% of cases. The sums awarded by adjudicators fluctuated quite considerably and would not appear to be commensurate with case values in a number of instances. In 8 cases no monetary award was made, in 8 other cases the award was in the €100,000 to €500,000 range and in only 1 case was the award in the €500,000 to €1m range despite 12 cases being in that value range.

50%
Timescales

The process is generally efficient with 23 cases, half of all cases addressed in the Report, completed within 42 days from the date of referring the case to the adjudicator.

Hourly Basis
Fees

Adjudicator's fees are calculated on an hourly basis and for the majority of cases the fees ranged between €1,000 - €10,000 which demonstrates that, when compared to other forms of dispute resolution, adjudication is a cost effective process.

The Report demonstrates that over the past year, adjudication represented a swift and cost efficient way for payment disputes arising under construction contracts to be determined, including lower value claims. We can anticipate then that the number of adjudications will rise during the course of the next year as the ongoing nature of COVID-19 and its impact on the construction industry forces parties to address payment disputes.

Sectoral Employment Orders: Appeal Awaited

In our summer Construction / Infrastructure update we reported on the then recent Sectoral Employment Orders (SEOs) turnabout.

On the 23 June 2020, the High Court ruled that the underlying legislation giving the Minister the power to issue SEOs was unconstitutional. The three construction SEOs in question (SEOs being orders which regulate rates of pay, sick pay and pensions within a specific sector of the economy and which replace the old Employment Regulations Orders and Registered Employment Agreements) were the general construction operatives which came into force in 2017 and was replaced in October 2019, the mechanical engineering building services sector from 2018 and the electrical contracting sector from September 2019.

The case considered the validity of the electrical contracting sector SEO. The basis of the Court's decision to invalidate this SEO was primarily on the basis that the Minister did not exercise its power properly in making the order as he did not scrutinise the necessary report from the Labour Court to satisfy himself that the mandatory processes and procedures set out in the legislation were properly followed. The High Court however went further to consider the constitutional validity of the Industrial Relations (Amendment) Act 2015 (the "Act"). In striking down the legislation, the Court found that the Act did not contain sufficient principles and policies to guide the broad discretion delegated to the Minister. Although the electrical sector SEO is the only SEO that has been specifically set aside, the other SEO's will be unenforceable.

In a statement to the Dáil on 9 July 2020, Tánaiste and Minister for Enterprise, Trade and Employment Leo Varadkar confirmed that it is government's intention to appeal this judgment to the Supreme Court. Currently, there is a six month stay on the reliefs provided by the High Court's finding that parts of the Act are invalid. This stay is to remain in force until the determination of the intended appeal.

Performance Bond Update: Pitfalls to Recovery

The Technology and Construction Court of England and Wales gave a decision this year dealing with the interpretation of performance bonds ***(Yuanda (UK) Company Ltd v Multiplex Construction Europe Ltd and another [2020] EWHC 468 (TCC))***.

Facts:

Yuanda (UK) Company Ltd (**Yuanda**) was engaged by the main contractor, Multiplex Construction Europe Ltd (**Multiplex**), as a façade sub-contractor on a major building project in London on the JCT Design and Building Sub-Contract 2011 Edition. The main contract works were delayed and Multiplex settled a claim for liquidated damages (**LDs**) with its employer. Multiplex sought to recover that sum from Yuanda for delays to the Yuanda sub-contract works. Yuanda claimed it was entitled to an extension of time and not therefore not liable for the LDs and submitted its final account claim including delay costs. Multiplex made a call on the Yuanda bond.

The bond itself provided the usual ABI wording that the Guarantor would "... satisfy and discharge the damages sustained by the contractor as established and ascertained pursuant to and in accordance with the provisions of or by reference to the [sub-contract] ..." [Emphasis added].

The Decision:

The court interpreted this language as requiring the damages to be established and ascertained through the procedures set out in the underlying sub-contract. The sub-contract required disputes to be determined by arbitration. The court therefore found that Multiplex had to obtain an adjudicator's decision in its favour prior to calling the bond. The court noted in particular that Multiplex had no right to make determinations under the sub-contract and left open the possibility of a contract providing for damages to be determined and certified by a 'decision-maker' such as an Architect or Contract Administrator. In that case, certification should be sufficient to form the basis of a call under a performance bond. It is not clear to the extent that the parties can settle or agree the damages for the damages to be considered established and ascertained. It is also not clear if the determination of the 'decision-maker' must be stated in the contract to be final and binding on the parties or if a dispute of the 'decision-maker's' determination can delay a call being made on a bond.

Key Takeaway:

The significance of this decision is that the beneficiary of the bond must be live not only to the drafting of the bond itself but it must also be vigilant to the terms of the underlying contract provisions in the context of a potential call on the bond. The underlying contract provisions must be well drafted to provide for the establishment and ascertainment of damages. Careful drafting around the claims procedure under the bond should also be considered to allow the beneficiary time to establish and ascertain the damages under the contract. From an Irish law perspective, this approach is consistent with the decision of the High Court last year in Clarington Developments Limited v HCC International Insurance Company PLC. In that case, the building contract in question did not provide an express mechanism for establishing damages. The bond had similar language to the Yuanda case that the quantum of damages should be "established and ascertained pursuant to and in accordance with the provisions of the building contract". Justice Simmons ruled that this meant that the dispute resolution procedure in the contract applied, meaning that conciliation / arbitration was first required in order to establish the damages before the bond could be called. This case highlights, from an Irish law context, the care required in drafting the provisions of the underlying contract.

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