



Fenwick Elliott

# Annual Review



2008

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*EU procurement legislation:  
challenging unfair tender procedures*

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*Adjudication 10 years on: are there any ways left  
to get round an adjudicator's decision?*

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*The perils of taking an unreasonable  
position when mediating*

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*The construction law specialists*



Fenwick Elliott

*Fenwick Elliott is the UK's largest specialist construction law firm with clients across the world. We advise on every aspect of the construction process from inception through building to completion and operation.*

*Our expertise covers contract documentation, negotiation and dispute resolution. We provide strategic advice to forestall potential problems throughout a project and audit completed projects to assess strengths and weaknesses. Our approach is commercial. We aim to add value to transactions and find practical solutions to disputes.*



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### September 2008

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Jeremy Glover

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## First word

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**Simon Tolson**

Senior partner

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*It's my pleasure to introduce once again this year's Fenwick Elliott Annual Review. It's been a busy year both in the courts and elsewhere and as always our Review seeks to provide practical informed advice and update you on all the latest legal developments. It's been an engaging year too at Fenwick Elliott. Although the world may be shrinking in terms of technological advances, that does not mean that there has been any reduction in the complexity of UK and international legislation - nor in the range of market and environmental risks facing the construction, engineering and energy sectors.*

Our international practice, lead by Richard Smellie, continues to flourish and we are now involved in many of the world's most important oil and gas developments, including the Kashagan field in Kazakhstan, the Baku-Tbilisi-Ceyhan crude oil pipeline project and the Shah Deniz natural gas development in the Caspian. At the same time our work in the domestic sector is proving just as varied and exciting. From major stadia, hotels, airports and data centres to complex demolition and groundworks schemes to advising on the long term operation of completed buildings, Fenwick Elliott has been there over the past 12 months. And yes, adjudication remains to the fore, with the publication of the government reforms closely following the 10 year anniversary of the Housing Grants Act.

There is no doubt that adjudication has led to significant changes in the way disputes are resolved within the construction industry. As we set out on page 4, the latest evidence is that the number of adjudications has stabilised at around 1400-1500 a year. At the same time, our experience suggests that the resurgence in confidence in the Technology & Construction Courts ("TCC") has, as I suggested in last year's Review, been sustained to the point where for the first time in years, the Judges there are so busy that at least one new Judge is shortly to be appointed. The UK construction industry is fortunate in that it can call on the services of a specialist court to resolve its disputes as its judges are all respected specialists in the construction field.

The TCC remains at the forefront of efforts to streamline the court procedure and many of its case management procedures are being adopted on a world wide basis. For example, many of the reforms proposed by the International Court of Commerce ("ICC") in its new publication "*Techniques for Controlling Time and Cost in Arbitration*" follow procedures that are already in place at the TCC.

You will discern a distinct European angle to this year's Review, a testament to the importance of the work we do for local authorities and in the education sector. For those of you working in that field, I commend you to our Capital Projects in the Education Sector seminars, organised each year by Victoria Russell. The next one, our fifth, is on 19 November 2008. Please contact Victoria for more details.

Re-reading my column from last year, I see that I noted the support given by the courts to contract terms requiring a contractor to give prompt notice of delay or disruption. If you read the articles on time bars on pages 34-36 and on the new FIDIC contract, on pages 32-33, you will see that although that trend has to some extent continued, the courts and contract bodies also recognise the sometimes unfair burden that such clauses can impose on contractors who may lose the right to make any claim at all, if prompt notice is not given.

Finally, if you are looking for the next big thing, well just maybe it's going to be Sustainable Development<sup>1</sup>. There is no doubt that we are all facing a whole new set of challenges from tougher government initiatives on climate change and sustainability. Why risk damaging costs in terms of money, time and reputation from not understanding or complying with the relevant rules? And if that sounds like a plug for a seminar, well you would be right. I am chairing, and Jeremy Glover is speaking at a seminar entitled Sustainable Development in the Construction Industry<sup>2</sup> on 30 September 2008. This may be short notice, but it is an important subject. If you can't make it, look out for details of the papers given on our recently relaunched website.

**Simon Tolson**

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<sup>1</sup> "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs." Brundtland Report 1987 'Our Common Future'

<sup>2</sup> For full details see [www.fenwickelliott.co.uk/news](http://www.fenwickelliott.co.uk/news)

## Editor's overview

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**Jeremy Glover**

Editor

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*Welcome to the Twelfth edition of our ever-popular Annual Review. Following the widespread approval of last year's re-design, there are no changes this year. Instead we have looked to increase the scope and breadth of the content, whilst retaining our long-standing features including the summaries of the key legal cases from the past 12 months.*

In April I was fortunate enough to be one of the speakers at our 14th Construction Law Update Seminar. My colleague Julie Stagg gave a talk on some of the ways in which you can overcome the pitfalls associated with letters of intent. That advice, which we have set out at pages 11-14, is particularly timely as there have been a number of cases involving letters of intent in the courts through the last 12 months. In each case at least one of the parties has been surprised to discover precisely what contract, if any, they have been working under. We report on one of these cases, *Diamond Build Ltd v Clapham Park Homes Ltd* on page 50.

Another topic which has featured in the courts this year is the number of (increasingly successful) challenges to tendering procedures by one or more of the unsuccessful parties. Our note on this, which can be found at pages 22-25 includes discussion of cases from Europe as well as Northern Ireland and the London Borough of Newham. We also highlight the question of the confidentiality of the tendering process.

The question of confidentiality crops up again in our mediation article, to be found at pages 19-21, where one party sought disclosure of a wide range of documents relating to various mediations. The mediation round-up also features a cautionary case outlining what the consequences might be if the court feels that you have behaved unreasonably during the mediation process.

As Simon has said, the international side of our practice is continuing to expand, and one important development was the appointment in January 2008 of Nicholas Gould as chairman of the Standing Committee of the ICC Centre for Expertise. In his article, on pages 39-41, Nicholas considers the role of experts in international construction disputes. In doing so, he provides some practical advice which is equally relevant to the work of experts in the UK.

One of the more interesting cases we reported last year was the *Fiona Trust* case where the Court of Appeal recognised that it was time for the courts to take a more liberal approach to the construction of jurisdiction and arbitration clauses. As we set out at page 37, that decision has been roundly endorsed by the House of Lords whose clear words undoubtedly can only serve to confirm the attractiveness of London as an arbitration centre.

In another update from the 2007 Review, we reported last year that the Government had finally revealed its intentions for the reform of the Housing Grants Act. However, we remained in the dark as to when those proposals might formally be published. As we discuss on page 5, those proposals were finally published in July, thus requiring a hasty re-write of the plaintive paragraphs asking where the reforms were!

Even 10 years on, the "resourceful" litigant (to use Mr Justice Coulson's words<sup>1</sup>), continues to find new ways to challenge adjudicators' decisions. In the case summaries from the *Dispatch*, on pages 43-46, we include new court guidance on the care that needs to be taken when appointing adjudicators and on whether you can sever those parts of a decision which may have been reached outside of an adjudicator's jurisdiction.

Personally, over the past few months, I have been pleased to be involved in the CODEP project to build a library and education centre in Sierra Leone. For further details please see page 42. I hope we can provide a full update next year.

We hope that once again you enjoy our Annual Review. As always, I would welcome your comments on any of the articles. Just email me at [jglover@fenwickelliott.co.uk](mailto:jglover@fenwickelliott.co.uk).

**Jeremy Glover**  
September 2008

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<sup>1</sup> *AC Yule & Son Ltd v Speedwell Roofing & Cladding Ltd* [2007] EWHC 1360 (TCC)

## Adjudication

# The Housing Grants Act 10 years on

*The Housing Grants, Construction & Regeneration Act ("HGCRA") came into force in May 1998<sup>1</sup>. Ten years have now passed, so has adjudication been a success? Sir Michael Latham wanted adjudication to become the "key to settling disputes in the Construction Industry"<sup>2</sup>. There is no doubt that adjudication has become a popular and accepted form of dispute resolution encouraged by the courts and adopted by many as a way of resolving disputes both interim and final. Indeed, adjudication is now used to deal with many complex disputes which may well have been outside the ambit of those who originally drafted the legislation.*

Adjudication owes much of its success to the attitude of the courts, who have shown their willingness to enforce the decisions of adjudicators. Today, there is a pro-adjudication approach amongst the judiciary, which was clearly demonstrated by Mr Justice Jackson in his judgment in the *Carillion v Devonport*<sup>3</sup> case:

*"76. Prior to 1998, if there was a dispute about payment within the construction sector, money would generally remain in the pocket of the paying party until final resolution of that dispute. This was a source of concern ... The statutory system of compulsory adjudication was set up to address this problem. The purpose of an adjudication was and is to determine who shall hold the disputed funds, and in what proportions, until such time as the dispute is finally resolved..."*

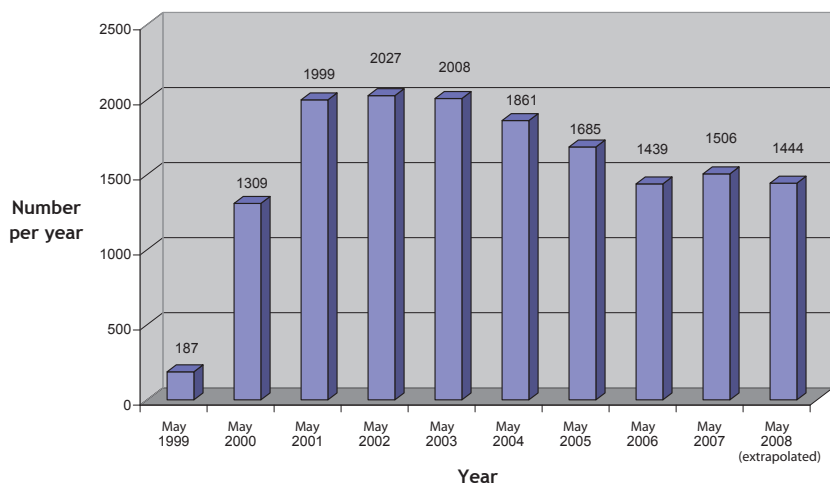
*78. ...adjudication has been widely used in the construction industry. On many occasions, the parties have chosen to use the adjudicator's decision as, or as the basis for the final settlement of their disputes. This is a perfectly sensible and commercial approach.*

*80.2 The Court of Appeal has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law..."*

## Adjudication - the key to settling disputes in the Construction Industry.

There have been many statistics produced over the years and the construction industry is particularly grateful for the work carried out by the Adjudication Reporting Centre Report at Glasgow Caledonian University. As can be seen from the Table below<sup>4</sup> there have been at least 15,000 adjudications since 1 May 1998, a figure which in itself suggests that adjudication has been a success.

Number of Adjudications



<sup>1</sup> Of course, the origins of the process are far from new: Dr Stephen Inwood has noted that Robert Hooke (1635-1703), who in collaboration with Sir Christopher Wren did much work in the reconstruction of London after the Great Fire, "carried out occasional views on properties in the City, providing professional adjudications in disputes between property owners or builders, usually for a fee of 10s" (*The Man Who Knew Too Much*; Pan, 2002, page 386). See Chapter 5 of *Building Contract Disputes: Practice and Precedents*.

<sup>2</sup> *Constructing the Team*

<sup>3</sup> 2005 EWHC 778 (TCC)

<sup>4</sup> Adjudication Reporting Centre Report No. 8 - November 2007.

Adjudication has undoubtedly speeded up the dispute resolution process in the construction industry generally. Many adjudication panels have been set up, including a panel for the 2012 London Olympics. Further adjudication is now starting to establish itself, not merely as a British procedure, but as a feature of other common law jurisdictions as well. So there is no doubt that adjudication is here to stay, something confirmed by the proposed reforms to the Housing Grants Act, which are clearly intended to widen the availability of adjudication, throughout the construction industry.

## Adjudication

# Reform At Last

Ten years on, after many seeming false starts, the Government has finally published its draft Construction Contracts Bill, the purpose of which is to amend key provisions of the HGCRA. This Bill follows the draft proposals revealed by the Government in June of last year. Many had questioned whether these proposals were ever going to be put into action. However, the Government has said that it intends to put the draft Bill before Parliament in December of this year and has asked for comments on the draft by 12 September 2008.

The Government wants to:

(i) Increase transparency and clarity in the exchange of information relating to payments to enable the better management of cash flow;

(ii) Encourage the parties to resolve disputes by adjudication, where it is appropriate, rather than by resorting to more costly and time consuming solutions such as litigation; and

(iii) Improve the right to suspend performance under the contract.

The Government has said the reason for the Bill was that:

*"Extensive consultation with the construction industry has identified that while the Construction Act has improved cash flow and dispute resolution under construction contracts it is ineffective in certain key regards."*<sup>1</sup>

The key policy objectives are to improve the existing regulatory framework in order to:

- (i) Increase transparency and clarity in the exchange of information relating to payments to enable the better management of cash flow;
- (ii) Encourage the parties to resolve disputes by adjudication, where it is appropriate, rather than by resorting to more costly and time consuming solutions such as litigation; and
- (iii) Improve the right to suspend performance under the contract.

Accordingly, the draft Construction Contracts Bill<sup>2</sup> proposes the following:

## Contracts in writing

As widely anticipated, the first part of the draft Bill repeals section 107 of the HGCRA which required that for the purposes of the HGCRA contracts had to be in writing or evidenced in writing. This means that adjudication will apply to all construction contracts which are either agreed in writing or orally. In order to encourage parties to resolve disputes by adjudication, the Government has acknowledged the difficulties caused by the Court of Appeal decision in the *RJT* case as noted by, amongst others, HHJ Wilcox, who decided that a letter of intent in the case of *Bennett (Electrical) Services Ltd v Inviron Ltd*<sup>3</sup> failed to comply with the requirements of section 107. It will be recalled that in commenting on the difference of opinion of the Court of Appeal in the *RJT* case he noted that:

*"...The reasoning of Auld LJ is attractive because at the subcontractor level and where cash flow difficulties are likely to be encountered in the smaller projects, the paperwork is rarely comprehensive. The extent of the requirement for recording contractual terms for an agreement to qualify under section 107 laid down by majority could have the effect of excluding from the scheme a significant number of those whom the Act was perhaps intended to assist."*

The new proposals are intended to limit the number who are excluded from the right to adjudicate by ensuring the right to adjudicate applies to contracts which are oral or partly oral and not just those which are evidenced in writing. The writing requirement has not totally disappeared. Any contractual provisions relating to adjudication must be "in writing" as defined by a new section 115A. Presumably if they are not, then the Scheme will apply.

## Adjudication costs

With a similar eye on making adjudication more accessible to everyone, the draft Construction Contracts Bill sets out certain controls on adjudication costs. A new clause, section 108A, makes it clear that any attempt to allocate the costs of adjudication between for the parties, will be invalid unless that agreement is made in writing after the adjudicator is appointed. This would include, for example,

<sup>1</sup> See [www.berr.gov.uk/sectors/construction/constructionact/page13956.htm](http://www.berr.gov.uk/sectors/construction/constructionact/page13956.htm) for full details

<sup>2</sup> In addition to the points outlined here, the draft Bill includes a new clause which requires the parties to a Scots law construction contract to provide that the adjudicator has the power to correct a clerical or typographical error in his decision. There is no need for such a provision in England & Wales as the judgment in *Bloor Construction (UK) Limited v Bowmer & Kirkland (London) Ltd* [2000] B.L.R. 314 already means that adjudicators have the power to correct mistakes.

<sup>3</sup> [2007] EWHC 49 (TCC)



## Adjudication

agreements that one party should pay the whole or part of the costs of the adjudication or agreements that the adjudicator may make a decision that a party should pay the whole or part of the costs of the adjudication.

Further, the adjudicator is given the new power, by virtue of section 108b to determine that any agreed allocation of any part of the costs which a party is required to pay is unreasonable. Finally, in section 108C the draft Bill expressly states that parties are jointly and severally liable to pay an adjudicator’s reasonable fees and expenses.<sup>4</sup>

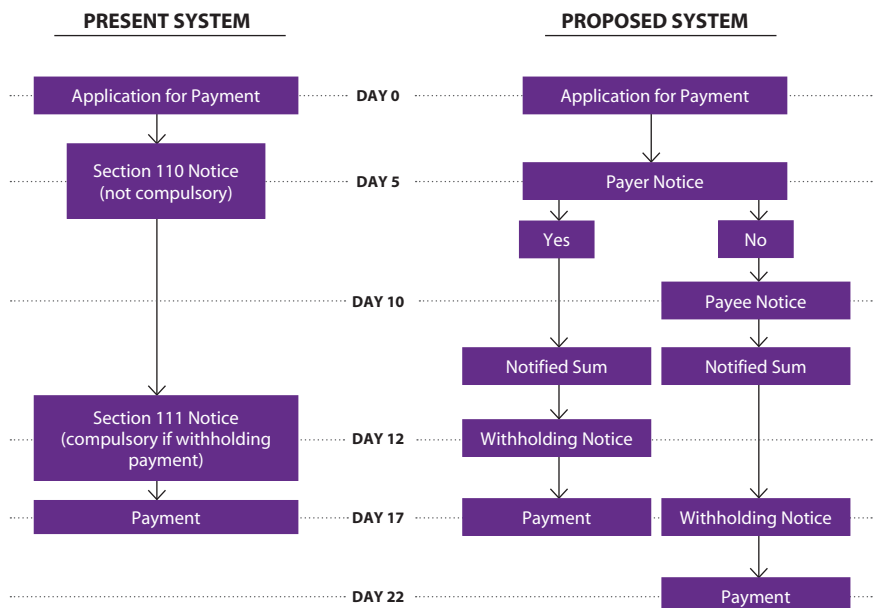
### Interim payment decisions

Under section 109 of the HGCRAs contractors are entitled to periodic payments. Concern has been expressed about clauses which make specific payments subject to “interim payment provisions”. A new clause has therefore been introduced to render ineffective any contractual provision which provides that a decision taken by a third party as to the amount of any periodic payment is “binding”.

### Withholding notices

The old payment and withholding notice system has been abandoned and is to be replaced with a new payment structure. Given the Government’s stated aim of achieving an increase in transparency and clarity this is not surprising. The new system, by section 110A, provides for “payment notices” which set out the sum the payer considers to be due and the basis upon which that sum is calculated and also provides for “payee notices”, under section 110B which can be given in default of the payment notice. If the payer does nothing, the payee can serve their own “payee notice” which will set out the sum the payee considers to be due and the basis upon which that sum has been calculated. The sum set out in the “payment notice” or the “payee notice” will become the “notified sum”. And a party can only withhold payment from the notified sum in accordance with the new section 111. This new section 111 states that the payer must pay the notified sum unless the payee is given a notice of the payer’s intention to pay less than the notified sum. That notice must specify the sum the payer considers to be due and the way in which that sum has been calculated. We set out below how the new provisions will work if applied to the Scheme.<sup>5</sup>

*By simplifying the payment provisions, it is now unlikely for there to be any recourse for a failure to serve a section 111 withholding notice.*



<sup>4</sup> Thus the drafting goes beyond the original intention of merely dealing with *Bridgeway v Tolent* clauses, which placed a costs’ burden on the party commencing adjudication.

<sup>5</sup> Whilst we understand that BERR, the Department for Business, Enterprise and Regulatory Reform, intends that the Scheme will be amended in line with the current recommendations, currently the timing of when this might happen is a little unclear.

<sup>6</sup> [2003] EWCA Civ 1563

Although this might not seem new, a paying party is now required to include details of any set-off or abatement in the notice, something which is currently not always thought to be necessary. This should bring an end to the series of cases, for example *Rupert Morgan Building Services (LLC) Ltd v Jervis and Anr*<sup>6</sup>, about the meaning of the “sum due”.



## Adjudication

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The government's message is clear. By simplifying the payment provisions, it is now unlikely for there to be any recourse for a failure to serve a section 111 notice. Payment notices are seen by the government as an important tool in achieving transparency and in communicating details of payments which are made or are proposed to be made. As the Government has made clear, this requirement to pay the "notified sum" is intended further to facilitate "cash flow" by determining what is provisionally payable. What is properly due and ultimately payable, as a matter of the parties' contract, is of course unaffected.

*The Government believes<sup>7</sup> the reforms will lead to the following savings:*

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*£600 per adjudication*

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*£5.8 million per year through amending the payment provisions*

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*1%-1.5% of the costs of an average project through improving the payment framework.*

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The new section 111 at subsection 10 makes reference to the House of Lords decision in *Melville Dundas Ltd (in receivership) and others v George Wimpey UK Ltd and others*<sup>8</sup>. Here the House of Lords decided that the payer could legitimately withhold moneys, notwithstanding that no "withholding notice" under current section 111 of the HGCR was had been given. The reason was that the contract had provided that moneys need not be paid in the event of the payee's insolvency. As the insolvency had occurred after the period for giving a "withholding notice" had expired, it was simply not possible for the payer to have given such a notice beforehand. Sub-section 10 confirms that the *Melville Dundas* decision remains but remains confined to insolvency situations alone.

## Conditional payment clauses

The ban on conditional payment clauses has been widened. A new subsection 1A, in section 110, extends the ban on pay-when-paid clauses to include requirements which make payment conditional:

*"(i) on the performance of obligations under another contract, or*

*(ii) a decision by any person as to whether obligations under another contract have been performed."*

## The right to suspend

The problem with the right to suspend under section 112 of the HGCR was that the compensation to which the suspending party is entitled under the legislation in the event of a legitimate suspension was not generous. The suspending party was merely entitled to an extension of time for completion of the works covering the period during which performance was suspended. That extension would not necessarily extend to the 7-day notice period prior to the right to suspend becoming operative nor would it apply to the time which it takes to re-mobilise following the suspension. This is important since the right to suspend ceases on payment of the amount "due" in full.

There was nothing to prevent the parties from conferring more extensive rights through the terms of the contract than the legislation provides. By way of example, clauses 2.29.5 and 4.24.3 of the JCT SBC 2005 form entitles the contractor to apply for both extensions of time in respect of "delay arising from a suspension..." and for "loss and expense where appropriate, provided the suspension was not frivolous or vexatious." However there was nothing to insist that the parties did this.

The new draft section 112(3A) clarifies this by making the defaulting payer liable to pay the suspending party "a reasonable amount in respect of costs and expenses reasonably incurred" as a result of suspending. This should help the Government to achieve its aim of making the right to suspend performance a more effective remedy.

## Conclusion

As can be seen from the very short review period, the Government does not intend for there to be a full blown consultation of the draft Bill. They are seeking comments on the technical aspects of the drafting, and are not looking for any further full discussion on a range of policy options. This should mean that there is every chance that these changes will find their way onto the statute books sometime during the next year.

<sup>7</sup> Impact Assessment of Part 2 of the Housing Grants, Construction and Regeneration Act 1996 and the Scheme for Construction Contracts (England and Wales) Regulations 1998 (The Scheme) and the Scheme for Construction Contracts (Scotland) - [www.berr.gov.uk](http://www.berr.gov.uk)

<sup>8</sup> [2007] UHKL 18

## Adjudication

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# Adjudication - when can an adjudicator's decision be trumped?

Simon Tolson, in an extract from a paper given in April 2008 at the LexisNexis Construction Law Conference 2008, looks at one of the fundamental points of law and practice which has arisen time and again, since statutory adjudication came into being. Whilst the courts at first instance have not always given consistent answers, Simon's analysis shows that you can get close to an answer, albeit one that is short of the highest appellate courts.

*The architect had no power to undo the decisions of an adjudicator and accordingly had to comply with those decisions so far as they were relevant to any of his tasks, including making his valuation in the final certificate.*

Over the last decade there have been scores of attempts to resist an adjudicator's decision on interim payments by citing later valuations where the key question was whether a final valuation can be used to defeat an adjudicator's decision on an interim valuation. The conflict was most recently taken in hand by Mr Justice Ramsey in *William Verry Ltd v The Mayor and Burgesses of The London Borough of Camden*<sup>1</sup>. The main issue was the status of an adjudicator's decision as a result of the operation of the final certificate provisions in the contract and a claim for defects that had not been considered by the adjudicator. In essence, could Camden defeat the adjudicator's decision because of a subsequent valuation and a claim for defects? It was held:

*"... Where there are potentially competing disputed rights and obligations those disputes must give way to the enforcement of the decision of the adjudicator..."*

The circumstances surrounding this case are fairly common. The contract was the JCT Intermediate Form 1998 and valuations were carried out by an independent firm of quantity surveyors. There had been three adjudications concerning valuations with the third being decided in January 2006, two years after practical completion. Another was to follow. The third adjudicator decided that the interim valuation at practical completion was £6,487,648.37. After taking into account the amounts paid, retention and liquidated damages he ordered Camden to pay Verry £532,351.61 plus VAT and interest.

However, just prior to the third adjudication commencing the PQS issued a draft final account. Indeed a week or so before the third adjudicator gave his decision. The contract administrator issued a final certificate based on the draft final account showing a gross valuation of £5,755,655.51 and an amount due to Verry of only £46,020.11. So at this point, the differences were over £486k between final certificate and the third adjudication. It was about to get worse.

Shortly after the third adjudicator's decision, Camden gave notice that it would deduct liquidated damages awarded by the third adjudicator from the amount in the final certificate. According to Camden, this meant that Verry owed Camden £35,275.61. The outcome of these corresponding procedures was that Verry had an adjudicator's decision ordering Camden to pay over half a million pounds but also had a final certificate and a notice from Camden that showed Verry was in debt to Camden for over £30,000. Camden refused to pay on the adjudicator's decision and Verry applied for summary judgment.

Mr Justice Ramsey considered a number of authorities but firmly rejected any arguments that the third adjudicator's decision should not be enforced. He held that Verry was entitled to the full amount awarded. The Judge made clear that an adjudicator's decision to which the HGCR applied was not simply a contractual obligation that could be impugned by other contractual obligations, thereby clearing a major legal fog. If what Camden argued was the case then each successive certificate would defeat the adjudicator's decision on a previous certificate and the fundamental purpose of providing cash flow in the construction industry would be undermined. Potentially conflicting rights had to give way to enforcement of an adjudicator's decision. This decision finally established at HCJ level that generally there is no right of set-off from such an adjudicator's decision.

<sup>1</sup> [2006] EWHC 761 (TCC)

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Camden also tried to reduce the amount awarded by an amount for alleged defects, even though it had not sought to have them dealt with in the third adjudicator's valuation or in the final certificate. Again, the judge rejected this approach for the same reasons. Camden had not sought to withhold an amount for defects against the certificate for interim payment on practical completion. It could not do so now.

Camden had started a fourth adjudication on the matter of defects and if the adjudicator awarded a sum thereon then Camden would be entitled to payment on that decision. It appears from the judgment that the valuation of the final certificate was based on various contentions that differed from the third adjudicator's decision.

But it was an important point in the recent Scottish decision in *Castle Inns (Sterling) v Clark Contracts*<sup>2</sup> where the final certificate was issued after the adjudicator's decision. In *Castle Inns*, Lord Young stated that the architect had no power to undo the decisions of an adjudicator and accordingly had to comply with those decisions so far as they were relevant to any of his tasks, including making his valuation in the final certificate. There was one important qualification: Lord Young held that if new material had emerged since the date of the adjudicator's decision, the architect was entitled to take that into account in preparing the final certificate, or indeed any interim certificate, and to make any appropriate modification to the adjudicator's decision. What he could not do was challenge an issue of principle in the adjudicator's decision.

It is clear from the judgments that the court will seek to resist any attempts to prevent cash flow based on an adjudicator's decision to which the HGCRAs apply. Any issues that will affect valuation need to be raised with an adjudicator during the adjudication proceedings; it will be most difficult to resist enforcement later for matters that could have been raised earlier. It is now very tricky to get round an adjudicator's decision using inconsistent certificates.

### Key points

- Subject to higher judicial authority, an adjudicator's decision is not simply a contractual obligation that can be reduced by other contractual obligations:
- There is no general right of set-off from such an adjudicator's decision.
- If new material emerges after the date of an adjudicator's decision, it may be taken into account in preparing the final certificate.
- Any issues that will affect valuation need to be raised with an adjudicator during the adjudication proceedings.

### Withholding liquidated damages from an adjudicator's decision

The basic starting point question is, if a defendant is entitled to be paid liquidated and ascertained damages is he entitled to set off that claim against the sum which the adjudicator has decided must be paid to the claimant? There have been a number of court cases on this issue and on the entitlement of the paying party to resist paying an adjudicator's decision due to set-off. However, as far back as 2000 this robust submission was rejected by Dyson J, as he then was, in *Edmund Nuttall Ltd v Sevenoaks DC*.<sup>3</sup> Dyson J held that the contract worked perfectly satisfactorily without such a term. He was very wary about implying a term as to the circumstances in which LADs may be deducted from a sum due to the contractor, when the contract contained detailed express provisions which dealt precisely with the issue.

Two years later in *The Construction Centre Group Ltd v The Highland Council*<sup>4</sup> the paying party only gave notice of withholding monies pursuant to Section 111 of the Act after the adjudicator's decision, arguing that it was impossible to give notice before the decision as there was otherwise "no sum due under the contract" and the adjudication notice had not referred to the paying party's claim for recovery of LADs, and which the

*The court will seek to resist any attempts to prevent cash flow based on an adjudicator's decision to which the HGCRAs apply.*

<sup>2</sup> [2005] CSOH 178

<sup>3</sup> Unreported 14.4.2001

<sup>4</sup> [2003] Scot CS 221

## Adjudication

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paying party had not therefore pursued in the adjudication itself. The Court found that an employer who disputes sums claimed by a contractor due to an alleged entitlement to recover LADs is entitled to rely on that LADs claim as a set-off in adjudication. The fact that it had not been referred to in the notice of adjudication was irrelevant to the issue of whether or not the adjudicator could consider the claim, assuming the claim had been made prior to the notice of adjudication being issued. However, and crucially, as the paying party had chosen not to raise the LAD claim during the course of the adjudication, the Court decided that they were not entitled to raise that claim as a set-off against the adjudicator's decision and that it was not possible to issue a section 111 notice after the adjudicator's decision

In 2004 Jackson J gave guidance (reviewing *VHE, Bovis Lend Lease, Parsons Plastics and Levolux*) on this point in his judgment in *Balfour Beatty Construction Ltd v Serco Ltd*:<sup>5</sup>

*“(a) Where it follows logically from an adjudicator's decision that the employer is entitled to recover a specific sum by way of liquidated and ascertained damages, then the employer may set off that sum against monies payable to the contractor pursuant to the adjudicator's decision...*

*(b) Where the entitlement to liquidated and ascertained damages has not been determined either expressly or impliedly by the adjudicator's decision, then the question whether the employer is entitled to set off liquidated and ascertained damages against sums awarded by the adjudicator will depend upon the terms of the contract and the circumstances of the case.”*

Two years later came *R J Knapman Ltd v Richards and others*<sup>6</sup>, a case which restricts the scope of the *Balfour Beatty* decision. Knapman was the contractor. Richards was the employer. It decided that if it does not strictly “follow logically” from the adjudicator's decision that a sum is due by way of liquidated damages, then no set-off can be made by the employer. In the *Knapman* case, the adjudicator had decided that Knapman was entitled to an extension of time of 13 weeks and that liquidated damages and interest were therefore repayable in part. Richards therefore took the line that they were entitled to set off liquidated damages for the balance of the delay period up to practical completion. However, the court decided that there were three grounds for saying that the right to deduct liquidated damages did not follow logically:

- (i) The adjudicator had not carried out an exhaustive review of delay within the adjudication;
- (ii) Knapman had put its claim on the basis that practical completion arose at the end of April 2006. It did not claim, in the alternative, that if there was a later practical completion date, it was entitled to an extension of time to that date. The court concluded that “the adjudicator was not dealing with any full extension claim”; and
- (iii) Richards' entitlement to levy liquidated damages depended on there being a non-completion certificate. The contract administrator had not issued a non-completion certificate. Hence there was no entitlement to take liquidated damages.

The *Knapman* case demonstrates that, even though the adjudicator has only awarded a partial extension of time, the employer cannot set-off liquidated damages unless the adjudicator's review of delay is comprehensive and all relevant notices and procedures under the contract have been complied with.

In *Avoncroft Construction v Sharba Homes*<sup>7</sup> HHJ Kirkham also rejected a cross-claim for liquidated damages made against an adjudicator's decision. The contract under which a dispute arose was JCT 98 Without Quantities. The judge reviewed the two principles of law identified by Jackson J and concluded in relation to (a) that the adjudicator did not decide the question of entitlement to liquidated damages, but he had decided whether the claimant was entitled to an extension of time for completion. No claim was made within the adjudication for payment of liquidated damages. As regards (b), she concluded that Clause 41A.7.2 is clear; the parties are obliged to comply with the decision of an adjudicator, and there is no reference to any right of set-off against such decision.

*Where there are potentially competing disputed rights and obligations those disputes must give way to the enforcement of the decision of the adjudicator.*

<sup>5</sup> [2004] All ER (D) 348 (TCC)

<sup>6</sup> [2006] EWHC 2518 (TCC)

<sup>7</sup> [2008] EWHC 933 (TCC)

## Letters of Intent

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# Letters of Intent: overcoming the pitfalls

*No matter how forcefully lawyers may counsel against them, Letters of Intent have an established position in the commercial and administrative landscape of the construction industry in the UK. Julie Stagg in an extract from a paper given at the 14th Fenwick Elliott Construction Update Seminar held in April 2008 discusses some of the ways to avoid the perils and pitfalls that may be faced when negotiating or proceeding to work under a Letter of Intent.*

*This case<sup>1</sup> is another example of the perils of proceeding with work under a letter of intent*

There is, to a certain extent, good reason for the use of letters of intent. In the real world where deals are struck and offices, schools, hospitals and homes, etc. are built, factors such as materials shortages, stakeholder expectations and aggressive programmes can trigger a need to “get on with the job” long before contract negotiations have come to an end and the lawyers have finished playing with words. Authorising activities under a Letter of Intent (“LOI”) has practical advantages for employers and contractors alike.

The LOI can alleviate programme constraints by enabling certain activities to be progressed pre-contract, such as:

- (i) off-site pre-construction activities;
- (ii) the instruction of subcontractors and suppliers; and/or
- (iii) the instruction of site remediation (in advance of full planning permission), enabling works and other (limited) on-site activities.

Open-ended commitments are, however, extremely unwise, both legally and commercially. Work should not be allowed to continue in perpetuity under an LOI as it is no substitute for formal contract terms, and will not (unless carefully drafted and administered) afford the parties a satisfactory degree of protection. This paper highlights many of the common problems with the drafting and general use of LOIs with reference to some of the more recent judicial decisions on the subject and offers some practical advice to those using LOIs on a regular basis.

If an LOI must be issued, there are several ways in which the parties can ensure that the document is legally binding. A binding LOI has essentially three fundamental elements:

- (a) intention to enter into a binding agreement;
- (b) certainty of terms and of dealings; and
- (c) consideration.

## Identity and intention of the parties

It would seem self-evident that the parties must be known to each other and have reached a consensus as to the purpose of the correspondence between them. Yet even these basic principles appear to present a challenge for certain parties engaged in activities pre-contract. Care should always be taken to ensure that each party understands the purpose of the proposed LOI and that each party intends it to be binding until superseded by a formal contract (subject to agreement of satisfactory terms).

LOIs are frequently issued by surveyors and project managers on behalf of their clients for expediency; however, this practice is best avoided whenever practicable. A contractor would not accept a JCT contract executed by any party other than the contractor’s ultimate employer; therefore the same discipline should apply to the signature and issue of a LOI.

<sup>1</sup> Although these words could have come from any of the number of cases concerning letters of intent which have come before the courts over the past 12 months, they were used by Mr Justice Clarke in the case of *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH and Others* [2008] EWHC 1087

## Letters of Intent

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### Scope and duration of instruction

The instruction should clearly identify the activities authorised under the LOI either by reference to a schedule of activities or by incorporating specific activities in the main body of the letter. Where a Programme has been agreed, appending a copy may also assist in defining the scope and duration of the authorised activities. A clear start date, and preferably an expiry date or specific event triggering expiry, is also recommended. An express expiry date imposes a certain amount of discipline on the parties to finalise their contract negotiations in a timely manner following signature of the LOI.

Monitoring expiry dates is perhaps an administrative burden, however we are of the view that it is better to invest time in doing so, and in issuing supplementary agreements extending the instruction, than to permit the letter to operate on an indefinite basis. The risk of the terms being varied by conduct and maximum financial commitments being exceeded without such changes being addressed contractually is much greater in LOIs unlimited in scope and/or duration.

From an employer's perspective, express termination and suspension provisions are recommended, particularly in the context of LOIs authorising on-site activities. As an interim contract, employers are advised to seek to ensure that an LOI is always capable of termination at any time at the employer's discretion and that loss of profit/loss of contract claims are excluded. Contractors will understandably hope for a more balanced approach to termination and/or suspension, and are advised to seek terms permitting recovery of cancellation costs and any costs associated with demobilisation and remobilisation.

### Price and payment

Price can be one of the most contentious aspects of a contract negotiation, so it may not be possible to confirm even the estimated contract sum in an LOI at the time of issue. The parties should nevertheless be in a position to price specific activities or to refer to an appropriate schedule of rates. The employer will be reassured by any measure of cost control that can be introduced into the LOI, whereas the contractor may prefer to leave prices undefined.

Where activities authorised under an LOI are for 45 days or more, a payment mechanism compliant with the HGCR will be implied if no express reference is made to payment terms. The parties may alternatively elect to apply the payment terms of the proposed contract.

Whilst the payment mechanism was not central to the discussion in *Allen Wilson and Buckingham*<sup>2</sup>, the judgment did touch on the complications that can arise over payment when an LOI has been allowed to lapse.

The claimant contractor seemed unsure how to claim its "perceived financial entitlement" for the valuations falling outside the only signed LOI for the works. Previously AWS had applied the payment mechanism of the proposed form of contract, but during the adjudication sought to rely on the Scheme for Construction Contracts in the Act. The adjudicator relied on the terms of the contract referred to in the LOI and the court was persuaded that (on the particular facts) this reasoning was sound. The defendant had sacked his surveyor but was, by his own admissions, administering the contract himself, therefore the payment mechanism remained in place and was unaffected by the change of administration.

### Limitations on liability

Well-advised employers generally cap their financial and legal liabilities to a contractor or consultant under an LOI to a specific amount. This is usually equivalent to the value of the activities to be instructed, however if the scope of the instruction is uncertain when an LOI is issued, the parties may agree a cap on a more general basis. The cap should be substantial enough not to stifle activity under the letter, but ought not to be so generous as to obviate the need for the parties, more particularly the contractor, to

*A binding LOI has essentially three fundamental elements:*

*(a) intention to enter into a binding agreement;*

*(b) certainty of terms and of dealings; and*

*(c) consideration.*

<sup>2</sup> [2005] EWHC 1165 (TCC)



## Letters of Intent

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settle the formal contract terms. Financial caps, like expiry dates, can always be revisited if at any stage an LOI needs to be renewed.

Some contractors are now paying closer attention to their own liabilities under an LOI, for example in the context of LOIs used to instruct pre-construction phase activities in two-stage procurement. Unless an employer is prepared to concede similar limitations in the proposed contract, concessions to the contractor in the LOI are best avoided unless the limitation can be ring-fenced to apply to professional and/or off-site activities only.

### Scope/duration unclear

As lawyers we are frequently asked to review LOIs expressed to authorise the contractor or consultant to proceed with the whole of the works or services for an indefinite period and either for full value or an unconfirmed sum. On such terms, there is very little incentive for the contractor or consultant concerned to cooperate with the employer so as to conclude a formal contract.

### Uncertain status of adjudication

The questionable status of LOIs as creatures of contract can also cause procedural problems when disputes arise during the course of authorised works. *Bennett v Inviron*<sup>3</sup> was an application to enforce an adjudicator's award. The dispute involved work undertaken by Bennett under an LOI with Inviron during the course of electrical installations at a project in Wimbledon. Bennett referred the matter to adjudication in 2005. Inviron asserted that the adjudicator had no jurisdiction as there was no binding contract between the parties necessary to comply with s107 of the Act.

The adjudicator agreed and declined to make any determination, therefore Bennett referred the matter to a second adjudicator. That adjudicator concluded that he did in fact have jurisdiction and found in favour of Bennett, but Inviron refused to pay. Inviron raised several jurisdictional challenges, including the submission that as there was no contract (simply an LOI), any remedy that Bennett might have was restitutionary and so outside the scope of s107 of the Act.

In considering the adjudicator's award, the court had regard to various matters of fact: whilst the terms of Inviron's own contract and the proposed form of subcontract with Bennett were mentioned, the LOI was clearly identified as an LOI and headed "subject to contract"; the letter also referred to a meeting between the parties but did not elaborate as to the significance of the meeting or the terms agreed at it; and although a price for Bennett's work was confirmed, subsequent valuations well exceeded that price and the scope of work was varied. Wilcox J concluded that the parties did not intend that the LOI should have contractual effect, as express and material terms were not specifically recorded in it or incorporated by reference in a manner satisfying s107. Therefore even if the LOI had not been subject to contract the agreement between the parties as evidenced by the letter had to comply with the Act. The adjudicator had no jurisdiction and Bennett's application for summary judgment was dismissed.

Contractual uncertainty was again an impediment to proper interpretation and thus a bar to adjudication. In other cases, however, the courts have found enough in the terms of agreement and in the conduct of the parties to conclude that the adjudicator did have the necessary jurisdiction to reach a decision on an LOI. Therefore the factual background to a dispute under an LOI assumes greater importance for the party wishing to rely on adjudication as a means of dispute resolution.

### Monetary limits exceeded

Financial thresholds may be exceeded in a number of ways. Most commonly, authorised expenditure is exceeded and goes unchecked when a limited LOI expires and is not renewed, or agreement as to renewal cannot be reached. Similarly, an employer's maximum aggregate liability cap, which was in all probability hard won in

*Parties are best advised to put formal contract negotiations first so that the contract is not treated as an afterthought.*

<sup>3</sup> [2007] EWHC 49 (TCC)



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negotiations, may be waived by conduct if the employer continues to pay out sums in excess of the cap, whether or not the general authority conferred by the LOI has expired. In the Buckingham case, much of the work carried out by AWS was not included within the two lump sum items referred to in the letter of intent and certainly not the work carried out in the two contested valuations. The court nevertheless found that, as it was work that the supervising officer had authorised on behalf of the defendant, AWS was entitled to be paid in accordance with the terms of the proposed contract. Employers should, accordingly, always have an eye on the budget and be wary of issuing or permitting the issue of instruction to a party under an LOI which pushes the boundaries of the sums authorised under it.

### Terms insufficient for on-site activities

A common pitfall for many employers is the use of LOIs intended only for off-site activities in a physical works context. The complexity of on-site activities from a liability perspective means that the parties are best advised to confine activities under an LOI to off-site works and/or services wherever possible. It can be helpful to use express terms to prohibit on-site activities so that the parties are compelled to vary the scope of the instruction formally before on-site works can commence.

LOIs authorising on-site activities are very different documents from those serving a more limited purpose. A limited letter will therefore be deficient in a number of fundamental ways if relevant terms of the proposed contract are not incorporated by reference and the LOI is silent on matters such as:

- works insurance and insurance for public/third-party property liability;
- indemnities for personal injury and/or death;
- site establishment and health and safety requirements such as CDM Regulations compliance;
- nuisance trespass in relation to adjoining owners and occupiers;
- (where appropriate) a duty of reasonable skill and care of a competent designer and professional indemnity insurance requirements;
- subcontracting arrangements (including a right for the employer to take over a subcontract or supply contract in the event of termination of the instruction).

### Conclusions

The practical issues surrounding and the judicial opinion flowing from disputes generated or exacerbated by the use of LOIs clearly demonstrate that LOIs are documents requiring serious consideration and, as such, should not be entered into lightly. Parties are best advised to put formal contract negotiations first so that the contract is not treated as an afterthought and, where possible, to seek other means of managing their commercial arrangements, such as placing smaller more limited contracts for early works if there are particular pressures to begin work in advance of agreeing the main contract. Where the parties have no alternative but to proceed on the basis of an LOI, its terms demand equivalent time and attention as formal contract terms (particularly where on-site activities are being authorised).

*Do your housekeeping :  
a well-drafted Letter of  
Intent is only as good as  
those who manage it.*

Avoid ambiguity, as neither party may benefit from it in the long term if the LOI is tested in an adjudication or in court proceedings. Have a positive eye to the future and to the successful conclusion of contract negotiations by including a clear statement in the LOI that the terms of the contract will take precedence and have retrospective effect. Finally, make sure that you do your housekeeping: a well-drafted LOI is only as good as those who manage it. Ensure that renewal dates are documented, reviewed and met, and that authorised expenditure is not exceeded, if there is really no alternative but to issue a supplemental LOI. The terms of any supplemental letter should be discussed well in advance of the expiry of the earlier LOI so neither party is facing a "showdown" over the drafting which might lead to a legal vacuum where an instruction has expired and there is no contract in its place.

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## Litigation

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# *What complying with the pre-action protocol for construction and engineering disputes really means*

*As we noted in last year's Review, on 6 April 2007, a revised Pre-Action Protocol for Construction & Engineering Disputes came into force. There have already been a number of decisions where the courts have indicated how the Protocol should be interpreted.*

In particular, Mr Justice Akenhead has had to consider the approach to take when faced with an application to stay proceedings in order for the Pre Action Protocol for Construction & Engineering Disputes ("the Protocol") to be followed in two cases. In both, he decided that the correct approach to take was a pragmatic one.

### *Orange Personal Communications Services Ltd v Hoare Lea<sup>1</sup>*

The dispute arose out of works carried out at the Bristol Data Centre. Kier had been engaged to carry out the fit out works including an air conditioning system. Haden Young were responsible for that air conditioning system. There was a flood which was said to have caused some £2m of damage. Orange issued proceedings against both Kier and Haden Young in relation to the flood. The position taken by Kier and Haden Young in those proceedings was that they were not in any way to blame for the loss and damage which was, they said, due to failings by Orange and/or its design team.

Hoare Lea had been retained in relation to the design of the M&E works. As it was nearly six years after the flood and fearing a possible limitation defence, Orange issued separate proceedings on 15 August 2007 against Hoare Lea and APS Project Management who had carried out various project management services. APS dropped out of proceedings, having obtained a stay under the 1996 Arbitration Act. In the first action, a trial date was fixed for 14 January 2008. However, the timetable slipped and the trial was pushed back to October. The directions made provision for ADR in April.

In December 2007, Orange served Particulars of Claim on Hoare Lea in the current action. Orange did not actually consider that Hoare Lea had anything to do with the flood. Orange's approach was a belt and braces one, being contingent upon the argument put forward by Kier and/or Haden Young in the first action succeeding. If that happened, Orange intended to assert that Hoare Lea was responsible in tort for the failures leading to the flood. Perhaps sensibly, Orange sought an application to seek an Order that the claims be consolidated or heard together. Hoare Lea then issued an application that the claim be stayed because Orange had not followed the Protocol. Orange responded by offering to provide any particular information which Hoare Lea said they might require. As the Judge noted, that offer was not taken up. The reasons why Hoare Lea made the application were as follows:

- (i) The Protocol was there to be complied with and should generally be complied with. There are general advantages in following the protocol process;
- (ii) Orange were guilty of a number of failings. It could have served the proceedings earlier. It should have served the proceedings earlier. Orange should have brought the matter before the Court earlier to seek directions at the time it issued the Claim Form;
- (iii) Hoare Lea wanted to avoid additional costs which would inevitably be incurred if the Protocol process was not implemented, for example in relation to the exchange of information and the narrowing of issues; and
- (iv) The Particulars of Claim were inadequate, failing properly to define the allegations of negligence. This could be resolved during the Protocol process.

Having considered the authorities, Mr Justice Akenhead made the following general observations:

*Whilst the norm must be that parties to litigation do comply with the Protocol requirements, the Court must ultimately look at non-compliances in a pragmatic and commercially realistic way. Non-compliances can always be compensated by way of cost orders.*

<sup>1</sup> [2008] EWHC 223

## Litigation

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*“(a) The overriding objective (in CPR Part 1) is concerned with saving expense, proportionality, expedition and fairness; the Court’s resources are a factor. This objective whilst concerned with justice justifies a pragmatic approach by the Court to achieve the objective. The overriding objective is recognised even within the Protocol as having a material application.*

*(b) The Court is given very wide powers to manage cases in CPR Part 3 and elsewhere so as to achieve or further the overriding objective.*

*(c) The Court should avoid the slavish application of individual rules, practice directions or Protocols if such application undermines the overriding objective.*

*(d) Anecdotal information about the effectiveness of the Pre-Action Protocol process in the TCC is mixed. It is recognised as being effective both in settling disputes before they even arrive in the Court and narrowing issues but also as being costly on occasion and enabling parties to delay matters without taking matters very much further forward.*

*(e) Whilst the norm must be that parties to litigation do comply with the Protocol requirements, the Court must ultimately look at non-compliances in a pragmatic and commercially realistic way. Non-compliances can always be compensated by way of costs orders.”*

Accordingly, having considered the situation as a whole, he dismissed the application put forward by Hoare Lea. The Judge gave a number of reasons, including:

- (i) He did not consider that the protocol process in this particular case would be sufficiently productive to justify a stay;
- (ii) Hoare Lea already had the relevant pleadings from the earlier action. Therefore there had already been an exchange of information. Hoare Lea had also been reluctant to take up Orange’s offer to provide additional information.
- (iii) Bilateral discussions between Hoare Lea and Orange would not narrow issues significantly because Orange’s published primary case was not against Hoare Lea;
- (iv) A settlement was much more likely if all parties participated in the ADR planned for the spring. A timetable could be set up now to enable that to happen. This chance might be lost if there was a stay;
- (v) The two claims were intimately connected. It would be unfortunate if they had to be tried separately. A timetable could be achieved now which could secure the trial of both claims.
- (vi) Little in terms of time or costs will be saved by embarking upon the protocol process. That said, the Judge reserved any application for additional costs for the future.
- (vii) Finally, the Judge noted that although Orange had not complied with the Protocol to effect the protocol process, that failure had not been “contumelious or Machiavellian”.

This left the question of the costs of this application. The Judge was concerned about the failings of Orange and thought that Orange could have told Hoare Lea about the potential claim earlier. There were also delays by Orange in relation to the procedural elements of this application. Accordingly, the Judge was of the view that Orange should pay their own costs and pay one third of the costs of Hoare Lea. This reflected the likely increase in Hoare Lea’s costs occasioned by Orange’s procedural failings.

## Conclusion

As always, the judges of the TCC will consider individual cases on their own merits. This may be why the Judge here adopted his “pragmatic” approach to the claim for a stay. He duly considered the whole context of the dispute between not just Orange and Hoare Lea but all the parties involved. He also considered both parties’ conduct. Orange may not have followed the Protocol, but it had not done so wilfully and Hoare Lea, being pragmatic, could have accepted Orange’s offer of additional information.

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*What the Court should do in considering the Pre-action Protocol is to look at the matters in substance, not as a matter of semantics... and not for technical non-compliances with the letter of claim requirements in the Pre-action Protocol.*

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Had this been a claim just between Orange and Hoare Lea then the situation may well have been different. However, there was a bigger picture, and taking that picture into account, the overall over-riding factor was the need to try and resolve the entire dispute. Allowing Hoare Lea's application for a stay might have jeopardised this.

### *TJ Brent Ltd & Anr v Black & Veatch Consulting Ltd*<sup>2</sup>

Mr Justice Akenhead has now further clarified what he means by the adoption of a pragmatic approach to the Protocol. B&V alleged that Brent had failed to comply with the Protocol. In many respects, the facts of the case do not really matter. Of more importance are the comments made by Mr Justice Akenhead about this type of application. First of all, in response to criticisms made of Brent's Letter of Claim, the Judge said that there was no need for the Letter of Claim to provide information in "ultimate detail" unless it was critical to the claim. The court should ask whether the absence of information was such as to prevent or make it difficult for a defendant to respond in detail:

*"What the Court should do in considering the Pre-action Protocol is to look at the matters in substance, not as a matter of semantics... and not for technical non-compliances with the letter of claim requirements in the Pre-action Protocol."*

Here the Letter of Claim, provided a clear summary of the facts on which the claim was based and identified so far as possible the principal contractual terms and statutory provisions relied on as well as the nature of the relief claimed. The Judge also commented on the time taken by B&V to raise the alleged failure to comply with the Protocol. Whilst he accepted that it was not incumbent upon a defendant as a matter of practice or procedure to have to raise the issue once the Particulars of Claim were served, the delay here, some 7 months had passed, undermined the stance taken now by B&V.

Further, Mr Justice Akenhead commented that it was not enough to demonstrate that there had been a failure to comply with the Protocol. A party making such allegations also had to demonstrate the effect of such failure. For a defendant to succeed in this type of application, it would have to establish that there was some realistic prospect, prior to the issue of the proceedings, of:

- (i) a mediation taking place; and
- (ii) some prospect (but no certainty or even necessarily probability) that a resolution of the disputes between the parties would be achieved.

A court would need to consider what would have happened if there had been an attempt at alternative dispute resolution during the period when the Protocol process would have taken or did take place. Not only must a court consider whether there had been non-compliance, it must also consider the extent to which the failure to follow aspects of the Protocol might have prevented a resolution of the dispute. The onus of proof is on the defendant to show that a settlement would or could realistically have been achieved at that stage. Here, B&V's unwillingness to attend meetings or discuss any matters without prejudice in any way, suggested that settlement was unlikely.

## Conclusion

Mr Justice Akenhead also referred back to his earlier decision where he made it clear that the Overriding Objective was concerned with saving expense, proportionality, expedition and fairness. Adopting that pragmatic approach to the facts of the present case, it was clear to the Judge that, in substance, B&V was very well aware, before these proceedings commenced, what the nature of the claim was against it. It did not know every detail but it knew in substance and it was able to deal with it in substance. Therefore B&V was able to work out what its defences were in some detail. The Judge cautioned that a court should be slow to allow the rules to be used in such a way for one party to obtain a tactical or costs advantage where in substance the principles of the Protocol have been complied with. Accordingly, the application failed.

*The Court should avoid the slavish application of individual rules, practice directions or Protocols if such application undermines the overriding objective.*

<sup>2</sup> [2008] EWHC 1497

## Litigation

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### Mediation and the costs of the pre-action process

It is well known that, where a claiming party is a limited company, if it appears by credible testimony that there is a reasonable belief that the company will be unable to pay the defending party's costs if its claim fails, then it may be required to provide security for the defending party's costs. Mr Justice Coulson in the case of *Lobster Group Ltd v Heidelberg Graphic Equipment Ltd & Anr*<sup>3</sup> was asked to consider whether a party seeking security for costs can include within those costs, the costs of pre-action activities including mediation.

### Can you recover the costs of pre-action activities including mediation?

The dispute between the parties related to the purchase of an alleged defective printing press. In January 2005, a mediation took place which failed to produce a settlement. Over two years later, in May 2007, proceedings were issued. As the claimant, Lobster, had been placed in administration, it was agreed that it was appropriate to provide security. However the amount of that security was not agreed. Heidelberg sought in the region of £160k, including security in respect of the costs incurred during the pre action proceedings. Mr Justice Coulson noted that, as a matter of principle, the costs incurred by a party prior to commencement of litigation proceedings can be recovered as costs. Following the case of *McGlenn v Waltham Contractors*,<sup>4</sup> that is provided those pre-action costs could be said to be either the costs of or costs incidental to the proceedings. Lobster put forward a number of reasons as to why the application for security in respect of the pre action costs was misconceived. Of these, the Judge that the following were important:

- (i) a considerable part of the pre-action costs were incurred in relation to the mediation and those costs were not recoverable in any event; and
- (ii) the length of the pre-action period was such that these costs should not form the subject of an order for security.

The mediation was carried out under the CEDR model form and the parties had, in the usual way, agreed to bear their own costs and share the costs of the mediator. Accordingly, the Judge was firmly of the view that mediation costs should not form part of the security ordered. The only way in which such costs would be recoverable would be if the parties had agreed that the specific costs could be the subject of any subsequent application. The Judge did take into account the delay. He thought that a court would be slow to exercise its discretion to award security in respect of costs incurred two years before proceedings were commenced. The longer the delay between the incurring of the pre-action cost and the application for security based on that item of cost, the more reluctant the court would be to make such an order. Here, the pre-action period was very prolonged covering a period from the mediation to proceedings of nearly two and a half years. The Judge said he would be very reluctant to decide that after all this time, Lobster should provide security to Heidelberg for the costs incurred during this period. That would be "unnecessarily draconian".

### Conclusion

The Judge disallowed the pre-action costs incurred by Heidelberg. The main reason for this was that a large proportion of the costs related to the mediation, the secondary factor was the large gap in time. However Lobster was required to provide suitable security up to the exchange of witness statements in the sum of £70k, being £50k to reflect the period from the application to the exchange of witness statements and an assessed figure of £20k to reflect the costs incurred from the commencement of the proceedings to the making the application for security for costs. Some concern has been expressed about the costs parties are required to incur as a consequence of the requirements of the pre action protocols.

Where companies are bringing claims, and there are legitimate questions about their ability to repay any costs that may be awarded against them, then those defending such claims may be well advised to consider including their pre action costs in any application they may bring for security.

<sup>3</sup> [2008] EWHC 413 (TCC)

<sup>4</sup> [2005]3 All ER

## Mediation

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### *Mediation: an integral part of the judicial process*

*There can be no doubt that the courts now give every encouragement to parties to mediate. Today that encouragement comes not just from the words of the Judges, but from the actual court rules themselves. And, as we explain, the judicial arm is extending into comment on the behaviour of parties during the mediation itself.*

Following the commencement of a claim, one of the first acts of the court is to send out an Allocation Questionnaire ("AQ"), which asks a number of procedural questions about the claim. As of 1 April 2008, the AQ has been amended to ensure that the parties give serious consideration to attempting to resolve their disputes through ADR. Previously the AQ asked whether the parties wanted to have a one-month stay of proceedings in order to allow settlement discussions to take place, now it requires that the parties make "every effort to settle the case before the hearing." Legal representatives must explain to their clients, the need to try to settle, the options available and the possibility of costs sanctions if they refuse to try to settle. If a party does not want to enter into settlement negotiations, it must be prepared to explain why to the court.

### The consequences of unreasonable conduct

There have, as you would expect, been further cases over the past 12 months which have reinforced the court's determination to promote ADR and mediation. In *Earl of Malmesbury v Strutt & Parker*<sup>1</sup> the Courts went as far as to consider the conduct of the parties during the mediation. In the main claim, the Judge had held that S&P were liable. However, when it came to the question of costs, S&P argued that the usual order should not apply. In particular, S&P claimed that the claimants should be treated as the unsuccessful party because they only recovered a small fraction of their claim. Further, the claimants' exaggeration made mediation impossible. S&P also said that the claimant failed to comply with the pre-action protocol. That claim was rejected. The Judge felt that the claimants had given a sufficient indication of how the claim was put, and that S&P had taken an "over-critical attitude and looked for difficulties."

Usually, what happens at a mediation is confidential. Here the parties had waived their right to confidentiality. When mediation was proposed, the solicitors for the claimants said that there must be a without prejudice meeting between solicitors first and that a refusal to do so was tantamount to a refusal to mediate. They further said that it was essential that at the meeting each solicitor had instructions as to the maximum to be offered or the minimum to be accepted. As the Judge said, "this was a curious lead in to a mediation". Nevertheless, the meeting did take place. However this mediation failed, in the view of the Judge, because of the attitude of both sides, who as they did at trial, both resolutely argued their own case. He noted that:

*"in these circumstances, where the failure to mediate was due to the attitudes taken on either side, it is not open to one party ... to claim that the failure should be taken into account in the order as to costs..."*

There was a further mediation before the quantum hearing. Having considered the offers made at this mediation, the Judge felt that the claimants' position was both unrealistic and unreasonable. Had the claimants made an offer which better reflected their true position, the mediation might have succeeded. The Courts have not previously had to consider the situation where a party has agreed to mediate but then has taken an unreasonable position in that mediation. In the view of the Judge:

*"...a party who agrees to mediation but then causes the mediation to fail by reason of his unreasonable position in the mediation is in reality in the same position as a party who unreasonably refuses to mediate. In my view it is something which the Court can and should take account of in the costs order in accordance with the principles considered in "Halsey"<sup>2</sup>*

*You can take a horse to water but whether it drinks is another thing entirely. ... We [i.e. the courts] should be doing more to encourage (and perhaps direct) the horse to go to the trough. The more horses approach the trough the more will drink from it.*

<sup>1</sup> [2008] EWHC 424 (QB)

<sup>2</sup> *Halsey v Milton Keynes NHS Trust*, [2004] EWCA (Cii) 576.



## Mediation

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Although the quantum of the claim was substantially reduced, the position was not that simple as the claimants had, in establishing negligence, “where it mattered most” achieved a considerable victory. The claimants had won on liability and had recovered substantial damages, but S&P had succeeded in cutting down the sum awarded to a fraction of what was claimed. As the action proceeded, and more became known about the claim, the claimants’ belief in their claim should have diminished until by the trial they should have realised that it had no real chance of recovering the full sums claimed. Accordingly, some costs should be deducted to reflect that the claimants had sought so much more than they recovered. After carrying out a balancing exercise, the Judge decided it would do justice to order that S&P pay the claimants 70% of the liability costs. In relation to quantum, at the time the mediation took place, substantial costs had already been incurred. Therefore, taking into account the claimant’s conduct at the mediation, the Judge decided that justice would be done by reducing the claimants’ costs by 20%.

### The confidentiality of the mediation process

HHJ Kirkham had to consider the confidentiality of the mediation process, in *Cumbria Waste Management Ltd and Lakeland Waste Management Ltd v Baines Wilson*<sup>3</sup>. In contrast to the *Malmesbury* case, the *Cumbria* case revolves around a situation where one party at a mediation was not prepared to waive privilege. There had in fact been two mediations, with different mediators, arising out of the 2001 foot and mouth outbreak. Cumbria had sued DEFRA for £4.5 million but settled at mediation for £3.9 million. Lakeland sued DEFRA for £1.72 million but settled through mediation for £1.4 million. Both Cumbria and Lakeland had instructed solicitors Baines Wilson (“B&W”) to advise and negotiate on the service agreements between DEFRA and themselves, and they now brought proceedings against B&W alleging professional negligence which had caused them to lose the difference between their invoiced claims (plus presumably interest) and the settlements which emerged from the mediation. The claimant claimed that they had acted reasonably in settling but that the discounts they had been forced to concede were as a result of B&W’s negligent advice.

Perhaps unsurprisingly, B&W sought disclosure of a wide range of documentation relating to the mediations. However, Judge Kirkham was of the view that here it was the defendant to the original claims who was seeking protection from disclosure and not the claimants. Therefore DEFRA had not waived without prejudice privilege about what happened at the mediation. There were public policy reasons why DEFRA should be entitled to assert that privilege and it was entitled to protect from disclosure material which may affect them in other disputes.

That said, the Judge went on to consider the extent and force of the confidentiality provision in the mediation agreement. This is not a topic previously covered by direct authority. Reference was made to the 2006 textbook *Confidentiality* by Toulson & Phipps. Among the passages from the book used in the judgment is the following:

*Mediation and other forms of dispute resolution have assumed unprecedented importance within the court system since the Woolf reforms of civil procedure. Formal mediations are generally preceded by written mediation agreements between the parties that set out expressly the confidential and “without prejudice” nature of the process. However, even in the absence of such an express agreement, the process will be protected by the “without prejudice” rule...”*

Accordingly Judge Kirkham concluded that documents within a mediation should be protected from disclosure:

*“In my judgment, whether on the basis of the without prejudice rule or as an exception to the general rule that confidentiality is not a bar to disclosure, the court should support the mediation process by refusing, in normal circumstances, to order disclosure of documents and communications within a mediation.”*

*The court should support the mediation process by refusing, in normal circumstances, to order disclosure of documents and communications within a mediation.*

<sup>3</sup> [2008] EWHC 786 (QB)



## Mediation

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### Mediation in Europe

And it is not just in the English Courts that mediation is being encouraged. In April 2008, the European Parliament approved a directive on mediation in civil and commercial disputes some four years after it was first proposed. Member States will be required to implement the Directive within three years of its adoption. The directive has been drafted as a part of the European Union's objective of providing better access to justice and encouraging the use of mediation across Europe.

The purpose of the directive is to encourage the use of mediation as a cost-effective and quicker alternative to civil litigation, for cross-border commercial disputes. Vice-President Jacques Barrot said:

*"Mediation can provide cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and help preserve an amicable and sustainable relationship between the parties."*

Whilst in many respects, the objects of the directive will be familiar to those in the UK, they are well worth setting out:

- (i) The Directive obliges Member States to encourage the training of mediators and the development of, and adherence to, voluntary codes of conduct and other effective quality control mechanisms concerning the provision of mediation services;
- (ii) The Directive gives every Judge in the EC, at any stage of the cross-border proceedings, the right to suggest that the parties attend an information meeting on mediation and, if the Judge deems it appropriate, to invite the parties to have recourse to mediation. However, mediation remains voluntary;
- (iii) The Directive enables parties to give an agreement concluded following mediation a status similar to that of a Court judgment by rendering it enforceable;
- (iv) The Directive does not apply to arbitration, adjudication or expert determination; and
- (v) The Directive ensures that mediation takes place in an atmosphere of confidentiality and that information given or submissions made by any party during mediation cannot be used against that party in subsequent judicial proceedings if the mediation fails. This provision is essential to give parties confidence in, and to encourage them to make use of, mediation.

### Conclusion

In May of this year, the Master of the Rolls, Sir Anthony Clarke<sup>4</sup> said this:

*"In conclusion, it seems to me then the power exists for the courts to regularise mediation and to make it an integral part of the litigation process. That is not to say that in every case it will be desirable. The court must be sensitive to this when assessing whether to make a standard direction with a mediation order in it. There is no reason why it cannot do this. Equally it is not to say that it will or ought to succeed in every case. It is of course a cliché that you can take a horse to water but whether it drinks is another thing entirely. That it is a cliché does not render it the less true. But what can perhaps be said is that a horse (even a very obstinate horse) is more likely to drink if taken to water. We should be doing more to encourage (and perhaps direct) the horse to go to the trough. The more horses approach the trough the more will drink from it. Litigants being like horses we should give them every assistance to settle their disputes in this way. We do them, and the justice system, a disservice if we do not."*

These words may have been spoken with a velvet glove as it were. However every party to litigation should be aware of the consequences of failing to make use of the assistance offered by the courts to try and resolve their disputes.

*A party who agrees to mediation but then causes the mediation to fail by reason of his unreasonable position in the mediation is in reality in the same position as a party who unreasonably refuses to mediate.*

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<sup>4</sup> 8 May 2008, The Second Civil Mediation National Conference

## EU Procurement

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# Challenges for breaches of the EU Public Procurement Rules<sup>1</sup>

*One of the more important trends which we have noticed over the past year or so is the increasing number of cases coming before the courts involving successful challenges to tender procedures in particular in relation to alleged breaches of the European Public Procurement Rules. One reason for this is undoubtedly that tenderers are becoming more aware of the possibility and indeed availability of their right to challenge the procurement process if they are unsuccessful.*

Back in 1999 HHJ LLOYD QC, in the case of *Harmon CFEM Facades (UK) Ltd v The Corporate Officer of the House of Commons*<sup>2</sup>, observed that the principle of equal treatment of tenderers requires that all tenders comply with the tender conditions so as to ensure an objective comparison of those tenders which are submitted.

## What must you tell bidders about your award criteria and your evaluation methodology?

This basic principle of equal treatment came before the European Courts in the case of *EMM G Lianakis AE and Others v Municipality of Alexandroupolis*<sup>3</sup>. It was a case about Article 36(2) of Council Directive (EEC) 92/50 which provides that:

*“Where the contract is to be awarded to the economically most advantageous tender, the contracting authority shall state in the contract documents or in the tender notice the award criteria which it intends to apply, where possible in descending order of importance.”*

Here, the Town Council had invited tenders for a town planning project. It had set out the award criteria in the contract notice and had listed these criteria in a specific order of priority. The list was (i) proven experience on projects carried out over the last three years (ii) manpower and equipment and finally (iii) the ability to complete the project by the anticipated deadline. Thirteen consultancies responded. However, during the evaluation procedure, the committee in charge of the appointment set weightings of 60%, 20% and 20% for each of the three award criteria. It also set up certain sub-criteria, for example stipulating that experience should be evaluated by reference to the value of completed projects.

As the stipulation of the weighting factors and sub-criteria were only made at a date after the submission of the tenders, certain tenderers brought proceedings against the Town Council. The Greek Court referred the case to the European Court asking whether Article 36(2) precluded a contracting authority from acting in this way, i.e. stipulating at a later date the weighting factors and sub-criteria to be applied to the award criteria referred to in the contract documents or notice.

The European Court noted that the purpose of the legislation is to ensure that there is no discrimination between different service providers. Where a contract is to be awarded to the economically most advantageous tender, a contracting authority must state in the tender documents the award criteria which it intends to apply. Potential tenderers must be in a position to ascertain the scope of the criteria elements when preparing their tenders. Therefore, a contracting authority cannot apply weighting rules or sub-criteria which it has not previously brought to the tenderers attention.

Tenderers must be placed on an equal-footing throughout the procedure which means that the criteria and conditions governing each contract must be adequately publicised by the contracting authorities. Here, the projects award committee referred only to the award criteria and it was only later after submission of the tenders that it introduced the stipulation of the weighting factors. Accordingly, this did not comply with the article requirements. In other words, the European Court was making clear that compliance with the legislation requires the equal treatment of tenderers. The evaluation process must be transparent and objective. That had not happened here.

*If a tender meets and focuses on the sub criteria considered most important by the contracting authority, it is much more likely to obtain higher marks than one which deals not only with those issues, but also matters which fall outside the selected key sub criteria.*

<sup>1</sup> This is one of the topics that will be covered at our 5th *Capital Projects in the Education Sector* seminar, please contact Victoria russell for more information.

<sup>2</sup> [1999] EWHC TCC 199

<sup>3</sup> Case C-532/06

## EU Procurement

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As to the consequences of any such breach? Well, where a public authority does not adhere to applicable public procurement law ( or the “OJEU Procedure”) when tendering for work, then it is susceptible to a claim by an aggrieved tenderer. The whole thrust of the public procurement law is to ensure that those tendering are able to compete on an equal basis and that public contracts are awarded fairly. There is also common law authority to the effect that public authorities engaged in tendering processes may in fact create collateral contracts with the tendering parties. The nature of those contracts is likely to be that if the public authority in question has stated that it will evaluate tenders in accordance with a given procedure, then that public authority is obliged to the tendering parties to do just that.

### Letting International Ltd v London Borough of Newham<sup>4</sup>: the requirement of transparency

Here, Mr Justice Silber applied the *Lianakis* decision and held that a contracting authority cannot further define its award criteria following submission of tenders as to do so would be contrary to the relevant Directive and the principles of equal treatment and transparency. LIL had tendered for a position under a framework agreement. The tender evaluation criteria stated that the contract would be awarded on the basis of the most economically advantageous tender. The evaluation of the tenders was to be based on the detailed written response, pricing and site visits. The evaluation criteria was weighted as follows, specification (50%), price (40%) and suitability of premises, staffing and working conditions (10%).

After LIL’s tender failed, it sought details from Newham as to how the tenders had been marked. It emerged that the proportions attributed to the subject matter of the method statements establishing compliance with specification were not equal but varied between 5%-17%. These weightings were established after the tender had been published but before any tenders had been received. LIL also learnt that the overall criteria of compliance with the specification had been broken down into 28 sub criteria. The weightings had not been previously disclosed. Finally, when evaluating the sub criteria, full compliance with the specification received three marks out of five, whilst the next highest mark was reserved for tenders which not merely met but actually exceeded the specification. Consequently, LIL obtained an interim injunction, upheld by the Court of Appeal, restraining Newham from entering into any contract or framework agreement pursuant to the above tender arrangements.

Following the *Lianakis* case, and in accordance with the Public Contracts Regulations 2006, the Judge noted that if parties wish to use sub criteria, they must state them in the tender notice. The requirement of transparency means that all criteria used to enable a contracting party to determine which tender will be accepted must to be disclosed. The weighting here should, in the view of the Judge, have been disclosed. The critical factor was not whether the disclosure of the weightings would have affected the preparation of the tenders but whether they could have affected the tenders.

If a tender meets and focuses on the sub criteria considered most important by the contracting authority, it is much more likely to obtain higher marks than one which deals not only with those issues, but also matters which fall outside the selected key sub criteria. A claim for breach of the EC regulations is not dependent on a party showing that if there had been full disclosure of the relevant criteria and approach, the party’s tender would have been different. All a party has to show is that as a result of the breach, it risked suffering loss and damage. Thus, the claim that Newham failed to mark its tenders fairly and objectively became academic as it would not alter the relief to which LIL was entitled. (As it happened, LIL failed in this part of their case.)

Accordingly, if LIL had been informed as it should have been of the weight attached to each item in the method statements and that to obtain full marks it had to exceed the specification, then it would have had a “significant chance” of being both a successful tenderer and then successfully obtaining some work under the framework agreement. That was enough to justify bringing its claim for breach of the transparency provisions.

*Where the contract is to be awarded to the economically most advantageous tender, the contracting authority shall state in the contract documents or in the tender notice the award criteria which it intends to apply, where possible in descending order of importance.*

<sup>4</sup> [2008] EWHC 158

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During the case, the parties had agreed that if the Judge reached the conclusion which he did, he should then invite the parties to agree on the remedy which should be adopted. This he did although noting that:

*“rather than having a new tender procedure, Newham might consider it prudent merely to add the name of the Claimant as one of the successful tendering parties. This is merely a suggestion and I will happily hear submissions if this were not to be mutually acceptable.”*

### Seeking an injunction

It is not yet known whether this suggestion will assist in the resolution of the dispute. However, it is certainly often the preferred outcome for aggrieved tenderers. In the Northern Irish case of *McLaughlin and Harvey Limited v Department of Finance and Personnel*<sup>5</sup>, M&H had sought an interlocutory injunction preventing the award of the framework agreement to the successful tenderers.

In October 2007 M&H had tendered for a place on the defendant's proposed four year framework agreement for various construction projects with an estimated value of £500m-£800m. On 17 December 2007 they were told that their tender had been unsuccessful and therefore requested a debrief meeting. At this meeting, M&H claimed that they realised that Department had marked their tender using a methodology which had not been disclosed to them in advance. M&H claimed this was in breach of the European requirement for transparency and was therefore unfair. They had come sixth in the competition (there being 5 places on the framework) but their score was only 1% behind and so even a modest improvement in their score would have materially affected the outcome. However M&H were unable to persuade the court that the Department should not be allowed to proceed with the award of the framework agreement. The key test in such cases is a sequential one taken from the decision in *American Cyanamid Co v Ethicom Ltd*<sup>6</sup>:

- (i) Has the plaintiff shown there is at least a serious issue to be tried?
- (ii) If it has, has it shown that damages would not be an adequate remedy for the plaintiff and would be an adequate remedy for the defendant if an injunction were granted and it ultimately succeeded?
- (iii) If there is doubt about the issue of damages the court will then address the balance of convenience between the parties;
- (iv) Where other factors are evenly balanced it is prudent to preserve the status quo;
- (v) if the relative strength of one party's case is significantly greater than the other that may be legitimately taken into account; and
- (vi) There may be special factors in individual cases.

The Judge added a seventh namely that the court has an overall discretion to do what is just and convenient in the circumstances.

One of the factors the court took into account was the effect on the Department of granting the injunction but then the Department and not M&H succeeding at the trial. Usually this could be dealt with by M&H as claimant giving an undertaking or cross-undertaking in damages. However the undertaking offered here was a qualified one confined to the additional costs sustained by the Department in putting individual projects out to tender generally pending the trial. The Department noted that construction inflation was running at 4%-6% and that inevitable delays caused by the injunction could add as much as £1.6m to construction costs on projects of this size. Furthermore the Judge noted that the whole purpose of this Framework Agreement is to obtain greater value for money for the public purse and the loss of that for projects for half a year would cost them £7.5m. Therefore M&H's undertaking in damages would not fully compensate the Department in the event of an interlocutory injunction being granted but the Department ultimately succeeding at the full hearing.

*The requirement of transparency means that all criteria used to enable a contracting party to determine which tender will be accepted must be disclosed. The weighting here should, in the view of the Judge, have been disclosed.*

<sup>5</sup> [2008] NIQB 25

<sup>6</sup> [1975] A.C. 296

## EU Procurement

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The final question the court considered was whether or not it could order the Department to add M&H to the list of contractors who benefit from the Framework Agreement. At first blush, that argument was contrary to Regulation 47(9) of the Public Contracts Regulations 2006.

*"In proceedings under this Regulation the court does not have power to order any remedy other than an award of damages in respect of a breach of duty owed ...if the contract in relation to which the breach occurred has been entered into."*

That seemed to preclude any award other than damages if the injunction was not granted and the Department proceeded to conclude the Framework Agreement. But did it? The court disagreed that a Framework Agreement was a "contract" within the meaning of Article 47(9). This definition distinguished between an agreement or arrangement and a contract which would only be entered into thereafter. There was a clear distinction in the language of that Regulation between the Framework Agreement as such and any contract or specific contract made under it. The purpose of Regulation 47(9) is not to compel a contracting authority to break a contract with another economic operator which it has entered into. Either the disappointed economic operator obtains interim relief preventing the contract from being entered into or it must be content with damages. However, a Framework Agreement is different. It is the selection of a number of operators, the number not being defined in the Regulations, who will be eligible to bid for these contracts over the duration of the Framework Agreement. Therefore it was not impossible that the court, if satisfied that there was a breach of transparency or a manifest error or unfairness which could have had a causative effect on the outcome, would order the Department to add the plaintiff as a sixth contractor to the list.

Public bodies are increasingly using framework agreements and the failure by a contractor to secure a place on those frameworks can have a significant impact on its business. This case demonstrates some of the hurdles faced by a contractor in trying to prevent the award of that framework agreement where it alleges there has been unfairness in the tender process. In this case, no evidence was put forward by the plaintiff that the existence of its business rested on being awarded a place on the framework agreement and therefore damages would constitute an adequate remedy. The court also was clearly persuaded by the submissions that any delay to the contract award would significantly delay and increase the costs of major infrastructure projects which ran contrary to the intention of awarding the framework in the first place.

### Ps: Confidentiality and competitive dialogue

In the case of *Varec SA v Belgium*<sup>7</sup>, Belgium issued a tender for the supply of parts for military tanks. Varec's bid was rejected on the ground that it did not meet the required technical specifications. Varec challenged the decision in front of the tender tribunal. The successful tenderer objected to the proceedings on the ground that if the tribunal agreed to review Varec's challenge, it would compel the successful tenderer to reveal some of its business secrets. Accordingly, it refused to disclose the full details of its bid to the tribunal. The issue found its way before the ECJ. The question was whether the tribunal was obliged to protect confidential business information (i.e. not disclose it to third parties) while at the same time being entitled to take note of such information for the purposes of the claim. The ECJ decided that:

*"[The law] must be interpreted as meaning that the body responsible ... must ensure that confidentiality and business secrecy are safeguarded in respect of information contained in files communicated to that body by the parties to an action, particularly by the contracting authority, although it may apprise itself of such information and take it into consideration."*

Thus the tribunal was allowed to take into account confidential information when reviewing challenges brought by third parties. However it had to guarantee that it would protect commercially sensitive information when dealing with such challenges.

*Rather than having a new tender procedure, Newham might consider it prudent merely to add the name of the Claimant as one of the successful tendering parties...*

<sup>7</sup> 14 February 2008



## Construction contracts – Framework Agreements

# Framework Agreements

*Whilst framework agreements are not new, and in particular have been used by many local authorities and government departments, we have noticed that they are becoming increasingly popular, something recognised by the fact that both the NEC and JCT have recently issued standard form framework agreements to supplement their respective contractual suites.*

The framework agreement, often known as an umbrella agreement, is an agreement which is reached between two parties to cover a long-term collaborative arrangement. Framework agreements are used typically where an employer has a long term programme of work in mind and is looking to set up a process to govern the individual construction or supply packages that may be necessary during that framework term. Framework agreements allow an employer to instruct another party to carry out works or provide services, by reference to pre-agreed terms, over a (usually) pre-agreed period of time. It is not intended for use with a single stand-alone contract; it is designed for use where a number of similar sets of works or services may be required of the same provider. The JCT Guide notes<sup>1</sup> that the JCT Framework Agreement has been set up to be used:

*“by anyone (including those in the public sector) who anticipates procuring a significant volume of construction/engineering work and/or services over a period of time and who wants to see a collaborative approach to such work and services and sustainable improvements in the way in which such work and services are performed.”*

## Why use Framework Agreements?

The Constructing Excellence website<sup>2</sup> says that when you are procuring over a period of time, a framework can deliver many benefits, such as:

- Reduced transaction costs, through economies of scale
- Continuous improvement within long-term relationships;
- Better value and greater community wealth;
- Solutions that delight customers.

The commercial advantages of a long-term commitment are clear. Where there are long-term relationships between a client and a contractor and/or consultant, the client has the benefit of securing a long-term commitment to the project from those contactors and consultants who in return have the benefit of securing long-term work from the client. In addition, if the relationship works, another of the intended benefits is that there should be an improvement in efficiency. People and organisations get used to working with one another. They can build relationships. They get to know what makes things tick and happen. There is the benefit of early contractor involvement in a project. Everyone involved can take a long-term view. For example, if the parties have the comfort of being contractually bound in a long-term relationship, they may be prepared to invest in product development. This requires an element of trust which can only be developed over a period of time as framework agreements rarely proceed on the basis that work is guaranteed.

## Types of Framework Agreements: the standard forms

Both the JCT and NEC have produced their own standard framework agreements. As you would expect, these are designed to fit in with their standard suites of contracts. It is worth considering the JCT 2007 form in a little detail as it will promote discussion of the key frameworking principles.

The JCT Framework Agreement lists at clause 5, eight Framework Objectives (objectives which should of course be common to all contracts), which should result in a ninth namely the *“enhancement of the Service Providers reputation and commercial opportunities”*. The remaining eight are as follows:

*8 reasons why framework agreements promote higher performance and innovation:*

*(i) Clients can use them as significant drivers of change;*

*(ii) They result in reduced competitive bidding/long-term relationships;*

*(iii) Innovations and cost savings can be delivered through supply chain relationships;*

*(iv) They will deliver continuous improvement agendas;*

*(v) Long-term collaboration on capital programmes boost margins;*

*(vi) They help to spread the overhead over a larger workload;*

*(vii) They can improve performance-based reward mechanisms; and*

*(viii) They encourage deeper relationships*

<sup>1</sup> Framework Agreement Guide 2007

<sup>2</sup> www.constructingexcellence.org.uk

## Construction contracts – Framework Agreements

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- (i) Zero health and safety incidents;
- (ii) Team working and consideration for others;
- (iii) Greater predictability of out-turn cost and programme;
- (iv) Improvements in quality, productivity and value for money;
- (v) Improvements in environmental performance and sustainability and reductions in environmental impact;
- (vi) Right first time with zero defects;
- (vii) The avoidance of disputes;
- (viii) Employer satisfaction with product and service.

The main aim of this Framework Agreement is to provide a mechanism for the Tasks to be called off and carried out and also to provide a supplemental and complementary framework of provisions designed to encourage the Parties to work with each other and with all other Project Participants in an open, cooperative and collaborative manner and in a spirit of mutual trust and respect with a view to achieving the Framework Objectives. The collaborative style of proceeding is reinforced by clauses 9 and 20 which include the following:

*“20.1 In the event of a technical and/or logistical problem with any Tasks, whatever the origins of the problem and whoever may be contractually responsible for the same, the Parties will work together and with the other Project Participants to try and find a solution to the problem which is safe and environmentally sensitive; minimises the effect on the out-turn cost and/or programme and/or the quality and/or performance of the Tasks; and is acceptable to the Employer.”*

Clause 4.1 is important because it makes it clear that unless specifically stated elsewhere there are no guarantees that the Employer will award any contracts to the Provider. This should serve to restrict the possibility of the Provider making a claim for lost opportunity and would have made our claim set out in the introduction of this paper difficult to maintain.

The aim of the framework is that it operates to make the agreement of the contract easier than with a one-off contract. Time periods are pre-agreed, the way the order is priced is pre-agreed, the form of contract is pre-agreed. Clause 17 deals with value engineering. The Provider is encouraged to keep costs and time under review and suggest changes if these will lead to a saving. The carrot comes in clauses 17.3 and 17.4 which refer to the possibility of the Provider sharing in the benefits of those savings.

The notes provided by the JCT acknowledge the possibility of conflict. Indeed the JCT Guide<sup>3</sup> hopes that the Parties “will have full regard to the partner and principles set out in the Framework Agreement with a view to resolving that conflict or discrepancy.” By clause 6.1, if there is a conflict between the underlying contract and the Framework Agreement, then the terms of the underlying contract prevail. Notwithstanding this, one area where there is a degree of overlap relates to the early warning required by clause 19. Whilst recognising that there might be notice provisions in the underlying contracts, clause 19, presumably in accordance with the need to have regard to the partnering principles, imposes a requirement on the parties to warn the other “promptly” if they become aware of any matter which might affect the performance of a particular Task.

The Framework Agreement is intended to last for a lengthy period of time. Thus by clause 8, each party must send out to the other details of their organisation and management on an on-going basis. Clause 12 complements this by setting out the need for a communications protocol. This is a common sense requirement. If the parties agree and/or understand a communal communications protocol, then this will promote clarity and the easy dissemination of information.

*The JCT Framework Agreement is designed to encourage the Parties to work with each other and with all other Project Participants in an open, cooperative and collaborative manner and in a spirit of mutual trust and respect with a view to achieving the Framework Objectives.*<sup>4</sup>

<sup>3</sup> Paragraph 33.

<sup>4</sup> See clause 3.1



## Construction contracts – Framework Agreements

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It is of paramount importance that the parties understand the organisational and management structures of the others involved, in particular roles and responsibilities. This means that if there are changes in those roles and responsibilities, this must be made clear. There is value in setting up a core group or management team. This can encompass representatives from each of the principal participants who will be responsible for coordination of new projects, formation of joint management teams for individual projects, arranging partnering workshops, liaising with management teams, and maybe even forming a Disputes Resolution Panel. An important strand of collaborative working is not the absence of disputes but their swift and efficient resolution achieved without damage to the parties' relationships.

*A framework can deliver many benefits, such as:*

- (i) Reduced transaction costs, through economies of scale*
- (ii) Continuous improvement within long-term relationships;*
- (iii) Better value and greater community wealth;*
- (iv) Solutions that delight customers.*

One of the potential drawbacks of this long-term arrangement is the question of the sharing of information and confidentiality. Clause 13, confirms that all project information must be kept confidential. Sharing of information is encouraged or even required by clause 11 which demands that a party "promptly volunteer" any information that comes into their possession which would be of assistance to the other in the performance of the tasks. That said, neither Party will be expected to volunteer or share:

- “.1 trade secrets which are only known to that Party and upon which that Party's business is essentially founded;*
- .2 knowledge or information which a Party is legally and/or contractually prohibited from disclosing to the other Party and/or other Project Participants; or*
- .3 knowledge or information which is privileged from disclosure.”*

Clause 21 deals with performance monitoring and performance indicators. These are particularly important from an employer's perspective. By the process of monitoring and appraisal, the employer will be able to assess the performance of the various project participants and thereby see who is best placed to deliver what is required.

Clause 22 deals with termination. No task with a duration of more than 12 months is to be instructed in the final 3 months before the framework end date. In other words the agreement gives the parties the chance to start building up a long-term relationship, but recognises the danger of being stuck in a relationship that benefits no one. Either party may terminate, after the first year, on one month's notice. The termination of the framework agreement will not affect any Tasks that have already been called off.

Of course, notwithstanding the provisions of the framework agreement, disputes might still arise. There is nothing new in the dispute resolution procedures. Mediation is permitted but only as a suggestion. Given the principles of collaborative working and the current judicial mood in favour of mediation, one might have expected a stronger word than "suggest". Also give some thought before adjudicating. A framework agreement by itself may well not be a contract for construction operations as required by section 105 of the Housing Grants Act.

## Conclusions

What do you need? Every project needs a clear set of contractual requirements and obligations so that all the participants know where they stand. Remember that a contract should set out:

- (i) what each party must do;
- (ii) what each party receives;
- (iii) time for performance;
- (iv) (sometimes) consequences of failure; and fundamentally
- (v) where risk is to fall.

The key to this with framework agreements is the ability to work together in an efficient, collaborative manner. Therefore you need to look to the following three objectives:

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## Construction contracts – Framework Agreements

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### (i) The Framework Agreement itself

An over-arching framework agreement will set out, in general terms, how the parties intend to conduct their relationship over a significant period. The continued turnover available for the one, and efficiency gains for the other, will in the long run more than compensate for any short-term deficit.

### (ii) The underlying contracts and subcontracts

In respect of the individual project the main contract, design contracts, and all subcontract and supply contracts, must be set up so as to facilitate collaboration. For this purpose, the use of a cost-reimbursable structure is often desirable. That approach assists transparency of pricing. The contract can also be designed to accommodate other important partnering mechanisms such as benchmarking and KPIs, and financial rewards for innovations that reduce time and cost. Much of this methodology will be carried down the supply chain as it will be essential to ensure that each project is served by a consistent suite of contracts and subcontracts.

### (iii) The relationship between the parties

Whilst there may be some difficulties in turning relationship-based obligations into binding contractual terms, the promotion of the relationship will nevertheless need to be given a very high degree of prominence in the collaborative structure. Many of the mechanisms to be found in the various partnering contracts can be applied with good effect outside the ambit of a formal contract and also deployed throughout the supply chain. However, ideally even such provisions as these will require a degree of legally binding regulation, in particular to determine who is to pay for each initiative, or in what proportion.

What matters is the effective operation of an integrated framework. What you must aim to achieve is a solid framework for establishing the parties' legitimate entitlements in the event of failure. The fact that it does so will not in any way make such a failure more likely, but it will reduce the likelihood of disputes arising that cannot be settled. It will also provide the certainty that will be required by funders in respect of any project that is dependent upon finance.

In the 2007 JCT Povey Lecture<sup>5</sup>, Bob White of Mace noted that regular users of the industry, in both the public and private sectors, had accepted that one of the most successful ways of harnessing the power of collaboration through partnering or integrated team working was through the adoption of frameworks, albeit of a variety of shapes, sizes and duration. He then went on to outline eight reasons why framework agreements promote higher performance and innovation:

- (i) Clients can use them as significant drivers of change;
- (ii) They result in reduced competitive bidding/long-term relationships;
- (iii) Innovations and cost savings can be delivered through supply chain relationships;
- (iv) They will deliver continuous improvement agendas;
- (v) Long-term collaboration on capital programmes and long-term service revenues boost margins;
- (vi) They help to spread the overhead over a larger workload and produce fewer loss-making projects (less risk, less volatility);
- (vii) They can improve performance-based reward mechanisms; and
- (viii) They encourage deeper relationships between clients/contractors/supply chain, demanding new upstream and downstream skills.

These are all reasons which suggest that the use of framework agreements will continue to rise.

*Remember that a contract should set out:*

*(i) what each party must do;*

*(ii) what each party receives;*

*(iii) the time for performance; and fundamentally*

*(iv) where risk is to fall.*

<sup>5</sup> Innovation in the Change Agenda, www.jcttld.co.uk

## Construction contracts – RIBA

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### *The RIBA Agreements 2007: a successful 1st year?*

*Last year, after two years of consultation, the RIBA launched a new suite of agreements specifically designed to offer a fairer allocation of risk between the client and the architect and to provide an innovative, flexible system for assembling appointments. The suite is now approaching its 1-year anniversary yet there still appears to be a much heated debate regarding its success. Both clients and architects have issues with the amended clauses, and even more interestingly, the RIBA and Association of Consultant Architects (“ACA”) are unable to present a united front as the ACA refuses to endorse the new forms. So, asks Stacy Sinclair, what’s all this fuss about?*

*Consultants should take particular note of the new amendments and understand the significance of their implications, prior to jumping in blindly.*

#### An Overview

The RIBA Agreements 2007 are comprised of separate, individual components which, when assembled, are customised to meet the individual needs of each project. They incorporate the latest changes in legislation, including the recently amended CDM Regulations, along with the new RIBA Outline Plan of Work 2007. The agreements are available for the appointment of ‘the Architect’ or ‘the Consultant’, are offered in ‘Standard’, ‘Concise’ or ‘Domestic’ forms, and are complete with Client Guides and Draft Supplementary Agreements including a Sub-Consultant’s Warranty, Third Party Rights Schedule, and Consultant Switch/Novation agreements.<sup>1</sup>

#### The Components

The Standard Agreement for the appointment of an Architect (S-Con-07-A), which replaces the previous SFA/99 and CE/99<sup>2</sup>, is a pack containing:

- Standard Conditions of Appointment for an Architect: Architect’s Copy/Client’s Copy
- Standard Agreement for the Appointment of an Architect: Memorandum of Agreement
- Standard Agreement: Model Letter
- Standard Agreement: Notes on use and completion
- Project Data
- Schedule of Design Services
- Schedule of Fees and Expenses
- Schedule of Role Specifications

Available both in hard copy and electronically online, the suite has been designed to provide flexibility and choice as users are able to purchase and customise the individual components as they require. The RIBA markets this as a unique strength of the new agreements. However, with numerous individual documents, some find it cumbersome and tedious to assemble. So perhaps its greatest strength is actually its greatest weakness? Could the Project Data, Schedules of Design Services, Fees and Expenses and Role Specifications not have been consolidated into one document thereby minimising excessive administration?

#### The Architect’s perspective

Whilst the new agreements may look familiar, architects should take particular note of the new amendments and understand the significance of their implications, prior to jumping in blindly. For example, clause A2.1.1 sets out the duty to take reasonable skill and care as one would typically expect of an architect or consultant. However, clause A2.1.2 then goes on to require further, more onerous obligations. The Standard form now states that the architect:

*“(a) performs the Services, so far as reasonably practicable, in accordance with the Brief and any time-scale or cost limit agreed with the client”*

<sup>1</sup> The Consultant Switch/Novation Agreement has recently been withdrawn for sale from the RIBA Bookshop website due to the RIBA’s recent review of the 2007 Agreements. The website recommends that the CIC’s Novation Agreement is used until the review has been completed. This is yet another indication that the new agreements have not had a successful 1st year.

<sup>2</sup> 1999 Standard Form of Agreement for the appointment of an Architect, revised April 2004 and the Conditions of Engagement for the appointment of an Architect

## Construction contracts – RIBA

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Though it is too early to say how this ambiguous clause will be interpreted by the courts, architects should be aware that this clause clearly extends their duties.

Amendments in the new Domestic form should also be noted. In particular, the “no set-off” clause has been omitted. In all RIBA agreements since the SFA/92, the clause has read:

*“All rights of set-off at common law or in equity which the client would otherwise be entitled to exercise are expressly excluded.”*

This is of great importance to architects in situations where they have been employed on a number of projects for a single client and, as a result of their negligence or lack of performance on one project, the client is looking to reduce their fees which are properly due on another project. In the new 2007 Agreements, the Standard form continues to expressly exclude the client’s common law right to set-off these monies. The client must pay the fees due, and reclaim any payments made via adjudication or litigation. However, in the Domestic form this clause has now been omitted. The RIBA stated that they wish to avoid an investigation by the Office of Fair Trading as, under the Unfair Terms in Consumer Contract Regulations 1999, clauses which could potentially be deemed to be unfair, such as no set-off, must be explained to consumer clients. However, architects have had to advise their domestic clients of such clauses since before the SFA/99 was published, so it seems curious that only now has fear of non-compliance set in.

Architects should also be aware that as all versions of the 2007 Agreements no longer provide the adjudicator with the discretion to allocate legal costs and expenses, adjudication may no longer be available under contracts where the client is a consumer. This follows the 2002 case of *Picardi v Cuniberti*.<sup>3</sup>

### The Client’s perspective

There are several changes which aim to create a more balanced agreement between the parties. However, clients must still take care to ensure that their interests are protected. For instance, the net contribution clause now appears to be optional. If a client prefers to cap the architect’s liability, rather than opting for the net contribution clause, the client must be sure to directly delete the net contribution itself.

Further, clause A3.3 has expanded the client’s responsibility to:

*“supply, free of charge, all the information in the Client’s possession, or which is reasonably obtainable, ... and the Architect is entitled to rely on such information.”*

Clients wishing to limit their liability with respect to information provided would be well-advised to amend this clause. Other changes in favour of clients include:

- (i) the default interest rate for late payment has been reduced from 8% over the Bank of England base rate to 5%; and
- (ii) the client no longer has to pay the architect’s legal costs on an indemnity basis in situations where the employer is unsuccessful in a dispute.<sup>4</sup>

### Conclusion

The above examples represent only a few of the amendments included in the new RIBA Agreements 2007. Both clients and architects should be particularly aware of these new amendments to ensure they understand what exactly they are signing up to. Whilst the objective was to create a flexible suite of contracts which balanced the risk between the parties, further contentious issues have now been created which ultimately have jeopardised a successful first year.<sup>5</sup> In conclusion, users should not get too comfortable with the 2007 suite as it is likely that we will see significant revisions over the course of the next year.

*There are several changes which aim to create a more balanced agreement between the parties, however clients must still labour diligently to ensure that their interests are protected.*

<sup>3</sup> [2002] EWHC 2923 (TCC). In this case Judge Toulmin QC held that the adjudication procedure was unfair to consumer clients as “a procedure which the consumer is required to follow, and which will cause irrecoverable expenditure in either prosecuting or defending it, is something which may hinder the consumer’s right to take legal action.”

<sup>4</sup> A direct result of the 2005 case *Munkenbeck & Marshall v Michael Harold* [2005] EWHC 356 (TCC).

<sup>5</sup> As a result, the ACA, when refusing to endorse these new agreements, stated that it will be publishing its own standard form of agreement prior to the summer of 2008. However, as of mid-August 2008, the industry has yet to see any sign of it.

## Construction contracts – FIDIC

### *FIDIC - following the gold standard*

*On 13 September 2007 in Singapore, FIDIC launched a new form of contract for Design Build and Operate (“DBO”) projects. FIDIC intend to publish a formal First Edition towards the end of 2008. The publication of the new contract, being as it is the first major standard form for DBO projects, is of considerable interest of itself. However, as Jeremy Glover<sup>1</sup> discusses, examination of the new clauses bears a wider interest as it may reveal the direction FIDIC is looking to move towards in respect of its suite of contracts as a whole.*

The new draft contract retains the standard FIDIC 20 Clause format and is intended to supplement the existing forms of contract, namely:

- (i) The Conditions of Contract for Construction – the Red Book;
- (ii) The Conditions of Contract for EPC Turnkey projects – the Silver Book; and
- (iii) The Conditions of Contract for Plant and Design-Build – the Yellow Book.

The new DBO form will be known as the “Gold Book.” This is probably because many of the provisions in the contract have been adapted from the existing Yellow Book. Indeed, the need for the DBO form arose out of recognition by FIDIC that for concession contracts in the transport and water/waste sectors, the market typically used the existing FIDIC Yellow Book with operations and maintenance obligations tagged on. FIDIC recognised that this was unsatisfactory and prepared the new form in order to achieve a degree of uniformity, and therefore it is hoped, a higher degree of certainty.

Under the DBO form, the contractor (who, given the size of these projects, will typically be in the form of joint venture or consortium) will be responsible for:

- (i) designing and constructing the works during the design-build period; and
- (ii) operating and maintaining the facilities for a 20 year period once the facility has been handed over with the issue of the Commissioning Certificate.

However, the contractor will have no responsibility for the financing and ultimate commercial success of the project.

### Dispute resolution, time bars and early warning notices

Given FIDIC’s stated desire for conformity, the changes to the dispute resolution provisions to be found at clause 20 are of particular interest as it is entirely possible that they will lead to amendments to the other existing FIDIC forms. In this regard, it is important to note that the difference in the way in which employer and contractor claims are treated remains. Clause 20 refers to contractor claims, whereas claims made by the employer are dealt with by clause 2.5. Therefore, the contractor remains bound by the condition precedent to be found in clause 20.1 whereby it must give notice of any event or circumstance giving rise to a claim “not later than 28 days after the contractor became aware, or should have become aware, of the event or circumstance” giving rise to a right to claim. In contrast, where the employer has a claim, it must give notice “as soon as practicable” after it becomes aware of the event or circumstance giving rise to that claim. Whilst the rationale for this difference in treatment is presumably that in the majority of, if not all, situations, the contractor will be (or should be) in a better position to know what is happening on site and so will be much better placed to know if a claim situation is likely to arise than an employer. To those on the contracting side, this distinction remains unfair and contrary to the generally regarded view that the contract adopts an even-handed allocation of risk.<sup>2</sup>

On the other hand, the obligation set out by clause 8.4 is on both parties. The clause introduces, for the first time in a FIDIC contract<sup>3</sup>, a requirement that both employer and contractor “endeavour to” advise the other of any circumstances of which they are aware which may adversely affect the project, e.g. increase the Contract Price or cause delay.

*Clause 20.4:  
If at any time the Parties so agree, they may jointly refer a matter to the DAB in writing with a request to provide assistance and/or informal discuss and attempt to resolve any disagreement that may have arisen...*

<sup>1</sup> Jeremy is the co-author of *Understanding the Red Book: A clause by clause commentary*.

<sup>2</sup> For example, A. Sandberg, then head of Legal Services at Skanska, said of the 1999 Rainbow Suite that: “The great benefits of the present Red and Yellow Books are that the balance of risks and responsibilities as well as allocation of duties and authorities between the parties generally is accepted by both employers and contractors. The FIDIC Conditions have therefore become the baseline conditions for a fair international construction contract.” - *A Contractor’s View on FIDIC Conditions of Contract for EPC Turnkey Projects* - ICLR (1999) Vol 16.

<sup>3</sup> It already features in the NEC3, see for example our article on page 24 of last year’s Review.



## Construction contracts – FIDIC

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Therefore contractors will be interested by the new words, included in clause 20.1(a), which as set out in our article on time bars (see pages 34–35), represent a softening of the condition precedent. Clause 20.1(a) now enables a contractor to submit to the dispute board, the details of any circumstances which may justify the late submission of a claim. The clause provides that if the dispute board considers that the circumstances are such that the late submission was “acceptable”, the dispute board may override the condition precedent. No definition of “acceptable” has been given, so a contractor is still best advised to operate as if the 28-day limit strictly applies. However, there is now some degree of latitude. In addition, a further new clause, 20.4 headed “Avoidance of Disputes”, has been introduced. This clause states as follows:

*Clause 20.1(a):  
However, if the Contractor considers there are circumstances which justify the late submission, he may submit the details to the DAB for a ruling. If the DAB considers the circumstances are such that the late submission was acceptable, the DAB shall have the authority under this sub-clause to override the given 28-day limit and advise both the parties accordingly.*

*“If at any time the Parties so agree, they may jointly refer a matter to the DAB in writing with a request to provide assistance and/or informally discuss and attempt to resolve any disagreement that may have arisen between the Parties during the performance of the Contract. Such informal assistance may take place during any meeting, site visit or otherwise. However, unless the Parties agree otherwise, both Parties must be present at such discussions. The Parties are not bound to act upon any advice given during such informal meetings, and the DAB shall not be bound in any future Dispute Resolution process and decision by any views given during the informal assistance process, whether provided orally or in writing.*

*If a dispute of any kind whatsoever arises between the Parties, whether or not any informal discussions have been held under this Sub-clause, either Party may refer the dispute in writing to the DAB according to the provisions of Sub-Clause 20.5...”*

Therefore, it can be seen that FIDIC is following the worldwide trend to encourage dispute avoidance. This is a trend to be found in Abu Dhabi where the Emirate has finally introduced a form of the 1999 Red and Yellow Books.<sup>4</sup> Thus for the first time the Middle East, having for many years resisted such a change in favour of the 1987 Old Red Book FIDIC 4th Edition, has recognised and adopted the Dispute Board concept. And whilst clause 20 does not go as far as the Gold Book, the standard amicable settlement clause to be found at clause 20.5 has been expanded to include the right, at any time, for either party to refer a dispute to independent management review, those senior managers then being required to endeavour to reach a settlement.

### Clauses 17-19: risk and insurance

There has also been a number of changes made to clauses 17-19. The insurance clause has been moved to 19, whilst clause 17 (formerly risk and responsibility) has been renamed “risk allocation”. The “force majeure” clause that was previously clause 19 has been dropped and replaced with a new clause 18 headed “exceptional risks”. The main change in this revised approach to the way in which risks and insurance are treated has been to set out in a much more detailed and precise way, the risks which the employer and contractor are to bear. That said, the definition of “exceptional risk” is very similar to the definition of force majeure previously to be found in clause 19 of the 1999 forms. Now, clause 17 details risks borne by each party and takes care to differentiate between the risks during the two project periods. If risks occur which are either exceptional or the responsibility of the employer, the contractor is entitled to an extension of time and payment of costs during the design-build period. However, as the operation service period cannot be extended, naturally enough, the contractor will only receive cost if these risks occurred during that time.

### Conclusions

We have written before about Project Mediation<sup>5</sup>, a collaborative process designed to manage the risk of disputes by focusing on dispute avoidance, project knowledge and the participation of all parties during the project. The new steps proposed by FIDIC do not go that far, but they do, if formally adopted, represent an acknowledgement by the FIDIC of the potential advantages to be gained by adopting a collaborative approach to dispute resolution.

<sup>4</sup> The 2007 Abu Dhabi Executive Affairs Authority General Conditions of Contract which has been introduced for construction projects undertaken in Abu Dhabi on behalf of public entities.

<sup>5</sup> See for example, *Alternatives to the Dispute Board - Project Mediation*, by Karen Gidwani - [www.fenwickelliott.co.uk/articles/adr](http://www.fenwickelliott.co.uk/articles/adr)



## Time bars and condition precedents

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### *Time Bars - have we reached the high-water mark of the condition precedent?*

*In last year's review we highlighted the increasing tendency in construction contracts to include time bar clauses which are intended to have the effect of disallowing the contractor a claim that might otherwise be legally recognisable. As Simon Tolson and Jeremy Glover explain, this trend has continued.*

There is still a real danger that a contractor cannot claim for an extension of time or loss and expense simply because it has forgotten to issue an appropriate contractual notice within the time specified in the contract. Accordingly, contractors and sub-contractors should carefully check their contracts when entering into them in order to see whether there are any time bars. On the other hand, of course, employers may seek to include time bars more frequently. It gives them the greater confidence in the outturn costs as there would then be an obligation on the contractor to put an employer on notice, such that the employer would then have the option to withdraw an instruction or attempt to mitigate the costs and delays.

*Contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current.*

Construction contracts like the NEC3 and FIDIC forms contain clauses that bar contractors' claims that are not made on time. Sometimes a claim is on time but challenged because it was not made in the specified form or with the required information. A recent shipping case *Waterfront Shipping Company Ltd v Trafigura AG*<sup>1</sup> confirms the courts' willingness to strike down otherwise valid claims if time bar provisions are not complied with. Delays occurred and the contract required the Charterer to compensate the Owner for such delays if the Owner made a claim within 90 days after completion of discharge. However, the Owner's claim failed because:

- The contract expressly required the claim to be accompanied by the vessel's pumping records signed by one of its officers and a representative of the terminal or the Charterer. The records were important because the Charterer was only liable for the discharge delay if the Owner's vessel had pumps that met the required pressure. It was not disputed that they did, but the records that the Owner provided were unsigned;
- This non-compliance was not so minor as to be irrelevant given the clear requirement for signatures. The court held that the signatures were important to confirm the accuracy, authenticity and provenance of the pumping records; and
- It did not matter that the Charterer had received pumping records from its own representative within the 90 day period. A key purpose of the time bar provisions was that the Charterer was presented with documentation by the Owner that was sufficient in itself for the Charterer to evaluate the claim without needing to consider other documents.

In a construction context:

- Parties should take care when concluding contracts to check any time bar clauses governing claims they might make;
- Parties should appreciate the risks they then run of not making a claim (even if to maintain goodwill) unless the other party agrees to relax the requirements or clearly waives them. Of course, time bar clauses, if cautiously operated, may generate a proliferation of claims, which may test the partnering ethos of forms such as the NEC3;
- The courts see the benefits of time bar provisions and support their operation. A tribunal might bar an entire claim for what seems like a technical reason (by which time it will usually be too late to make a new, compliant, claim); and
- It may be that non-compliance with a specific requirement (e.g. that a notice should be "communicated separately from other communications," as per the NEC3 form) would not be so minor that it might be ignored. Nor should claimants necessarily rely upon the other party already having the information they are required to provide.

<sup>1</sup> AG [2007] EWHC 2484 (Comm)

## Time bars and conditions precedent

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Indeed as we noted in last year's Review, the English and Welsh courts have made it clear that there is nothing inherently wrong in that. In the case of *Multiplex Construction v Honeywell Control Systems*<sup>2</sup>, Mr Justice Jackson held that:

*"Contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent."*

HHJ Davies followed the approach of Mr Justice Jackson in the case of *Steria Ltd v Sigma Wireless Communications Ltd*<sup>3</sup>. The case related to the provision of a new computerised system for fire and ambulance services. Sigma contracted to provide a communications system and Steria, in turn, subcontracted with Sigma to provide the computer-aided despatch system. The subcontract was a heavily amended version of the standard MF/1 form of subcontract. A dispute arose in relation to the release of the final tranche of retention due at the expiry of the defects liability period. Sigma asserted that Steria had delayed in completing the subcontract works and as a result Sigma was entitled to set off against the final payment and/or counterclaim LADs or general damages. Clause 6.1 of the subcontract stated:

*"... if by reason of any circumstance which entitles the Contractor to an extension of time for the Completion of the Works under the Main Contract, or by reason of a variation to the Sub-Contract Works, or by reason of any breach by the Contractor the Sub-Contractor shall be delayed in the execution of the Sub-Contract Works, then in any such case provided the Sub-Contractor shall have given within a reasonable period written notice to the Contractor of the circumstances giving rise to the delay, the time for completion hereunder shall be extended by such period as may in all the circumstance be justified..."*

Now, clause 6.1 is similar in type to standard forms such as the JCT contract. The language is very different from the conditions precedent to be found in FIDIC and the NEC3. Sigma argued that the written notice referred to in clause 6.1 was a condition precedent to a grant of an extension of time and that it had not been complied with. Steria countered that there was no such condition precedent but that if there were, then either it had been complied with and/or it had been waived. The Judge held that clause 6.1 was a condition precedent requiring Steria to give written notice within a reasonable period. That notice had to emanate from the subcontractor claiming the extension of time. Therefore, for example, minutes of meetings prepared by third parties recording that the subcontract works had been delayed did not constitute adequate notice. Judge Davies agreed with Mr Justice Jackson's comments in the *Multiplex* case and said that:

*"In my judgment an extension of time provision confers benefits on both parties; in particular it enables a contractor to recover reasonable extensions of time whilst still maintaining the contractually agreed structure of a specified time for completion (together, in the majority of cases, with the contractual certainty of agreed liquidated damages, as opposed to uncertain unliquidated damages). So far as the application of the contra proferentum rule is concerned, it seems to me that the correct question to ask is not whether the clause was put forward originally by Steria or by Sigma; the principle which applies here is that if there is genuine ambiguity as to whether or not notification is a condition precedent, then the notification should not be construed as being a condition precedent, since such a provision operates for the benefit of only one party..."*

The Judge felt that the clause was clear. The subcontractor was required to give written notice within a reasonable period from when he is delayed, and the fact that there may be scope for argument in an individual case as to whether or not a notice was given within a reasonable period is not in itself any reason for arguing that it is unclear in its meaning and intent. The case is important because the Judge held that the extension of time clause gave rise to a condition precedent even though there were no express words to that effect. Therefore the case seems to confirm that the courts may well follow a strict line when it comes to interpreting such clauses.

*Whilst the employer (in discussions with the contractor) and the architect (by issuing delay notices) both made it clear that the contractor was not getting an extension of time, neither gave the failure to operate clause 13.8 as a reason.*

<sup>2</sup> [2007] EWHC 447 (TCC)

<sup>3</sup> [2008] CILL 2544

## Time bars and condition precedents

### Are there any ways round the condition precedent?

Is there the possibility that a court/arbitral tribunal might decline to construe the time bar as a condition precedent, having regard to the particular circumstances of the matter before it and the impact of the applicable law? The Scottish case of *City Inn Ltd v Shepherd Construction Ltd*<sup>4</sup> suggests there may be. The disputes related to the construction of a hotel under a contract incorporating the JCT Standard Form (Private Edition with Quantities) 1980 as amended. The core element of the dispute was whether or not the contractor was entitled to an extension of time of 11 weeks and consequently whether or not the employer was entitled to deduct LADs. Clause 13.8 contained a time bar clause, requiring the contractor to provide details of the estimated effect of an instruction within ten days. Lord Drummond Young characterised the clause thus:

*"I am of opinion that the pursuers' right to invoke clause 13.8 is properly characterized as an immunity; the defenders have a power to use that clause to claim an extension of time, and the pursuers have an immunity against that power if the defendants do not fulfil the requirements of the clause."*

*In a construction context parties should:*

*Take care when concluding contracts to check any time bar clauses governing claims they might make.*

*Appreciate the risks they then run of not making a claim.*

*Remember that the courts see the benefits of time bar provisions and support their operation.*

However, the Judge also felt that an immunity can be the subject of waiver. The architect and employer have the power, at least under the JCT Standard Forms, to waive or otherwise dispense with any procedural requirements. This was what happened here. Whilst the employer (in discussions with the contractor) and the architect (by issuing delay notices) both made it clear that the contractor was not getting an extension of time, neither gave the failure to operate the condition precedent at clause 13.8 as a reason. The purpose of clause 13.8 is to ensure that any potential delay or cost consequences arising from an instruction are dealt with immediately.

The point made by the Judge is that whilst clause 13.8 provides immunity, that immunity must be invoked or referred to. At a meeting between contractor and employer, the EOT claim was discussed at length. Given the importance of clause 13.8, the Judge felt that it would be surprising if no mention was made of the clause unless the employer, or architect, had decided not to invoke it. Significantly, the Judge held that both employer and architect should be aware of all of the terms of the contract. Employers and certifiers alike will need to pay close attention to their conduct in administering contracts in order to avoid the potential consequences of this decision.

### Conclusion

In summary, it seems clear that under English law a condition precedent will be held to be effective, so as to preclude a claimant from bringing an otherwise valid claim, provided that the wording of the contract is clear that that is its intention. However, might the comments of Mr Justice Jackson's amount to a high-water mark in the enforcement of condition precedents? As we set out on pages 32-33 below, the FIDIC approach seems to be changing. In the autumn of 2007, FIDIC introduced a new draft form of contract, the Gold Book for DBO projects. This included the following concession within clause 20:

*"20.1(a) However, if the Contractor considers there are circumstances which justify the late submission, he may submit the details to the DAB for a ruling. If the DAB considers the circumstances are such that the late submission was acceptable, the DAB shall have the authority under this sub-clause to override the given 28-day limit and advise both the parties accordingly."*

Further, as can be seen from the *City Inn* case, in practice, the particular circumstances of each situation will need to be considered, not solely because the courts construe these provisions extremely strictly, but also because the actual circumstances of the case might reveal that the time bar provision cannot be considered to be effective.

<sup>4</sup> [2007] CSOH 190

## International Arbitration

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# International Arbitration - caselaw update

In last years Review we welcomed the new liberal approach of the Court of Appeal and highlighted the comments of Longmore LJ in the *Fiona Trust* case. The Judge said that a new approach needed to be taken by the English courts when considering questions relating to the jurisdiction of arbitration clauses in international commercial contracts. Longmore LJ indicated that:

*"It seems to us any jurisdiction or arbitration clause in an international commercial contract should be liberally construed."*

*The proposition that any jurisdiction or arbitration clause in an international commercial contract should be liberally construed promotes legal certainty. It serves to underline the golden rule that if the parties wish to have issues as to the validity of their contracts decided by one Tribunal and issues as to its meaning or performance decided by another, they must say so expressly.*

The case, albeit with a new name, *Premium NAFTA Products Ltd & Ors v Fili Shipping Co. Ltd & Ors*<sup>1</sup> has now reached the House of Lords, who unanimously approved Longmore LJ's comments. The key issue related to the lengthy dispute resolution clause, which referred first to disputes "arising under" the contract, and later to disputes which have "arisen out of" the contract. The Court of Appeal was asked to consider lengthy arguments about whether or not there was any difference in meaning between the two. Should "out of" have a wider meaning than "under"; and if so, given the wording of this particular clause, which of the two should prevail? After reviewing the authorities, the Court of Appeal said that the time had come to take a fresh approach. The English Courts should not spend time considering the fine distinctions and minutiae of the wording of arbitration clauses. If a businessman wanted to exclude disputes about the validity of the contract it would be comparatively simple to say so. The House of Lords agreed. In particular Lord Hope of Craighead, having expressly noted that the arbitration clause here was taken from a standard form, said this:

*"The proposition that any jurisdiction or arbitration clause in an international commercial contract should be liberally construed promotes legal certainty. It serves to underline the golden rule that if the parties wish to have issues as to the validity of their contracts decided by one Tribunal and issues as to its meaning or performance decided by another, they must say so expressly. Otherwise they will be taken to have agreed on a single Tribunal for the resolution of all such disputes."*

Any dispute resolution clause should be construed in accordance with this presumption unless the language made it clear that certain questions were intended to be excluded from (in this case) the arbitrator's jurisdiction. In the view of the Law Lords the attempt to draw out differences between the meanings of the words "arising under" and "arising out of" was inappropriate. The distinction was at best a "fussy" one. This is something which is not without interest to the construction industry given the wording of the HGCR which says that "a party to a construction contract has the right to refer a dispute arising under the contract for adjudication". The rationale behind this judgment was clearly expressed by Lord Hoffman who said this:

*"In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship to which they have entered or purported to have entered to be decided by the same Tribunal."*

By stressing that the English Courts should not become, bogged down in the detail of the wording of arbitration clauses, the House of Lords have sent a clear message to parties to international commercial contracts that they can be much more certain that arbitration clauses will be upheld and that, if arbitration is their chosen course, then it is the arbitrators who will be left to decide any dispute which may arise. Thus taken with their decision in the *Lesotho Highland Development Authority v Impregilo* case, where it was held that an error of law does not necessarily mean that the arbitrators had exceeded their powers, it seems clear that this judgment of the House of Lords can only serve to confirm the attractiveness of London as an arbitration centre.

<sup>1</sup> [2007] UKHL 40

<sup>2</sup> [2005] UKHL 43

## International Arbitration

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### Jurisdiction

There have been two contrasting cases which asked the question as to which court had jurisdiction to deal with challenges made to an arbitral award.

#### *C v D*<sup>3</sup>

C and D entered into a Bermuda form of insurance contract which was governed by New York law but which provided that any arbitration proceedings should take place in London. C obtained an award in its favour against D for unpaid monies. D said that it was going to apply to a US federal court to challenge the award. C therefore sought an anti-suit injunction to prevent D from challenging the award in New York. At first instance, Mr Justice Cooke agreed with C and held that by agreeing to London being the scene of the arbitration, the parties had agreed that any challenge to an award must be made only in the courts of the place where the seat of the arbitration was. Thus, this dispute was about the question of whether English law was the “curial law” of the arbitration. In other words, were only remedies normally available under English law available to D as the party seeking to challenge the arbitration tribunal decision. The Court of Appeal agreed. Longmore LJ said:

*“If there is no express law of the arbitration agreement, the law of which that agreement has its closest and most real connection is the law of underlying contract or the law of the seat of arbitration. It seems to me that ... the answer is more likely to be the law of the seat of the arbitration than the law of the underlying contract.”*

#### *Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd*<sup>4</sup>

The parties entered into an EPC contract in connection with the provision of 36 wind turbine generators in Stirling. Proceedings were brought to challenge an arbitrator’s decision about LAD’s. Braes said that the seat of the arbitration was Scotland which would mean that the English courts had no jurisdiction to entertain the application. There was a difference between the approach of the two courts. The Scottish courts’ powers of intervention was said to be limited to extreme cases such as the dishonest procurement of an award. The contract was governed by laws of England and Wales and gave the English courts exclusive jurisdiction to settle disputes arising out of the contract subject to arbitration conducted in accordance with the CIMAR rules. The arbitration agreement was said to be subject to English law and the seat of the arbitration was to be at Glasgow. Whilst Mr Justice Akenhead noted the case of *C v D*, he decided that here the court did have jurisdiction for the following reasons:

- (i) the need to consider what, in substance, the parties agreed was the law of the country which judicially controlled the arbitration - here it was the English courts. The 1996 Arbitration Act permits and requires the court to entertain applications for leave to appeal against arbitration awards. Thus the parties were agreeing that the dispute resolution process was arbitration but that the English courts retained such jurisdiction as necessary to address any disputes that may arise; and
- (ii) the express agreement that the seat of the arbitration was to be Glasgow related solely to the place where the hearing was to take place. All the other references to the law which governed the arbitral proceedings were to that of England and Wales.

*To succeed under s69, the decision of the tribunal had to be obviously wrong or the question had to be one of general public importance with the decision being open to serious doubt.*

To succeed under s69, the decision of the tribunal had to be obviously wrong or the question had to be one of general public importance with the decision being open to serious doubt. The clause here was very much a one off, so the question of law was not one of general importance. Further just because a Judge has come to a view that a decision was wrong, that does not mean that it is necessarily “obviously wrong”. The Judge’s view may be one that is reached “on balance”. In fact, here, the Judge thought the arbitrator’s decision was ultimately right. The Judge also said that the fact that the arbitrator was a “highly experienced and well known construction law QC” was a relevant factor to take into account under section 69 of the Arbitration Act.

<sup>3</sup> [2007] EWCA Civ 1282

<sup>4</sup> [2008] EWHC 426 (TCC)



## Expert evidence

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# *Experts in international construction disputes*

*On 1 January 2008, Nicholas Gould accepted an offer to act as Chairman of the Standing Committee of the ICC Centre For Expertise for a three year period. The Centre which acts as the service centre for the International Chamber of Commerce ("ICC") offers three distinct services, the proposal of experts, the appointment of experts and the administration of expertise proceedings. Here, Nicholas considers the role of the expert in international construction disputes. He focuses on the difference between party and tribunal appointments and the procedural rules that might apply. He also considers some practical considerations, such as issue identification, timetabling, joint meetings and expert reports, which are relevant to the appointment of an expert in any jurisdiction.*

### Appointment: parties or tribunal?

It has been said that the role of an expert in a construction dispute is to provide independent opinion evidence based upon the facts. It is also frequently said that this requirement is entirely fictional, because most experts are in reality appointed and paid by one party and so experts may view the dispute from that party's perspective. An unbiased and careful review of the facts may well lead to a truly independent view, while at the other end of the scale, an expert may advocate a party's case and even be criticized as a "hired gun".

In many respects this criticism is levied against the Anglo-Saxon common-law jurisdictions, which for many years have allowed the parties a great deal of freedom to appoint their own experts. Many authors have considered this problem. For example, Andrew Bartlett described this as the "*chief unsustainable myth is the complete independence of the expert*". The distinction in approaches between the civil and common law is in contrast to the international arena. Lawyers, experts and other consultants involved in domestic arbitration, will, in most circumstances, have developed their understanding from domestic litigation. The traditional approach of a particular country, governed by its domestic civil procedure rules, practices and guidelines will and is transposed into the international dispute resolution arena.

An alternative in international commercial arbitration is for the parties to agree that the tribunal can appoint the expert or experts. If they do so agree, the applicable procedural rules may provide the tribunal with the power to decide how expert evidence is to be dealt within the arbitration.

### Applicable rules

If the parties select and appoint their own expert then the parties must comply with the directions of the tribunal and see that the expert delivers the report on time, meets with the other party's expert, and is available for the hearing. If a different approach is to be adopted by the tribunal then they will need the consent of the parties or an appropriate power in the procedural rules or law.

A common feature of the UNCITRAL Model Law, Model Rules, AAA/ICDR International Arbitration Rules and the LCIA Rules is that the tribunal can appoint the expert or experts. The tribunal has the power to identify the issues which a tribunal is to decide and to order the parties to provide relevant information. An expert's report is to be in writing, and the parties are to be given an opportunity to examine and comment upon the report. The quality of treatment between the parties and the opportunity to consider and put their case is of course paramount in arbitration, as it is in litigation.

The Model Law and these Rules do not provide procedures for dealing with expert evidence, nor do they provide support services for proposing, appointing or even administering expert proceedings. The ICC has published rules, and provides a proposal, appointment and an administration service.

*The chief unsustainable myth is the complete independence of the expert.*



## Expert evidence

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### ICC expertise

The ICC's Rules for Expertise came to force on 1 January 2003 ("the Rules"). The Rules recognise that experts with particular knowledge in technical, legal, financial and other fields may well be used in a variety of situations. One of those could of course be to compliment an international commercial arbitration. The Rules are however complimentary to three services provided by the ICC, which are:

- (i) The proposal of experts;
- (ii) The appointment of experts; and
- (iii) The administration of expertise proceedings.

The ICC is in a unique position as its network of 90 national committees around the world provides the ICC with direct links to government and business worldwide. The ICC therefore has access to a network of experts in a wide range of fields internationally. The ICC's International Centre for Expertise ("the Centre") is assisted by a Standing Committee. The Standing Committee comprises a chairman, two vice chairmen and eight further members for a three year renewable term. These individuals are drawn from around the world, thus adding to the international perspective of the ICC.

### CIArb Protocol

The Chartered Institute of Arbitrators' Protocol for the Use of Party-appointed Expert Witnesses in International Arbitration was launched in October 2007. This protocol can be adopted by the parties and tribunal in its entirety or in part, or they may use it as a guideline when developing their own procedure. It is supplementary to the applicable law and the institutional or ad hoc rules that apply to the conduct of the arbitration. Article 4.5 sets out the requirements of an expert's written opinion. The list initially includes many familiar items, but goes on to provide useful and more complete guidance than many of the current procedural rules. The written opinion must:

- "(a) contain the full name ..., background, qualifications, training and experience...;*
  - (b) state any past or present relationship with any of the Parties, the Arbitral Tribunal, counsel or other representatives of the Parties, other witnesses and any other person or entity involved in the Arbitration;*
  - (c) contain a statement setting out all instructions the expert has received from the appointing Party and the basis of remuneration of the expert;*
  - (d) only address the issue or issues in respect of which the Arbitral Tribunal has given permission for expert evidence to be adduced;*
  - (e) state which facts, matters and documents, including any assumed facts or other assumptions, have been considered in reaching the opinion;*
  - (f) state which facts, matters and documents, including any assumed facts or other assumptions, the opinion is based upon;*
  - (g) state the opinion(s) and conclusion(s) that have been reached and a description of the method, evidence and information used in reaching the opinion(s) and conclusion(s);*
  - (h) state which matters the expert has been unable to reach an opinion on;*
  - (i) state which matters (if any) are outside the expert's area of expertise;*
  - (j) be as brief as is reasonably possible;*
  - (k) not contain copious extracts from other documents;*
  - (l) adequately reference all documents and sources relied upon;*
  - (m) not annex more than is reasonably necessary to support the opinion;*
  - (n) contain a declaration in the form set out in Article 8; and*
  - (o) be signed by the expert and state its date and place."*
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*A common feature of the UNCITRAL Model Law, Model Rules, AAA/ICDR International Arbitration Rules and the LCIA Rules is that the tribunal can appoint the expert or experts.*

## Expert evidence

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The emphasis is on restricting the expert to the issues for which expert evidence is required, but then requiring the expert to concisely state the facts, assumptions and opinions relating to those issues. The experts are required to hold a discussion in order to identify the issues upon which they are to provide evidence, identify any tests and analysis that may need to be conducted and try to reach an agreement on how those tests and analysis are to be carried out. Once the experts have concluded their discussions, then they are to set out the issues, tests, analysis and identify any areas of agreement and disagreement, together with reasons for the disagreement, and send this to the parties and the tribunal. If tests and analysis are required, then they should be carried out in the agreed manner. If agreement cannot be reached, then each expert can carry out those tests that he or she considers appropriate, but this must be done in the presence of the other expert.

A written opinion is then produced, which is exchanged simultaneously. The experts can review each other's opinion, and if necessary write supplementary opinions which are again exchanged simultaneously. If the experts provided a written opinion, they are obliged to give an oral testimony at the hearing. This may only be dispensed with if both parties agree and the tribunal confirms that agreement. If an expert does not give a testimony at the hearing, the tribunal is to disregard the expert evidence unless "in exceptional circumstances" the tribunal decides that the opinion may be considered.

### The expert's mandate

An expert needs to be clear about his or her "mission" or "instructions" or "mandate". The appointment of an expert requires that the expert is given clear instructions and ideally a timetable. The instructions may be provided by the party that appoints the expert, or joint instructions may be agreed by the party or the tribunal may set out the instructions. In any event, the tribunal should have the power to determine a definitive list of issues, even if the tribunal needs to devise a process whereby an initial set of issues are determined by the tribunal in consultation with the parties, and then the experts are given the opportunity to further develop the list of issues which the tribunal can then determine after further consultation with the parties.

### Conclusion: practical considerations

The practical considerations for the parties and in particular the arbitral tribunal in any international commercial arbitration involving expert evidence are:

- (i) Identification of the issues;
- (ii) Timetabling;
- (iii) Procedures for developing the particular questions of the experts, carrying out any test, visiting the site, and analysing test results;
- (iv) Joint meetings of experts (who should attend);
- (v) The need for a written joint expert report of areas of agree and disagreement (together with brief reasons for disagreement);
- (vi) Report only on areas of disagreement and by issue; and
- (vii) The potential for witness conferencing at hearing.

If the tribunal is to manage the arbitration in an efficient manner, and write an award that addresses each of the issues that are properly in dispute between the parties then, a focused schedule of issues must be produced. Requiring the experts to meet and discuss each issue can save time and money. The experts can discuss all of the issues and work out where they agree and disagree. The need to identify the reasons for disagreement will focus their minds, and will provide the basis for a focused expert report and cross-examination. An expert report from each expert need only deal then with the areas of disagreement on an issue by issue basis. The reports can be compared by the tribunal. From this an agenda for the hearing can be established.

*The Rules are however complimentary to three services provided by the ICC, which are:*

- (i) The proposal of experts;*
- (ii) The appointment of experts; and*
- (iii) The administration of expertise proceedings.*

## Fenwick Elliott news

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# Fenwick Elliott news

Fenwick Elliott continues to grow and we are pleased to announce the appointment of two new Associates:

**Barry Hembling** joined us as an Associate from Alfred McAlpine plc in April; whilst **Charlene Linneman**, who has been with us since May 2005, became an Associate in June 2008;

In addition, there are three other new assistants to enhance our team:

**Theresa Mohammed** who qualified in December 2007;

**Rebecca Williams** who joined us in January 2008 from Lane & Partners; and

**Claire King** who joined us from Ashurst in September 2008

## Sierra Leone

We are pleased to be contributing, in a small way, to the construction of a new library and education centre, which is set to rejuvenate the community in Waterloo, Sierra Leone. The people there, when asked what development scheme they most wanted for their community, chose without hesitation — a library. They believed education was the key to recovering from the Civil War, which ended in 2002.

The library, to be named the Equiano Centre<sup>1</sup>, is being delivered by a charity, the Construction & Development Partnership, and owes much to the vigour of Liverpool MP Claire Curtis-Thomas. The project, designed by engineers Ramboll Whitbybird and architect Willson & Bell, is due to start on site at the onset of the dry season in October 2008. The library, which will be constructed using in-situ local concrete, will be built by a local contractor, as another aim of the project is to use it as a case study to develop local skills. For more information contact Jeremy Glover or visit the project website, which will shortly go live at [www.codep.co.uk](http://www.codep.co.uk).

## Website

As you may have seen, we relaunched our website in June. The key elements of the redesign are intended to improve the appearance, navigability and usability of the site as a whole thereby enabling easier access to the wealth of information to be found inside. However we have of course retained our valuable archive of newsletters, papers and articles written by the Fenwick Elliott team, examples of which can be found in the Case Law Round-Up below. Please feel free to log on to [www.fenwickelliott.co.uk](http://www.fenwickelliott.co.uk) and explore.

## Seminars 2008

As can be seen from this year's Review, as well as running our ever popular Construction Update and our still relatively new Capital Projects in the Education Sector Seminars, members of the firm regularly speak at a variety of seminars both in England and abroad. Forthcoming examples include:

Nicholas Gould, David Robertson and Jeremy Glover at the 3rd Biennial IBA Conference on *Construction Projects From Conception to Completion*, 5-6 September 2008, to be held in Brussels, Belgium

Simon Tolson and Jeremy Glover at the Butterworths Conference: *Sustainable Development in the Construction Industry*, to be held in London, on 30 September 2008

Simon Tolson, Victoria Russell, Nicholas Gould, David Bebb and Jeremy Glover at the Sweet & Maxwell seminar, *The Construction Law Conference 2008*, to be held in London on 17 October 2008.

Further details can be found on our website or alternatively please contact Susan Kirby.

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<sup>1</sup> The centre is named after Olaudah Equiano, a freed slave whose vivid 1789 autobiography contributed to the abolition of slavery 200 years ago.

## Case law update

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### Case law round-up

*Our usual case round-up comes from two different sources.*

*Tony Francis, together with Karen Gidwani, continue to edit the Construction Industry Law Letter ("CILL"). CILL is published by Informa Professional. For further information on subscribing to the Construction Industry Law Letter, please contact Clare Bendon by telephone on +44 (0) 20 7017 4017 or by email: [clare.bendon@informa.com](mailto:clare.bendon@informa.com).*

*Then, there is our long-running monthly bulletin entitled Dispatch, now into its 9th year, which summarises recent legal and other relevant developments. If you would like to look at recent editions, please go to [www.fenwickelliott.co.uk](http://www.fenwickelliott.co.uk). If you would like to receive a copy every month, please contact Jeremy Glover.*

*We begin by setting out the most important adjudication cases as taken from the Dispatch, followed by summaries of some of the more important other cases, taken from CILL.*

### Adjudication - cases from the Dispatch

#### Breaches of natural justice

#### Cantillon Ltd v Urvasco: Part 1

*Breaches of the rules will be material in cases where the Adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant.*

This case is important for two reasons. First Mr Justice Akenhead set out the following propositions which should be followed if a breach of natural justice was being alleged:

- (a) It must be first established that the adjudicator failed to apply the rules of natural justice;
- (b) Any breach of the rules must be more than peripheral. It must be a material one;
- (c) Breaches of the rules will be material in cases where the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant;
- (d) Whether the issue is decisive or of considerable potential importance or is peripheral or irrelevant obviously involves a question of degree which must be assessed by any judge in a case such as this;
- (e) It is only if the adjudicator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side, without giving parties the opportunity to comment, or where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case of *Balfour Beatty Construction v The London Borough of Lambeth*<sup>1</sup> was concerned comes into play.

It follows that, if either party has argued a particular point and the other party does not come back on the point, there is no breach of the rules of natural justice in relation to that point.

#### Severability

#### Cantillon Ltd v Urvasco: Part 2

Although it is clear that a decision that is wrong on the facts will be enforced, provided the adjudicator had jurisdiction to decide the matter and provided he answered the question referred to him, what is the position with a decision that might be good in part and impeachable in others? This time, Mr Justice Akenhead having reviewed the authorities suggested that a decision could be severable if two or more disputes have been determined and the challenge only goes to one of those disputes. In doing so, he listed the following propositions:

<sup>1</sup> [2002] EWHC 597 (TCC)

*If the [adjudicator's] decision as drafted is simply not severable in practice, for instance on the wording, or if the breach of the rules of natural justice is so severe or all pervading that the remainder of the decision is tainted, the decision will not be enforced.*

## Case law update

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- (a) The first step must be to ascertain what dispute or disputes has or have been referred to adjudication. One needs to see whether in fact or in effect there is in substance only one dispute or two and what any such dispute comprises.
- (b) It is open to a party to an adjudication agreement as here to seek to refer more than one dispute or difference to an adjudicator. If there is no objection to that by the other party or if the contract permits it, the adjudicator will have to resolve all referred disputes and differences. If there is objection, the adjudicator can only proceed with resolving more than one dispute or difference if the contract permits him to do so.
- (c) If the decision properly addresses more than one dispute or difference, a successful jurisdictional challenge on that part of the decision which deals with one such dispute or difference will not undermine the validity and enforceability of that part of the decision which deals with the other(s).
- (d) The same in logic must apply to the case where there is non-compliance with the rules of natural justice which only affects the disposal of one dispute or difference.
- (e) There is a proviso to (c) and (d) above which is that, if the decision as drafted is simply not severable in practice, for instance on the wording, or if the breach of the rules of natural justice is so severe or all pervading that the remainder of the decision is tainted, the decision will not be enforced.
- (f) In all cases where there is a decision on one dispute or difference, and the adjudicator acts, materially, in excess of jurisdiction or in breach of the rules of natural justice, the decision will not be enforced by the Court.

## Contracts in writing

### Harris Calnan Construction Co. Ltd v Ridgewood (Kensington) Ltd

This was a claim to enforce an adjudicator's decision for some £102k. Ridgewood said that the adjudicator did not have the necessary jurisdiction because there was no contract in writing. Unusually, there was no suggestion in any of the documents before the court that Ridgewood had actually reserved its position on this issue during the adjudication. Accordingly, it seemed to HHJ Coulson QC that the decision that the adjudicator reached as to the existence of a contract in writing could not now be challenged by Ridgewood.

However, the Judge did go on to consider whether or not there was a contract in writing. This is of interest because the contract in question took the form of a Letter of Intent. There have been a number of cases including *Bennett v Inviron*<sup>2</sup> where the particular letters of intent in question were ruled not to be contracts where all the terms were in writing.

As HHJ Coulson QC made clear, each case must turn on its own facts. Here, the letter of intent made plain that there was complete agreement as to the parties to the contract. The contract workscope was contained in what was described as "Tender Documents dated 2nd November, 2005". There was an agreed lump sum of £200,787.75 and an agreed set of contract terms (namely the JCT 2005 Standard Form, Private with Quantities). The retention was 5% and LADs were agreed at £5,000 per week. Finally, the contract period was sixteen working weeks.

The adjudicator observed that "*there appears to be nothing left for the parties to agree*" and went on to note that all that was missing was a set of documents which made that agreement more formal. The Judge agreed that that did not mean that there was not a contract between the parties. All the terms were evidenced in writing. Accordingly, the adjudicator did have the necessary jurisdiction.

<sup>2</sup> [2007] EWHC 49 (TCC)

## Case law update

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### Set-off against an adjudicator's decision

#### Ledwood Mechanical Engineering Ltd v Whessoe Oil & Gas Ltd & Anr

A dispute arose in respect of the defendant Joint Venture's assessment of interim application 19. The contract incorporated adjudication provisions, even though the project related to the fabrication and erection of pipeworks at a natural gas terminal. An adjudicator held that the JV had wrongly withheld some £1.2m. The JV did not challenge the decision. However, it claimed that it was entitled to set off against the adjudication decision. The contract provided for a risk/reward (often known as "pain and gain") regime to be applied. The JV said that the elements of risk/reward should be dealt with on applications for interim payments.

Ledwood had made their application 19 in July 2007. Before the adjudicator made his decision, there were three further interim payment applications, 20-22. The JV issued a revised payment notice against application 22 on 11 October 2007. However, when they received the adjudicator's decision, the JV issued a revision to that payment notice giving effect to the decision but also assessing their own deduction for risk/reward. This led to a negative sum being due. Mr Justice Ramsey said that to permit the JV to use an adjustment to the payment notice for application 22 to give effect to the adjudicator's decision would ignore the wrongful deduction from application 19 and permit the JV to take account of subsequent events and other rights of set off which it was not entitled to do. However, the JV also argued that a risk/reward adjustment should be made in respect of application 19. They said that this was based on the logical corollary of the adjudicator's decision. In particular, they referred to the decision of Mr Justice Jackson on the *Balfour Beatty v Serco*<sup>3</sup> case where the Judge had said:

*"Where it follows logically from an adjudicator's decision that the employer is entitled to recover a specific sum by way of liquidated and ascertained damages, then the employer may set off that sum against monies payable to the contractor pursuant to the adjudicator's decision, provided that the employer has given proper notice (insofar as required)."*

The question for Mr Justice Ramsey was whether it followed logically that the JV was entitled to recover a specific sum by way of adjustment of the risk/reward element. First he had to consider whether a set off could be made. There was a dispute between the parties about the expended and revised target man hours which formed the basis of the risk/reward calculation. The Judge held that while the natural corollary of the decision was that it increased the number of expended hours in the pain/gain calculation, the calculation of the effect was not undisputed or indisputable. Thus, the position differed from the calculation of LADs which can be made using a number of weeks decided by an adjudicator and applying the contractual rate. Therefore, Ledwood was entitled to the summary judgment.

### Appointing the adjudicator

#### Makers UK Ltd v The Mayor and Burgesses of the London Borough of Camden

Sometimes, a party will contact a potential adjudicator direct to try and ascertain whether they would be available to accept the appointment. This case demonstrates the caution that may be required. Here, Camden challenged the appointment of an adjudicator and his jurisdiction because his name was suggested to the RIBA for appointment. Camden also argued that there was apparent bias because the claimant's solicitor had contacted the adjudicator before his appointment to check on his availability. Before Mr Justice Akenhead both arguments failed. The Judge made the following observations:

*Where it follows logically from an adjudicator's decision that the employer is entitled to recover a specific sum by way of liquidated and ascertained damages, then the employer may set off that sum against monies payable to the contractor pursuant to the adjudicator's decision, provided that the employer has given proper notice (insofar as required).*

<sup>3</sup> [2004] EWHC 3336 (TCC)



*It is better for all concerned if parties limit their unilateral contacts with adjudicators both before, during and after an adjudication; the same goes for adjudicators*

## Case law update

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*“(1) It is better for all concerned if parties limit their unilateral contacts with adjudicators both before, during and after an adjudication; the same goes for adjudicators having unilateral contact with individual parties. It can be misconstrued by the losing party, even if entirely innocent.*

*(2) If any such contact, it is felt, has to be made, it is better if done in writing so that there is a full record of the communication.*

*(3) Nominating institutions might sensibly consider their rules as to nominations and as to whether they do or do not welcome or accept suggestions from one or more parties as to the attributes or even identities of the person to be nominated by the institutions. If it is to be permitted in any given circumstances, the institutions might wish to consider whether notice of the suggestions must be given to the other party.”*

## Crystallisation of disputes

### Ringway Infrastructure Services Ltd v Vauxhall Motors Ltd

Vauxhall employed Ringway to carry out the development of a large car park to accommodate new cars being built by Vauxhall. The contract was the JCT1998 with Contractor's Design as amended. On 16 May 2007, Ringway submitted interim application No 11. This was a detailed document, and sought the sum of £1,303,704.95. Vauxhall, acting principally through its agent Walfords LLP, finally responded on 27 June 2007 stating that it had not had sufficient time to consider in detail the build up of the variation costs. It did not issue a payment notice. Although, both parties discussed the need to resolve the matter between themselves, this came to nothing and an adjudicator was appointed. Vauxhall made several jurisdictional challenges, which were rejected. The adjudicator found that by operation of clause 30.3.5, Vauxhall were obliged to pay Ringway the amount stated in the interim payment application, plus interest and his fees.

The inevitable enforcement proceedings came before Mr Justice Akenhead. The jurisdictional challenges included that the adjudication notice referred to Ringway's ultimate entitlement under its final account as opposed to the amount due under the interim application. Vauxhall also said that no dispute had crystallised prior to the reference to adjudication in relation to the interim application, because no demand had been made for payment. As Ringway had not, prior to the reference, relied upon the provisions of clause 30.3, no dispute existed or could exist in relation to the claim made in respect of interim application which was based on clause 30.3.5.

The Judge was of the view that the key issue was whether the adjudicator had jurisdiction to decide that, in the absence of any timely payment or withholding notices, Ringway was entitled under clause 30.3.5 to the sum claimed in interim application 11. The Judge was satisfied that the dispute which was referred to adjudication, was a dispute relating to the interim application. It was material that the previous applications for payment were numbered 1-10, and that these were valued by Walfords LLP within a seven day period of their receipt. Interim application 11 was not an academic valuation exercise which Ringway were seeking to embark on. Further, the Judge had to decide what, if anything, was in dispute and if there was a dispute, whether the dispute resolved by the adjudicator was the one referred to him. Here, as a matter of fact, the dispute concerned the amount due to Ringway arising from application 11. Part of this dispute was whether or not Vauxhall had complied or not with the payment provisions of the contract.

The Judge held that the issuing of a payment notice under clause 30.3.3 was a mandatory obligation. Vauxhall's failure to do so was effectively a breach of contract. Although there was no express reliance in the adjudication notice to clauses 30.3.3 and 30.3.5, this did not change the fact that there was a clear claim for payment. The lack of a timely notice under clause 30.3.3, inevitably meant that under clause 30.3.5, the sum claimed became due and payable. Thus, no invoice can have been required in circumstances where Vauxhall was itself in breach.

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## Case law update

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### Other Cases

#### *Construction Industry Law Letter*

### Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission of the European Communities

Court of First Instance of the European Communities

Before JD Cooke, President, R. Garcia-Valdecasas, I Labucka, M Prek, V Ciuca

Judgment delivered 17 September 2007

#### **The facts**

In February 2003, the European Commission carried out an investigation based on the suspicion of anti-competitive practices at the premises of Akzo Nobel Chemicals Limited ("Akzo") and Akcros Chemicals Limited ("Akcros") in Eccles, Manchester. Such investigations are carried out pursuant to what is termed "Regulation 17": procedures and powers given to the European Commission to deal with anti-competitive conduct under the First Council Regulation implementing Articles 81 and 82 of the EC Treaty. Articles 81 and 82 of the EC Treaty deal with anti-competitive behaviour, for example cartels and abuse of a dominant position. During the investigation the Commission took copies of documents. Akzo and Akcros said that certain documents were likely to be covered by legal professional privilege ("LPP") and would therefore be confidential.

A dispute arose between Akzo and Akcros and the Commission as to whether five documents were subject to LPP. The Commission rejected a request by Akzo and Akcros for the return of the documents and for confirmation by the Commission that all copies of those documents in its possession had been destroyed. Accordingly, Akzo and Akcros referred the matter to the Court of First Instance of the European Communities. Two of the documents were emails, exchanged between Akcros' general manager and "Mr S"; Akzo's coordinator for competition law. Mr S was enrolled as an Advocaat of the Netherlands Bar and, at the material time, was a member of Akzo's legal department, employed on a permanent basis.

A European case called *AM & S v Commission*<sup>1</sup> is authority that, in order to establish privilege, Akzo and Akcros had to show that (i) the communications were made for the purposes of exercising client's rights of defence and (ii) that the communications emanated from independent lawyers. One of the questions that arose here was what constitutes an "independent lawyer". Akzo and Akcros contended that *AM & S* could be interpreted to mean that in-house lawyers were "independent" and that, in the alternative, the law should be widened on this point in any event given that many Member States recognised LPP for the communications of in-house lawyers. The Commission disagreed, stating that properly interpreted *AM & S* excluded in-house lawyers as "independent" and that there were still a number of Member States where being employed and being a member of the relevant regulatory body (i.e. a bar council or law society) was incompatible.

#### **Issues and Findings**

Are in-house lawyers deemed to be "independent" for the purposes of anti-competitive investigations such that their communications are subject to LPP?

No.

#### **Commentary**

During the past eighteen months, the construction industry has become more familiar with "dawn raids" to investigate suspected anti-competitive practices. In this context, it is important to know whether or not communications of in-house lawyers (i.e. advice on potentially anti-competitive practices) will be covered by LPP.

*Are in-house lawyers deemed to be "independent" for the purposes of anti-competitive investigations such that their communications are subject to legal professional privilege?*

No.

<sup>1</sup> [1982] ECR 1575

## Case law Update

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The question of privilege attaching to communications with in-house lawyers in any case is important, hence the intervention of various international bar councils and law societies in this case. Whilst in the UK most in-house lawyers are bound by the standards set by the Solicitors Regulatory Authority, the Court's view was that not all Member States had analogous restrictions. Accordingly, in order to prevent abuse of any kind, the European Commission and the European Court will apply a restrictive approach to claims of LPP attaching to internal communications of in-house lawyers.

### Bodill & Sons (Contractors) Ltd v Harmail Singh Mattu

Technology and Construction Court

Before Mr Justice Akenhead

Judgment delivered on 30 November 2007

#### **The Facts**

By a contract based on the JCT Standard Form of Building Contract, Private Edition with Contractor's Designed Supplement, 1998 edition ("the Contract"), Mr Mattu engaged Bodill to construct new apartments and convert two warehouses. The contract sum was £3.79 million. By 12 October 2007, £3.97 million had been certified although retention was still being held. Clause 30.1 of the contract provided that:

*"the Employer's interest in the Retention in fiduciary as trustee for the contractor and for any nominated subcontractor (but without obligation to invest)"*

Clause 30.5.3 of the standard form goes on to state that:

*"The Employer shall...if the Contractor...so requests at the date of payment under each Interim Certificate place the Retention in a separate banking account (so designated as to identify the amount as the Retention held by the Employer on trust... and certify to the Architect with a copy to the Contractor that such amount has been so placed..."*

In the last week of September 2007, Bodill asked Mr Mattu to set up the requisite bank account and pay the retention money into it. On 19 October 2007, Mr Mattu instructed his bank, the Royal Bank of Scotland, to set up a separate account and they did so within a few days. Mr Mattu instructed the bank to transfer monies into the new account but due to an oversight on the part of the bank this did not happen. Bodill's solicitors wrote to Mr Matthu on 19 October 2007 threatening to seek an injunction to enforce clause 30.5.1 if, within 48 hours, confirmation was not given that the retention had been placed in a separate bank account. On the same day, RBS wrote to Bodill stating that they had been instructed to open a new account in the name of "Harmail Singh Mattu, trading as Urban Surburban re: Bodill retention monies". RBS stated that the account would be opened within two to three working days.

Bodill received no confirmation that the account had been set up and that it had the requisite money in it. Bodill therefore issued proceedings for an injunction on 9 November 2007. By the time the matter came to a hearing (30 November 2007), the account was open and the sum of £123,207.93 had been transferred by Mr Mattu into the account. Two issues were raised at the hearing. Firstly, what was a reasonable time for the account to be set up and secondly, whether the account was sufficiently a trust account as envisaged by the contract.

#### **Issues and Findings**

How long should it take for such an account to be set up?

A reasonable period to set up the account and transfer money is two to three weeks.

What should the status of the account be?

It should be clear to the bank that the account is a trust account or that the sums in it are impressed with a trust. The account should have been designated a trust account.

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*It should be clear to the bank that the account is a trust account or that the sums in it are impressed with a trust. The account should have been designated a trust account.*

## Case law update

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### Commentary

Whilst the principle that retention is held on trust is well established, this case provides much needed authority on whether the bank account envisaged by the JCT scheme should expressly be designated a trust account so that the bank, and others, are aware of the status of the money being held in it. The name of the account is of great practical importance in asserting a right over the monies held by the bank should the employer become insolvent or try to dissipate the funds. This case now provides the necessary clarity that the account should clearly be set up as a trust account and that this must be reflected in its title.

### Brynley Collins & Others v Drumgold & Others

Technology and Construction Court

Mr Justice Coulson

Judgment delivered 12 March 2008

#### The Facts

Mr and Mrs Collins and some of their neighbours ("the Claimants") issued proceedings against seven different parties ("the Defendants") claiming that their properties suffered from inadequate foundations and consequently had suffered from heave damage. The Claimants claimed breach of statutory duty and/or breach of contract against the contractor, and breach of statutory duty against the architect for certifying practical completion and allegedly implying that the properties were constructed to a reasonable standard and fit for habitation. They also claimed breach of statutory duty against the structural engineer employed by the contractor. Some of the Claimants were also claiming against their solicitors who undertook their conveyancing.

The disputes related to the adequacy of the design and construction of ground beams, and therefore involved the consideration of detailed geotechnical and engineering calculations. There were also disputes on causation, limitation and the scope and applicability of the Defective Premises Act 1972. The overall claim was for some £300k. The Claimants issued the claim in the Cambridge County Court. Numerous pleadings were exchanged and disclosure took place. The court gave permission for architectural, engineering and valuation expert evidence to be called and it was estimated that up to nine experts might be instructed. In accordance with CPR 30, the Second Defendant made an application in the TCC to transfer the case from the county court to the TCC. The application was opposed. CPR 30.3(2) sets out the matters which a court hearing such an application must consider. However, there were no reported authorities on the application of these principles to a transfer from a county court to the TCC.

#### Issues and Findings

In considering the matters in CPR 30.3(2), what approach will the TCC adopt to applications for transfer of a case to the TCC from a county court?

The TCC will consider (i) whether the dispute is one of the types of claim listed in the Practice Direction to Part 60 as suitable for the TCC; (ii) whether the financial value of the claim and/or its complexity mean that in accordance with the overriding objective, the case should be transferred to the TCC; and (iii) whether questions of convenience to the parties have any effect on the decision to transfer.

#### Commentary

It is interesting that here complexity was given priority over the amount in dispute. This is important in construction cases as many low value cases are still highly complex, particularly where issues of negligence are involved. Before this case there was no specific authority on transfer of cases from the county courts to the TCC. We now have clear guidance on the factors that will apply to such applications including the likely increase in cost of such transfer and the availability of specialist judges.

*In considering the approach to applications for transfer of a case to the TCC from a county court. The TCC will consider:*

*(i) whether the dispute is suitable for the TCC;*

*(ii) whether the financial value of the claim and/or its complexity mean that in accordance with the overriding objective, the case should be transferred; and*

*(iii) whether questions of convenience to the parties have any effect on the decision to transfer.*

## Case law update

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### Diamond Build Ltd v Clapham Park Homes Ltd

[2008] EWHC 1439 (TCC)

25 June 2008, Mr Justice Akenhead

#### **The Facts**

In early 2007, Clapham Park Homes ("CPH") wished to have refurbishment and regeneration works carried out to a number of houses and flats. Diamond Build Ltd ("DB") were invited to tender for the works. The invitation to tender letter dated 2 March 2007 enclosed a specification and other documents. The specification stated that the contract would be the JCT Intermediate Building Contract 2005 edition With Contractor's Design and that the agreement would be executed as a deed.

DB submitted its tender on 2 April 2007 and on 5 June 2007, CPH sent DB a letter of intent, which was reissued on 7 June 2007. The letter of intent was signed by DB. Amongst other things, the letter of intent set out when the works were to commence and the Contract Sum and also stated that:

- (i) it was CPH's intention to enter into a contract with DB on the basis of the JCT Intermediate Form of Contract, 2005 Edition with further amendments as specified in the Specification;
- (ii) should it not be possible for CPH and DB to execute a formal contract in place of the letter of intent then CPH would reimburse DB their reasonable costs up to and including the date on which DB was notified that the contract would not proceed provided that the Supervising Officer was satisfied that those costs were appropriate and that in any event total costs would not exceed £250,000; and
- (iii) the undertakings given in the letter of intent would be wholly extinguished upon execution of the formal contract.

Following commencement of the works, the contract documents were drawn up and signed by CPH and sent to DB for signature. In the meantime, DB negotiated with a subcontractor to enter into a JCT form of subcontract consistent with the main contract arrangement and interim certificates were issued using a JCT proforma. However, DB did not sign and return the contract documents. Disputes arose between the parties and on 15 November 2007, CPH wrote to DB giving notice that no further work was to be carried out under the letter of intent. DB responded stating that the contract was based on the JCT Intermediate Form of Contract, 2005 Edition. The question of what contract terms governed the parties was referred to the TCC.

#### **Issues and Findings**

Had the letter of intent been superseded by the contract documents?

No.

Could it be argued that CPH were estopped from relying on the letter of intent?

No.

#### **Commentary**

At the outset of his judgment the Judge commented that this is a case which illustrates the dangers posed by letters of intent which are not followed up promptly by the parties' processing of the formal contract anticipated at the letter of intent stage. Even though the parties in this case essentially acted as if the formal contract documents had been executed, on the basis of the law as it stands, the letter of intent was still held to be in force thus limiting the recourse of the contractor against the employer.

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*Even though the parties in this case essentially acted as if the formal contract documents had been executed, on the basis of the law as it stands, the letter of intent was still held to be in force thus limiting the recourse of the contractor against the employer.*

## Case law update

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### M&J Polymers Ltd v Imerys Minerals Ltd

Commercial Court

Mr Justice Burton

Judgment delivered 29 February 2008

#### **The Facts**

M&J had been supplying dispersant chemicals to Imerys since 1991. In January 2005, the parties signed a new supply contract. The contract which had a three-year minimum term, contained a take or pay and termination clause which stated:

*"5.5 Take or pay: the Buyers collectively will pay for the minimum quantities of Products as indicated in this Article...even if they together have not ordered the indicated quantities during the relevant monthly period."*

and

*"16.3 The Buyer may at its option terminate this Agreement with immediate effect and without incurring any liability to the Supplier in the event that the Supplier (i) delivers Product which fail [sic] to meet the significant specification requirements...on more than two occasions in any given three month period, provided Supplier is informed timely [sic] of such breaches and such breaches are confirmed by an independent analytical laboratory."*

Imerys purportedly terminated the supply contract in May 2006 by a notice that M&J treated as an unlawful repudiation of contract, and which M&J accepted. M&J then made a claim pursuant to the take or pay clause in respect of a shortfall of deliveries of the dispersants up to the date of the termination. Imerys argued that the take or pay clause amounted to a penalty and refused to pay. M&J said that the effect of the take or pay clause was to establish a debt and so the law as to penalties did not arise.

#### **Issue and Findings**

Was the take or pay clause a penalty?

Whilst take or pay clauses are capable of being construed as penalties, this particular clause was not a penalty.

#### **Commentary**

There appears to be no previous authority as to whether a take or pay clause is a penalty. The Judge rejected the "simplistic" argument that the sum claimed was a debt for a price and that, accordingly, the law of penalties did not apply. In his view, whilst take or pay clauses were susceptible to the rule against penalties, here, the clause was commercially justifiable, did not amount to oppression, was negotiated and freely entered into between parties of comparable bargaining power and did not have the predominant purpose of deterring a breach of contract. Therefore the clause was enforceable. Given the broad commercial usage of such clauses, one might question to what extent, if ever, a court will find that that a take or pay clause is a penalty.

### Reinwood Ltd v L Brown & Sons Ltd

#### Part 3 - the House of Lords<sup>2</sup>

Lord Hope of Craighead, Lord Scott of Foscote, Lord Walker of Gestingthorpe, Lord Brown of Eaton-under-Heywood, Lord Neuberger of Abbotsbury:

Judgment delivered 22 February 2008

#### **The Facts**

The appellant contractor, Brown appealed against a Court of Appeal decision which had held that Brown had not been entitled to determine a contract (JCT Standard Form 1998 edition) between it and the respondent employer, Reinwood .

*Here, the clause was commercially justifiable, did not amount to oppression, was negotiated and freely entered into between parties of comparable bargaining power and did not have the predominant purpose of deterring a breach of contract. Therefore the clause was enforceable.*

<sup>2</sup> For parts 1 and 2, please see our 2007 Annual Review: [www.fenwickelliott.co.uk/reviews](http://www.fenwickelliott.co.uk/reviews)



## Case law update

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Brown had claimed that Reinwood had unfairly withheld a sum which was due under the contract. There was a specified completion date under the contract as well as provisions for extensions of time ("EOT"), damages for non-completion and the right of the contractor to determine the contract on certain specified defaults by the employer.

On 14 December 2006, Reinwood had issued a Certificate of Non-compliance ("CNC") which was a condition precedent under the contract to Reinwood's entitlement to LADs. On 11 January 2007, Reinwood then issued an interim payment certificate ("IPC") in which the final date for payment was 25 January 2007. On 16 January 2007, the Employer was informed by the architect that it was about to issue an EOT which would set a later completion date. On 17 January 2007, Reinwood issued a Withholding Notice based on the LADs to which it became entitled on the strength of the CNC of the previous December.

On 20 January 2007, Reinwood paid Brown the sum stipulated under the IPC, less the value of the LADs claimed. On 23 January, the architect issued an EOT to 10 January 2007 thus making the CNC which formed the basis of the withholding notice invalid. The following day Brown ordered Reinwood to pay the outstanding balance due under the IPC by 25 January, the final date for payment. Reinwood did not pay by the due date and citing this as a specified default under the contract Brown determined its employment. Brown submitted that Reinwood was entitled to rely on the CNC at the time it served the Withholding Notice. However, Reinwood had lost that entitlement by the final date for payment since it could no longer rely on the CNC as a basis for withholding payment from Brown.

Under a decision in the Court of Appeal it was held that Reinwood's right to LADs crystallized at the time of the Withholding Notice thus upholding its right to levy LADs. The effect of the EOT meant that the balance of the damages properly due to Brown should be paid in a reasonable time though not by the final date for payment. Brown appealed to the House of Lords.

### **Issues and Findings**

Was Reinwood entitled to withhold the balance of the LADs from Brown?

Yes. The effect of the EOT did not remove Reinwood's right to rely on the CNC.

Would the decision have been different if the EOT had been granted before the IPC had been issued?

In those circumstances, Reinwood would not have been entitled to the LADs as a result of non-completion since the EOT would have cancelled out the act of non-completion at the time the IPC was issued on 11 January 2007.

What if the EOT had been issued before the date on which Reinwood made the payment in advance of the due date?

It was not clear, except that it was a deciding factor that Reinwood had made the payment early in reliance on its Withholding Notice.

### **Commentary**

Although the effect of the extension of time was to cancel the non-completion certificate, such a cancellation was not retrospective in its effect. Contractors will have to be careful if they seek to rely on an EOT that falls before the final date for payment as they may still suffer from a reduced payment in interim LADs. More importantly, the contractor apparently cannot rely on the "final date for payment" where payment by the employer has been made before the due date. In those circumstances it remains unclear when the repayment of LADs would be due. One thing is clear, however, the contractor cannot rely on the employer's failure to repay the balance as valid grounds for determining the contract.

*Was Reinwood entitled to withhold the balance of the LADs from Brown?*

*Yes. The effect of the EOT did not remove Reinwood's right to rely on the Certificate of Non-Compliance.*

*The effect of the extension of time was to cancel the non-completion certificate, and such a cancellation was not retrospective in its effect.*

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