



Fenwick Elliott

The construction & energy law specialists

# Annual Review

A round-up of key developments in the construction, engineering and energy arena



## 2010/2011

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Deal or no deal: practical advice when preparing to submit a tender

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Assessing claims for extensions of time: concurrency and apportionment

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Expert evidence: getting into the hot tub

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Preparing for the implementation of the new Bribery Act

## ANNUAL REVIEW 2010/2011

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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 in the building, engineering and energy sectors, including oil, gas, nuclear and power.

Our expertise includes procurement strategy, contract documentation and negotiation, risk management and dispute avoidance, project support, and decisive dispute resolution, including international arbitration, mediation and adjudication.

Our approach is commercial. We aim to add value to transactions and find practical solutions to disputes.



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**Fenwick Elliott**

The construction &amp; energy law specialists


**Simon Tolson**

Senior partner

## First word

*It is my delight to introduce our 2010 Fenwick Elliott Annual Review. It has been a year positively buzzing with action, jostled by the dynamics of the macro-economic squeeze exhibited in both the courts and outside in various forms of engagement from bloody battle to tree hugging. As always, our Review seeks to provide practical informed advice and update you on all the latest legal developments.*

Given how belts have tightened there is no doubt surprise in some quarters that adjudication referral numbers have shrunk this year. Data amongst ANBs shows this is universal, rather different from the 2009 upswing. However, the use of arbitration and mediation in the UK has risen dramatically in the wake of the financial crisis, according to research published by TheCityUK's legal services and dispute resolution group. The report, *Dispute Resolution in London and the UK 2010*, which was released on 20 September 2010, contained figures which show that the total number of disputes resolved through arbitration and mediation in the UK reached 34,541 in 2009, a 78% increase on the 2007 figure of 19,384.

Yet we are in a period of mixed data, and not helped by the Office for National Statistics' embarrassing errors this year. If what we read is to be believed, the latest figures from the Insolvency Service showed a 22.5% drop in construction insolvencies in the second quarter of this year, down to 86 from 111 in the same period last year. You might be forgiven for thinking we are in a boom. However, it is generally recognised that the impact of spending cuts announced in the Comprehensive Spending Review on 20 October is going to hit construction very hard and economists are gearing up for a substantial rise in failing businesses and mad scrambles for fast legal remedies.

If you are looking for the next big thing, despite this coalition government's reticence, it appears they see a role for new nuclear projects, provided that there is no subsidy requirement. This government has said it is for private sector energy companies to construct, operate and decommission new nuclear plants. Not exactly encouragement; small wonder. Yet further asset life extensions are being sought for our existing nuclear stock to see us through the danger period as reliable smooth power wanes. So watch this space; 2011 onwards will be very busy in this field on a number of existing nuclear sites and the transmission lines of the grid.

The nation's competitiveness in this field was not exactly helped by another lead balloon, in the shape of the Chief Secretary to the Treasury's announcement that Forgemasters would no longer be granted an £80m loan promised by the Labour government in March this year, to help buy and install a 15,000-tonne forging press for developing large steel components for the next generation of nuclear reactors.

Our international practice continues to flourish. The character of our work ranges from front-end project advice to managing major ICC arbitrations - a considerable logistical task to service, administer and, if necessary, fight! We are now involved in many of the world's most important oil and gas developments, including in the Indian Punjab, Teesside, the Kashagan field in Kazakhstan, the Baku-Tbilisi-Ceyhan crude oil pipeline project, the Shah Deniz natural gas development in the Caspian, major gas fields and pipelines in Turkmenistan, power plant/desalination plant consortium disputes on projects in Kuwait, an LPG condenser vendor dispute in Libya and bond disputes in Iran.

We have much also going on for our Korean clients, whilst on the back of our Romanian infrastructure work, we established this year a formal association with Romanian construction law specialist, SDC & Partners and we continue to expand our work in that region, and Hungary and Bulgaria too.

Our work in the domestic sector is equally varied and exciting. We have matters on everything from failed engineered timber-framed schools to hotels, bridges, highways, hospitals, Olympic venues, universities, airports, datacentres, to complex delay analysis cases. Yes, Fenwick Elliott has been there over the past year.

We hope that as a firm we have shown we are commercial, easy to talk to, available and, most importantly, responsive to your needs, and I would urge you to communicate with us as your feedback is tremendously important to us.

**Simon Tolson**



**Fenwick Elliott**

The construction & energy law specialists



Jeremy Glover

Editor

## In this issue

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*Welcome to the fourteenth edition of our Annual Review. As always, our Review contains a round-up of some of the most important developments from the past 12 months including our customary summaries - from page 42 - of some key legal cases and issues, taken from both Dispatch and the Construction Industry Law Letter.*

Simon has commented on the increasing number of international arbitrations we are now working on. One relatively new feature of international arbitration is the expert hot tub; we discuss exactly what this means on pages 8-9. The hot tub may also be coming to the UK. The TCC, as part of the revised court guide which we review on pages 4-5, specifically recognises the possibility of introducing the expert hot tub to trials. The TCC Guide also stresses the importance of mediation. We summarise, on pages 6-7, the findings of a report entitled "*Mediating Construction Disputes*" carried out by a team headed by Nicholas Gould and Claire King. We are particularly proud that that report has been nominated for an award for the best communication or publication at the 20th anniversary CEDR Awards for Excellence.

Of course, we have not neglected adjudication and other forms of dispute resolution. At pages 10-12, Karen Gidwani, in an extract from a paper given at our "*Managing and Resolving Construction Disputes*" seminar discusses the impact of insolvency when it comes to enforcing adjudication decisions. Jourdan Edwards then follows that article with a look at the Part 8 process - a possible alternative to adjudication.

As we move into 2011, one of the main talking points is the introduction in April next year of a new Bribery Act. This is widely drawn and, as we discuss at pages 30-32, it is clear that the new coalition is just as determined as its predecessor to ensure that commerce is undertaken in an open and transparent manner.

Our Review this year also features, at page 32, an article by Tom Young on the recoverability of cost under the FIDIC form. We find that FIDIC crops up almost everywhere, even in Sierra Leone, where as part of our work for the Construction & Development Partnership, we found local construction contracts clearly following the FIDIC format. You can find out more about our work with CODEP, helping to promote literacy in Sierra Leone, on page 41. We all recognise here the importance of giving something back and our pro bono programme of work has included work on the building of new accommodation units in Chalfont St Peter for the charity BBuild Aid for Epilepsy.

Last year's Review discussed the fall-out from the *West Tankers* case, where European Court of Justice apparently put a block on the ability of the English courts to protect arbitration clauses by issuing anti-suit injunctions where the parties have commenced proceedings in a foreign court. Unsurprisingly, there have been further developments this year as we discuss in our International Arbitration case law round-up to be found on pages 34-37.

Another return feature is our article by Stacy Sinclair on pages 39-40 on the new RIBA Agreements 2010. Last year she commented on the Association of Consultant Architects's response to the RIBA 2007 contracts. This year the RIBA hit back with a revised form of contract. Our discussion of contractual developments also includes a commentary by Chris Farrell on pages 37-38 on the latest judicial comments on the NEC3 form and some typically robust practical advice from Simon Tolson, on pages 22-24 on the steps you should take when considering putting together a tender. Unsurprisingly too, there have been further high profile challenges to tendering procedures over the past 12 months, a trend that is bound to continue. On pages 25-27 we discuss some of the issues parties to such challenges will need to consider in relation to the disclosure of documents.

Finally, we take a look at "that Scottish case", or the dispute between City Inn and Shepherd Construction which has been rumbling on for some time. In July of 2010, the Scottish Inner House - or Court of Appeal - gave its verdict. Igor Bichenkov reviews at pages 15-17 what the court said about time bars, whilst in the article that follows, I take a look at the impact of the case on making a claim for an extension of time.

As always, I'd welcome any comments you may have on this year's Review. Just email me at [jglover@fenwickelliott.com](mailto:jglover@fenwickelliott.com)

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Jeremy Glover

## TCC Guide

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# Changes at the TCC

*There are a number of changes afoot in the way in which disputes are resolved in England and Wales. Readers will be familiar with the changes being made to the Housing Grants Act, including the extension of adjudication to all construction contracts, and not just those evidenced in writing. The Review of Civil Litigation Costs, undertaken by Lord Justice Jackson, was published on 14 January 2010. This report proposed a number of changes on the way the courts and litigation process might work. Closer to home, on Friday 1 October 2010, The Technology & Construction Court ("TCC") issued a revised Guide. We commence this year's Review with a look at some of these changes.*

## The TCC Revised Court Guide

The key points to emerge from the revised Guide are as follows:

### Email, electronic working

As a result of a trial running since 20 July 2009, parties have been able to issue all TCC claims in the TCC Registry in London electronically. Further, all proceedings, whether the claims were commenced electronically or by a paper claim form issued after that date, can be continued by taking advantage of the electronic issuing and filing process (known as "eworking" at the TCC). It is the clear intent of the TCC to continue with this and extend eworking to courts outside London.

### E-disclosure

In the wake of today's technological advances, this is not an unsurprising development. It is mirrored by the Practice Direction 31B which also come into effect on 1 October 2010, which deals with electronic disclosure. In short, this has widened the scope of what might be considered a document. Paragraph 5 of the new Practice Direction sets out a series of definitions for terms contained in the new Practice Direction itself, one of which is "Electronic Document", which is given the broad definition of "any document held in electronic form." This will include not only "email and other electronic communication" such as "word-processed documents and databases" but also "text messages and voicemail." E-disclosure means that parties to a dispute may have to give particular thought to the storage, retrieval and production of a wide variety of perhaps surprising documents and data. For example:

- (i) Do you have a policy for deleting email and other electronic documentation that might need to be temporarily suspended?
- (ii) Do you have a system in place for preserving documents and data or keeping text or other sms messages?
- (iii) Do you know where all your PCs, laptops and mobile phones are? Who has control of them?
- (iv) Are back-ups easily available? Can you recover information that has been deleted in the normal course of business?

This is just the type of information you may need to record in a disclosure statement outlining the steps you have taken to search for relevant documents.

### Costs

The TCC Guide makes it clear that judges are going to keep a closer eye on costs. If the judge in charge of a case considers that any particular aspect has unnecessarily increased costs, such as what are termed "prolix" (i.e. Unnecessarily overlong) pleadings or witness statements, then they may make a costs order disallowing costs or ordering costs to be paid, either on the basis of a summary assessment, or by giving a direction to the costs judge as to what costs should be disallowed or paid on a detailed assessment. Equally, if at any stage the judge considers that the way in which the case has been pleaded is likely

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***Rule 1.1.2: "... The Guide is designed to ensure effective management of proceedings. It must always be remembered that if parties fail to comply with these requirements, the court may impose sanctions including orders for costs."***

## TCC Guide

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to lead or has led to inefficiency in the conduct of the proceedings or to unnecessary time or costs being spent, he or she may order that the party should re-plead the whole or part of the case and may make an appropriate costs order disallowing costs or ordering costs to be paid.

The TCC has been at the forefront of the judicial drive to cut costs. It seems clear that the various litigation arising out of the construction of the new Wembley Stadium has led to judicial thinking. For example in the case of *Brookfield Construction (UK) Ltd v Mott MacDonald Ltd*<sup>1</sup>, Mr Justice Coulson was also concerned about the level of future costs.

At the Case Management Conference, he directed, and the parties' agreed, that costs would only be recoverable for the proposed sub-trial beyond the estimates given in December 2009, if the party in question was able to demonstrate an unforeseen increase which, in all the circumstances, the Judge concluded was reasonable. In this way the Court had achieved a form of costs control which was reasonable, proportionate and in accordance with the overriding objective.

## Alternative Dispute Resolution (ADR)

Unsurprisingly, the Guide stresses the importance of ADR, noting both that ADR may be appropriate before the proceedings have begun or at any subsequent stage and that the later ADR takes place, the more the costs which will have been incurred, often unnecessarily. As we set out on pages 6-7 below, Fenwick Elliott has been involved in research entitled *Mediating Construction Disputes* which provides further evidence of this. Equally unsurprisingly, the TCC Guide lays additional stress on two Court-backed ADR initiatives, Early Neutral Evaluation ("ENE") and the Court Settlement Process. The take-up of ENE has been low. Perhaps one reason for this is that a party with a weak case will much prefer taking its chances in a mediation or other negotiation-style ADR rather than submitting its case for an informal evaluation or judgment.

The Court Settlement Process ("CSP"), a form of mediation carried out by TCC judges, was more of a hit. During a pilot scheme carried out in 2007/8, 14 out of 18 cases were settled. However, again, experience suggests that this is not popular with parties. This may be because of the perceived different skill sets between a judge who makes a decision or finding and a mediator who is specifically trained not to do that. Of course, the judge who took part in the CSP would not, if the case did not settle, hear the actual trial.

## Expert evidence

The revised Guide contains an interesting discussion on the presentation of expert evidence. It notes that particularly in large and complex cases where the evidence has developed through a number of experts' joint statements and reports, it is often helpful for the expert at the commencement of his or her evidence to provide the court with a summary of their views on the main issues. This can be done orally or by way of a PowerPoint or similar presentation. The purpose is not to introduce new evidence but to explain the existing evidence.

It then lists the ways in which expert evidence is given. Most of this is fairly standard, but the section on expert evidence ends by referring to an Australian practice also used in International Arbitration where the experts for all parties are called to give concurrent evidence, colloquially referred to as "hot-tubbing". The Guide notes that, frequently, hot-tubbing allows the extent of agreement and reason for disagreement to be seen more clearly. The Guide also suggests that the TCC will look favourably on this process, noting that the giving of concurrent evidence is frequently consented to by the parties, and the judge will consider whether, in the absence of consent, any particular method of concurrent evidence is appropriate in the light of the provisions of the CPR. We discuss this relatively new process to the UK at least - in more detail at pages 8-9 below.

## Conclusion

These may seem relatively minor changes, but once implemented they will ensure that the TCC retains its position as one of the most efficient courts in the UK.

**Rule 5.1.6: "If the judge considers that any particular aspects has unnecessarily increased costs, such as prolix pleadings or witness statements, the judge may make a costs order ..."**

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<sup>1</sup> [2010] EWHC 659 (TCC)

## Mediating Construction Disputes

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# Mediating Construction Disputes – An Evaluation of Existing Practice

*In June 2006, the TCC joined forces with the Centre of Construction Law and Dispute Resolution at King's College London to obtain and utilise data from the TCC in London, Birmingham and Bristol, in order to analyse the use of mediation in construction disputes. At Fenwick Elliott we were proud to be at the forefront of the preparation and drafting of the report entitled, Mediating Construction Disputes - An Evaluation of Existing Practice. The report was used by Mr Justice Jackson in his Review of Civil Litigation Costs and we have also been shortlisted as a finalist for the CEDR Awards 2010 in the "Best communication or publication" category.*

### Summary of the research

The report was written by Nicholas Gould and Claire King of Fenwick Elliott LLP and Philip Britton, a professor at the Centre of Construction Law and Dispute Resolution at King's College London. The survey came about because much more has been written about the theory of mediation, and its proper place in the avoidance and resolution of disputes in construction, than about its actual use; this report combines hard detail about its practice within UK construction litigation, with a summary of the existing knowledge about mediation in the common law world and about its relation to other formal and informal methods of dealing with construction disputes.

The research demonstrates the savings in time and cost that mediation brings to the UK construction industry. In summary, the findings show that:

*Lord Justice Jackson:  
"mediation should be promoted with particular vigour for those low value construction cases in which conventional negotiation is unsuccessful."*

- Mediation now plays an important role in the TCC and is an indispensable tool for settling cases before they go to trial.
- Parties do not generally wait until a hearing is imminent before attempting to settle their dispute, and successful mediations are mainly carried out during the exchange of pleadings, or as a result of disclosure.
- Where a settlement was reached prior to judgment, the most successful method used was conventional negotiation, not mediation.
- In the vast majority of cases, mediation is undertaken on the parties' own initiative. Out of the successful mediations only 22% were taken as a result of the Court suggesting it. Even where unsuccessful, 91% of mediations occurred as a result of the parties' own initiative.
- Surprisingly, only a small number of typical mainstream construction disputes (such as claims for variations, delays and site conditions) come before the Court. The common disputes that reach the TCC are those involving defects, payment issues, design issues and professional negligence.
- For the vast majority of mediations in construction disputes, the mediator is appointed by agreement of the parties, rather than by an appointing body.
- The cost savings attributed to successful mediations are a real incentive for parties to consider mediation.

This last point is significant. Only 15% of respondents reported savings of less than £25,000; 76% reported savings in excess of £25,000; and the top 9% saved over £300,000. The cost savings are generally proportional to the cost of the mediation, suggesting higher value claims spend more money on mediation, presumably because they realise that the potential savings resulting from mediation will be greater.

This suggests that the incentive to consider mediation provided by the Civil Procedure Rules (namely, cost sanctions) is effective and that advisers to parties to construction

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## Mediating Construction Disputes

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disputes now routinely consider mediation to try and bring about resolution of the dispute. The parties themselves generally decided to mediate their dispute at three key stages: as a result of exchanging pleadings; during or as a result of disclosure; and shortly before trial. Of successful mediations, a higher percentage of respondents whose mediations had taken place during exchange of pleadings and shortly before trial believed that the dispute would have progressed to judgment if mediation had not taken place. This potentially suggests that mediation was comparatively more successful at these stages.

The vast majority of mediators were legally qualified. Only 16% were construction professionals. This perhaps diminishes the strength of any argument for greater regulation of mediation and supports the market-based approach adopted by the recent EC Mediation Directive for 2008/52/EC.

In the vast majority of mediations, the parties were able to agree between them on the mediator to appoint. Appointing bodies were only used by 20% of respondents. There was also a tendency to use the same mediators again and again, suggesting a comparatively mature market with parties' advisors suggesting well known mediators within the construction dispute field.

As the construction industry is particularly innovative in designing a wide range of dispute resolution methods, both domestically and internationally, the report also considers the broad spectrum of dispute resolution techniques utilised in the construction industry. In addition to the widespread use of mediation, the report looks at the use of an independent intervener; the dispute resolution adviser; the ICE's conciliation procedure; project mediation; dispute boards; and multi-tiered dispute resolution. The extensive choice available to parties when forming a construction contract does provide a degree of flexibility, allowing them to decide how they prefer their dispute to be resolved, managed and controlled.

Furthermore, regulation for the training, appointment and performance of mediators, as well as the professional backgrounds and skills of mediators in construction disputes, are also discussed in the report.

### The Jackson review

The results from the TCC / King's College London research project have been supported by Lord Justice Jackson in both his preliminary and final reports of his review of civil litigation costs. In chapter 29 of the final report, he recommended that "mediation should be promoted with particular vigour for those low value construction cases in which conventional negotiation is unsuccessful".

### The hard facts

Lord Justice Jackson further emphasises his support for the research in his foreword to the recent mediation report. He notes in the foreword to his Final Report that: "Empirical data are far more valuable than the anecdotal evidence about litigant behaviour which sometimes informs decisions."

His comments echo the sentiments of Professor Dame Hazel Genn of UCL, co-director of the Centre for Empirical Legal Studies in the Faculty of Law at University College London, who has often criticised civil justice policy and practice as being based too much on anecdotes and assumptions, and too little on solid empirical evidence. The aim of this research is a response to just that. It attempts to dispel those anecdotes and assumptions employed when considering mediation in the resolution of construction disputes, by providing the detail of the data gathered.

The research may only consider one form of alternative dispute resolution (ADR), in a specialised and complex category of the High Court; however, it sets the ball rolling for future research on the use of ADR.

*Mediating Construction Disputes – An Evaluation of Existing Practice* can be downloaded at: [www.fenwickelliott.com/mediating-construction-disputes-download](http://www.fenwickelliott.com/mediating-construction-disputes-download).

*Mediation now plays an important role in the TCC and is an indispensable tool for settling cases before they go to trial.*

## Expert evidence - hot tubbing

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# Expert evidence – hot tubbing

*One of the most interesting proposals contained in Lord Justice Jackson's fundamental review of the rules and principles governing the costs of civil litigation, published on 14 January 2010, was the proposal to pilot the use of the Australian practice of concurrent expert evidence, colloquially known as witness conferencing or "hot tubbing"; an idea that is beginning to play an increasing role in International Arbitration as well. The basic idea is that experts from the same discipline are sworn in at the same time and the tribunal then chairs a discussion between the experts. The format will obviously differ from hearing to hearing, but one way to proceed is to use any joint expert statement (recording the matters upon which the experts disagree) as an agenda. Counsel are able to put questions to the experts and the experts themselves can question each other. The suggestion made is that hot tubbing provides a cost-effective and efficient means of cutting through what the expert evidence really means and what the experts themselves genuinely believe. Is that right or is this just a fad, whose popularity has spread simply because of a name, which is both catchy and a boon for commentators and humourists alike?*

As noted above at page 5, Lord Justice Jackson's proposal has been adopted as part of the Revised TCC Guide. The Guide notes that often there is a stage prior to this when each of the experts gives evidence conventionally and is cross-examined on general principles and other matters. The experts are then invited to give evidence concurrently on particular issues. Procedures vary but, for instance, a party may ask its expert to explain his or her view on an issue, then ask the other party's expert for his or her view on that issue and then return to that party's expert for a comment on that view.

Alternatively, or in addition, questions may be asked by the judge or the experts themselves may ask each other questions. According to the Guide, the process is often most useful where there are a large number of items to be dealt with and the procedure allows the court to have the evidence on each item dealt with on the same occasion rather than having the evidence divided sometimes by a number of days, as different experts are cross-examined.

This theory is confirmed by those with experience of the process in Australia. Gary Edmond, a professor at the University of New South Wales School of Law<sup>1</sup>, has said of hot tubbing:

*"The openings of these sessions tend to be more informal than examination-in-chief (that is, direct) and cross-examination, which are associated with conventional adversarial proceedings... at least part of their testimony, experts are freed from the constraints of formally responding to lawyers' questions. During concurrent-evidence sessions, expert witnesses are usually presented with an opportunity to make extended statements, comment on the evidence of the other experts, and are sometimes encouraged to ask each other questions and even test opposing opinions."*

His conclusion is interesting, noting that whilst the practice of hot-tubbing:

*"is not a panacea for partisanship, adversarial bias, or the difficulties created by expert disagreement and decision making in the face of uncertainty... [it does have] the potential to improve communication and comprehension in the courtroom."*

The basic idea behind hot-tubbing seems to be that as the process is more informal or relaxed, there will be the opportunity for the experts to engage in constructive discussion. Ideally, this will encourage and/or enable them to reach a higher degree of consensus. As the experts are being questioned together there is the opportunity for detailed discussion on particular issues or even the opportunity for immediate rebuttal, something that is impossible with traditional cross-examination.

Certainly, one can see that by having the experts answer questions together, it will be easy to identify areas where there is true disagreement and it will be easier for an expert to clarify or correct errors or inaccuracies in his evidence, partly because of the less-

**TCC Guide, rule 13.8.2(d):**  
***"The process is most useful where there are a large number of items to be dealt with ... Frequently it allows the extent of agreement and reason for disagreement to be seen more clearly."***

<sup>1</sup> Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure (2009).

## Expert evidence - hot tubbing

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adversarial nature of the process, perhaps partly because of immediate peer pressure. An expert knows he is likely to be picked up on any such points by a colleague sitting next to him. In theory, it may also be of benefit where there are complex and complicated issues. Cross-examination, with its emphasis on short responses, is not always the best forum to do this. Hot-tubbing would seem to allow for a more expansive approach to explanations of more tricky areas.

However, this is also one of the potential risks of the system. In a more relaxed environment, will your expert perhaps concede more easily ground he would hold over rigorous cross-examination? Whilst you would hope that this is a problem that would never arise, partly because if there were concessions that needed to be made, a good expert would already have indicated to you what they were, and partly because a party has the right to expect that an expert is properly and thoroughly prepared for every circumstance. Hot-tubbing is no different to cross-examination in that regard. However, it is fair to say that as with any new process, those with experience will, at least initially, have an advantage which they may be able to press home.

Obviously, too, the Tribunal must be fully prepared. Unlike cross-examination, it is the Tribunal that takes the lead. This does raise one potential problem. Does this impose a restraint on a party's right and ability to lead the case it wants and to put the questions it wants? Whilst hot tubbing will enable parties to see which issues are of greatest concern to the Tribunal at perhaps an earlier stage in proceedings than might otherwise be the case, there seems to be a risk that a party might not have the opportunity to make all the points they need to raise or bring forward all the documents that they would like the Tribunal and experts to see.

It is important, therefore, that the advocates take a positive and active role in the process and are not passive bystanders allowing the Tribunal to take complete charge. Perhaps the best way is for the Tribunal to start the process off, and then allow input from the advocates as the discussion progresses.

Also, when it comes to questions of credibility and independence, the informal relaxed atmosphere (and this of course can only be in relative terms) of the hot tub does not really seem to be the ideal forum to examine such issues. Most parties would want these to be brought out in formal cross-examination. Perhaps, therefore, there is scope for a two-stage process involving both formal cross-examination and the joint session.

Finally, there is the question of costs, the real driver of the Jackson Report. However, here one must question whether there is any real benefit. Hot-tubbing takes place during the hearing. Therefore all the costs of the hearing will have already been incurred. Further, an expert will have to prepare just as thoroughly for the joint session as he would for cross-examination. Accordingly, it is difficult to see where there will be any saving in costs at all.

## Conclusion

Hot-tubbing is already a feature of International Arbitration, and whilst strictly whether it becomes a feature of litigation (or perhaps adjudication) in the UK might well depend on the success (or otherwise) of the pilot scheme. It does seem likely that it is going to become more prevalent in the UK. Therefore it cannot be ignored.

So what steps can you take to ensure that you, your expert and legal team are properly prepared? The first is to understand the process as best you can. Ensure that a clear set of ground rules has been agreed so that everyone understands how the process is going to run. You should then ensure that everyone understands those rules.

There is nothing unusual about the second step: make sure that everyone, from expert to advocate, is properly prepared and thoroughly understands what the key issues are and what issues in particular you want to raise before the Tribunal. Hot tubbing does not provide any easy answer, as the expert who has not done his homework will find to his cost, whether hot tubbing with his peers or being subject to cross-examination in the traditional way.

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*Hot tubbing is "not a panacea for partisanship, adversarial bias, or the difficulties created by expert disagreement and decision making in the face of uncertainty."*

## Adjudication - Insolvency

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# Latest developments in adjudication - insolvency

*Our regular seminars continue to be a great success. This year we held four on topics ranging from public procurement, the education sector and, naturally, adjudication. Karen Gidwani, at the Managing and Resolving Construction Disputes Seminar held on 29 September 2010, updated our audience on the latest developments in adjudication. In an extract from her paper she discusses the effect of insolvency when it comes to enforcing adjudicators' decisions.*

### The basic position at law

In the case of *Pilon Ltd v Breyer Group*, Breyer argued that any judgment to enforce the adjudicator's award should be stayed given Pilon's financial position. Although Mr Justice Coulson concluded that the adjudicator's decision was not enforceable, he considered whether he would have ordered a stay of execution had he found that the adjudicator's decision should be enforced. The Judge concluded that had he been minded to enforce the adjudicator's decision, either in whole or in part, then he would have granted the stay of execution sought by Breyer.

The Judge started by reviewing the caselaw on staying the execution of a judgment enforcing an adjudicator's award. He started with his own judgment in the case of *Wimbledon Construction Company 2000 Ltd v Derek Vago*<sup>1</sup> which summarised the relevant principles as follows:

- "26 ... d) *The probable inability of the claimant to repay the judgment sum (awarded by the adjudicator and enforced by way of summary judgment) at the end of the substantive trial or arbitration hearing, may constitute special circumstances within the meaning of Order 47 Rule 1 (1)(a) rendering it appropriate to grant a stay (see Herschel Engineering Ltd v Breen Property Ltd (unreported) 28th July 2000, TCC).*
- e) *If the claimant is in insolvent liquidation or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted (see Bouygues and Rainford House Ltd v Cadogan Ltd (unreported) 13<sup>th</sup> February 2001, TCC).*
- f) *Even if the evidence of the claimant's present financial position suggested that it is probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:*
- i) *The claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made (see Herschel), or*
  - ii) *The claimant's financial position is due, either wholly, or in significant part, to the defendant's failure to pay those sums which were awarded by the adjudicator (see Absolute Rentals v Glencor Enterprises Ltd (unreported) 16<sup>th</sup> January 2000, TCC)."*

Mr Justice Coulson then referred to another of his judgments, this time *Mead General Building Ltd v Dartmoor Properties Ltd*.<sup>2</sup> In that case, the claimant was the subject of a CVA which was relied on by the defendant in support of an application for a stay. The Judge said in that case:

- "12 ... a) *The fact that a claimant is the subject of a CVA will be a relevant factor for the court to take into account when deciding whether or not to grant a stay under RSC Order 47.*
- b) *However, the mere fact of the CVA will not of itself mean that the court should automatically infer that the claimant would be unable to repay any sums paid out in accordance with the judgment, such that a stay of execution should be ordered.*
- c) *The circumstances of both the CVA and the claimant's current trading position will be relevant to any consideration of a stay of execution."*

*It seems to me most unlikely that Parliament intended that provisions intended to improve the efficiency of the construction industry should determine priorities between the employer and an insolvent contractor's creditors.*

<sup>1</sup> [2005] BLR 374

<sup>2</sup> [2009] EWHC 200 (TCC) (4 February 2009)

## Adjudication - Insolvency

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### *Pilon Ltd v Breyer Group*

The Judge clarified the point that, it being their application, the burden of proof lay on Breyer to establish that the money was unlikely to be repaid. Three questions arose. Firstly, whether Pilon's financial position was significantly different from its position at the time when the contract was made; secondly, whether Pilon's financial position was due to Breyer's non-payment of the sum awarded by the adjudicator; and finally whether, on the evidence, there was a significant risk that any sums paid by Breyer to Pilon would not be repaid if or when there was a final determination in Breyer's favour. There was no dispute that Pilon's financial position had changed significantly since the contract was made. Turning to the second question, the Judge observed that the adjudicator had awarded Pilon £207,000 whereas when Pilon's CVA was agreed, the total owed to Pilon's creditors was in excess of £2.7 million. Therefore, on the face of the evidence, the sum owed by Breyer was less than 10% of the sums Pilon owed to others. The Judge concluded that it was not possible on these figures for Pilon to demonstrate that their financial position, and the CVA in particular, was caused by Breyer's non-payment of the sum awarded by the adjudicator. The Judge also stated that whilst Pilon had raised the issue of non-payment by Breyer of sums arising from other contracts, this was irrelevant and those sums were disputed. In any event, those sums would only take the amount owed by Breyer to Pilon to £1 million at the most, leaving £1.7 million still owed to creditors. With regard to the final question, on the evidence, the Judge found that it would be unlikely that Pilon would be able to repay the judgment sum, had it been awarded.

*The English Courts have not as a general rule enforced decisions of an adjudicator in favour of a contractor who was demonstrably insolvent. claimant's insolvency.*

### *Anrik Ltd v AS Leisure Properties Ltd*<sup>3</sup>

The *Vago* case has been applied on many occasions. Here, Mr Justice Edwards-Stuart provided an interesting variation on the question of the date of the relevant contract. The parties entered into a contract in 2006, disputes arose, but to avoid a dispute about jurisdiction, an ad hoc adjudication agreement was entered into in 2009. After the adjudicator had awarded £516k to Anrik, AS Leisure applied for a stay of execution on the basis that Anrik's financial position had deteriorated between 2006 and 2009. Anrik argued that the court should assess any change in its financial position from the date of the ad hoc adjudication agreement. The Judge agreed, holding that this was the "relevant" contract as referred to by Judge Coulson at paragraph f(i).

### *Integrated Building Services Engineering Consultants Ltd (t/a Operon) v PIHL UK Ltd*<sup>4</sup>

Here, the Scottish Court considered whether three adjudicator's awards should be enforced in light of the supervening insolvency of Integrated Building Services Engineering ("IBS"). PIHL entered into contracts with IBS relating to the refurbishment of schools in Aberdeen. Disputes arose, culminating in three adjudicator's awards in IBS's favour. PIHL refused to pay. On 11 January 2010, IBS issued a letter before action. On 18 January 2010, IBS commenced court proceedings to enforce the awards. Just under two weeks later, administrators were appointed. PIHL defended the enforcement on the basis that IBS was insolvent and so PIHL was entitled to retain sums which may be due to IBS until its claims against IBS had been determined and offset against its liability. This process is known as "balancing accounts in bankruptcy" which is an equitable doctrine. At the hearing, IBS contended that:

- The 1996 Act altered the common law and restricted the circumstances in which a party could rely on the principle of balancing accounts in bankruptcy. Further, it was the task of the courts to assist the prompt enforcement of decisions.
- Averments of insolvency, that fell short of liquidation did not constitute a defence in either Scotland or England to enforcement of such decisions.
- Whilst the courts had the discretion to stay execution of a judgment where there was no dispute that the claimant was insolvent, if the defendant's failure to pay sums which an adjudicator had awarded caused or significantly contributed to the insolvency, then a stay would not be justified: *Wimbledon v Vago*.

<sup>3</sup> Unreported, but see comments of Jonathan Lewis in Issue 11 of the 4 Pump Court Newsletter

<sup>4</sup> [2010] ScotCOS CSOH 80 (1 July 2010)

## Adjudication - Insolvency

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- The parties must be taken to have addressed the contingency of insolvency in their agreement as it contained warranties of solvency and a provision which allowed the agreement to be brought to an end in specified circumstances, including IBS's insolvency, the appointment of an administrator or the winding up of a company.
- To allow retention based on IBS's insolvency, which occurred after the commencement of the enforcement proceedings, would defeat the purpose of the 1996 Act and allow a person against whom an adjudicator had made a decision to use "capricious manipulation" to avoid its obligations.
- The enforcement of the adjudicator's awards was entirely consistent with the decision in *Melville Dundas Ltd v George Wimpey UK Ltd*<sup>5</sup>.

*The obligation to pay the sum due under the adjudicator's decision is a contractual obligation to implement the result of the provisional dispute resolution procedure. Following the approach of the House of Lords in Melville Dundas Ltd, I do not consider that that obligation supersedes the obligant's rights to assert the principle on the claimant's insolvency*

The Judge analysed the 1996 Act and the equitable doctrine of balancing of accounts and concluded that the purpose of the 1996 Act was to encourage cooperation between the parties to a construction contract to preserve the cash flow of contractors<sup>6</sup> and subcontractors during the contract and improve the efficiency of the construction industry. Adjudication must be viewed in this context. It is clear from the caselaw<sup>7</sup> that adjudicators' decisions are a method of providing a summary procedure for the enforcement of payment provisionally due under a construction contract. The Judge viewed the provisional nature of an adjudicator's decision and the reservation of a final determination to another decision maker as important characteristics of the procedure. He also cited Lord Hoffmann in the *Melville Dundas* case at paragraph 12:

*"It seems to me most unlikely that Parliament intended that provisions intended to improve the efficiency of the construction industry should determine priorities between the employer and an insolvent contractor's creditors."*

The Judge found that the approach of the majority in *Melville Dundas* was consistent with the view that the obligation to implement an adjudicator's decision without delay does not necessarily supersede an employer's other entitlements on a contractor's insolvency. He also noted that the English courts have not as a general rule enforced decisions of an adjudicator in favour of a contractor who was demonstrably insolvent and unable to repay the sums to be paid. The Judge concluded that whilst mere averments of insolvency should not provide for a court to delay enforcement of an adjudicator's award, he did not agree that the undisputed insolvency of a claimant cannot be a defence if the claimant is not in liquidation. The Judge reached this view on the basis of the *Melville Dundas* judgment and on the basis that he was persuaded that when a company enters administration, the principle of balancing of accounts in bankruptcy can be invoked. Finally, the Judge held that the 1996 Act does not exclude the principle of balancing of accounts in bankruptcy. He said:

*"28 . . . The obligation to pay the sum due under the adjudicator's decision is a contractual obligation to implement the result of the provisional dispute resolution procedure. Following the approach of the House of Lords in Melville Dundas Ltd, I do not consider that that obligation supersedes the obligant's rights to assert the principle on the claimant's insolvency. The decision of the adjudicator is a provisional award. The speed of the process by which he or she reaches the decision, on occasion, may not allow the parties to present their positions in full. But that is the nature of the process, which is designed to facilitate cash flow in the context of a continuing contract by reaching interim decisions and leaving the final resolution of disputes until later. It would be strange in my view if an adjudicator's decision, provisional as it is, were, in the absence of misbehaviour by an obligant, to prevent the obligant from asserting its rights occasioned by the supervening insolvency of the claimant. I doubt if allegations of insolvency, which were seriously contested, would justify the application of the principle in the context of the 1996 Act. But those are not the circumstances of this case."*

Accordingly, the Judge found in favour of PIHL. This case demonstrates that the Scottish Court will take a similar view to the English and Welsh courts in the enforcement of adjudicators' decisions where the receiving party is insolvent.

<sup>5</sup> 2007 SC (HL) 116

<sup>6</sup> In this regard the Judge referred to *Melville Dundas Limited v George Wimpey Limited*, per Lord Hoffmann at paragraph 12 and Lord Hope at paragraph 36

<sup>7</sup> The Judge cited *Bouyges (UK) Limited v Dahl-Jensen (UK) Limited* [2000] EWCA Civ 507 (31 July 2000) and *Rainford House Limited v Cadogan Limited*

## Alternatives to adjudication

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# Alternatives to adjudication: Part 8 proceedings

*Inevitably in difficult economic times, disputes between parties arise more frequently. However, if a dispute arises, should parties automatically jump to adjudication? As Jourdan Edwards discusses, whilst undoubtedly adjudication remains one of the more popular forms of dispute resolution, one new tactic to note is the way in which Part 8 proceedings are being brought as a complement to the adjudication process.*

### What is Part 8 all about?

Paragraph 9.2.1 of the Revised TCC Guide provides that the TCC has jurisdiction to hear Part 8 applications for declaratory relief arising out of a disputed adjudication and so, rather than being a complete alternative to adjudication, parties are seemingly using the Part 8 process as a complement to adjudication. The Part 8 process is one which can be used if the claimant seeks a court's decision on a question that is unlikely to involve a substantial dispute of fact. If a substantial dispute of fact is likely then the more appropriate means, if seeking final determination of the issue, is to commence regular Part 7 proceedings (or to arbitrate, depending on what the contract specifies, if indeed it does so).

*The Part 8 process is one which can be used if the claimant seeks a court's decision on a question that is unlikely to involve a substantial dispute of fact.*

Why are parties doing this? Well it depends when the Part 8 proceedings are brought. If they are initiated before an adjudication is commenced, then it might inform the submissions a party makes in an adjudication or it might well obviate the need to adjudicate at all. Take the following situation: (i) a construction contract contains payment provisions, but the Employer's Requirements for that same project contain differing provisions as to payment; (ii) the employer and contractor differ as to which payment provisions are operable; (iii) the employer is administering the contract as he thinks appropriate; (iv) the contractor is not being paid pursuant to what he sees as the contract payment provisions and is thinking of adjudicating.

As the dispute between the parties turns on the construction of a particular contract clause, then putting the matter to a judge to get a binding decision might well influence the contractor as to whether or not any adjudication on this point is worth while. Equally, if the contractor's view is shared by the judge then this might prevent any adjudication, because it might militate towards a change of tack by the employer in the way it administers the contract.

### *Fenice Investments Inc v Jerram Faulkus Construction Ltd*

Whilst not strictly the substance of the case, the above analogy has been drawn from *Fenice Investments Inc v Jerram Faulkus Construction Ltd*<sup>1</sup>. In this case Fenice argued that the payment provisions in the Employer's Requirements were the ones that were operable and not those contained in the contract (as Jerram Faulkus asserted). Fenice was the unsuccessful responding party in an adjudication during which it made the same submissions and it brought these proceedings to finally determine the dispute between the parties. Fenice, however, was ultimately unsuccessful again. Part 8 is being used for a variety of other reasons, too. There have been recent cases where:

(i) Parties successfully seeking final determination of part of a dispute (see *Geoffrey Osborne Ltd v Atkins Rail Ltd*<sup>2</sup>);

(ii) Part 8 proceedings commenced during an adjudication itself (*Banner Holdings Ltd v Colchester Borough Council*<sup>3</sup> on the issue of an adjudicator's jurisdiction); and

(iii) Part 8 proceedings seeking a declaration that an adjudication clause was incompatible with the Housing Grants Construction and Regeneration Act 1998 ("the Act") (see *Yuanda (UK) Co. Ltd v WW Gear Construction Ltd*<sup>4</sup> - a case in which Fenwick Elliott represented Yuanda).

<sup>1</sup> [2009] EWHC 3272

<sup>2</sup> [2009] EWHC 2425

<sup>3</sup> [2010] EWHC 139

<sup>4</sup> [2010] EWHC 720

## Alternatives to adjudication

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### *Yuanda (UK) Co Ltd v WW Gear Construction Ltd*

Yuanda was engaged by Gear to work on the Westminster Bridge Park, Plaza Hotel project. The amended adjudication clause in the contract between the parties stated that Yuanda would meet any of Gear's legal and professional costs of any reference to adjudication that Yuanda made, regardless of the outcome. Mr Justice Edwards-Stuart stated that the adjudication clause was not compliant with the Act as it fettered the statutory right to adjudicate "at any time" because, in effect, the value of any adjudication would have to be sufficiently large to warrant Yuanda spending money on both parties' costs – victories on small claims might, in fact, result in a net financial loss to Yuanda. In the circumstances, the judge held that the clause should be replaced wholesale by the Scheme.

### A note of caution

Though judges are encouraging the use of Part 8, there is an undertone of caution embedded in recent judgments; caution with regard to ensuring that the type of case is proper for Part 8 proceedings and also that they are not brought in improper circumstances.

A very recent example of the former of the two cautionary notes is in *Forest Heath District Council v ISG Jackson Ltd*<sup>5</sup>. There was a dispute about, *inter alia*, delays relating to the painting of steelwork in a pool hall in a community sports centre. In respect of this point ISG Jackson had obtained an adjudicator's decision that the painting *in situ*, rather than off site, was as a result of late design information and was a relevant event for which Forest Heath was responsible. Forest Heath commenced Part 8 proceedings on this discreet part of the decision but Mr Justice Ramsey did not grant the declarations sought. He stated that there was a substantial dispute of fact that would require further evidence to be considered (Part 8 decisions are not appropriate in circumstances where there is a substantial dispute of fact). Also, in any event, this dispute was not suitable to be determined by an application for such a declaration, as any declaration would not lead to a final resolution of the dispute - nor would it serve to do justice between the parties to grant it. To do so, in the words of Ramsey J, would prove a "treacherous shortcut".

Another cautionary note came from Mr Justice Akenhead in *Build Ability Ltd v O'Donnell Developments Ltd*<sup>6</sup>. The proceedings were concerned with costs alone, as the parties had, by consent, dealt with the substantive points at issue. Build Ability had entered into a conditional fee arrangement with its solicitors that provided for a 100% uplift on their fees in the event of success. Akenhead J stated that it would be "wholly inappropriate" to permit any contingency fee because, among other reasons, Build Ability had made no effort to comply with the TCC Pre-Action Protocol.

Further recent words of warning have come from Mr Justice Coulson in *Fenice*. Although Part 8 can be used to seek final determination of a dispute, this does not mean that the adjudicator's decision is any less binding temporarily. In other words, you still have to pay whatever amounts the adjudicator decides you should pay. Coulson J underlined this by stating that a party that does not comply with an adjudicator's decision should "expect to be penalised by way of interest and costs"; he instructed that the costs of the enforcement proceedings be paid by Fenice on an indemnity basis.<sup>7</sup>

### Conclusion

If you have a dispute that does not require a substantial dispute of fact, the Part 8 process seems an eminently sensible one to utilise. It can be used to finally determine all or part of a dispute that has been the subject of adjudication; Part 8 declarations can be sought during adjudications themselves; and, indeed, before adjudications have been started. The attraction of the process is not just the final, binding nature of the decision that is obtained; unlike in adjudications where the costs of referring or responding to adjudications are lost, there is the chance of cost recovery in Part 8 proceedings. Plus, given that the TCC suggests that a one-day hearing can be obtained as quickly as four to six weeks after issuing the claim form, a party can get this binding decision in a time limit not dissimilar to the one in which an adjudication is concluded. Simple.

*Where there is a substantial dispute of fact, Part 8 may be "a treacherous shortcut".*

<sup>5</sup> [2010] EWHC 322

<sup>6</sup> [2009] EWHC 3196

<sup>7</sup> The costs of the Part 8 proceedings (which were heard at the same time as the enforcement proceedings) were ordered to be paid by Fenice on the standard basis as its point of law, while incorrect, was bona fide.



## Time bars

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# The continued rise of time bars?

*We have highlighted previously, 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 valid. Here, Igor Bichenkov revisits this topic by reference to a number of recent court decisions.*

Two of the best known examples of contracts which include time bars are the NEC3 and FIDIC forms. The NEC3 form is particularly important in the UK as it forms the basis of the London 2012 construction contracts and is being taken up on major projects more and more, whilst the FIDIC form, outside of the UK and USA, has a widespread application.

### *WW Gear Construction Ltd v McGee Group Ltd<sup>1</sup>*

This was a case before Mr Justice Akenhead. The dispute arose from the construction of the Westminster Plaza Hotel, as part of which Gear engaged McGee as groundworks contractor. The contract incorporated the JCT Trade Contract Terms (TC/C) 2002 edition with Amendment No.1: 2003, together with further bespoke amendments. The contracted works commenced in late 2007 and were completed in May 2009. McGee made applications for payment, broadly on a monthly basis. The applications included requests or claims for payment for extended preliminary costs associated with delays to the works. In Application No. 18, which was said to summarise the position up to 29 March 2009, McGee referred in its summary to a "Loss & Expense Claim" being "As Attached". In relation to such applications, Clause 4.21 of the contract provided as follows:

*"If the Trade Contractor makes written application to the Construction Manager that he has incurred or is likely to incur direct loss and/or expense ... then the Construction Manager ... shall ascertain the amount of such loss and/or expense ... provided always that:*

*.1 the Trade Contractor's application shall be made as soon as and in any event not later than two months after it had become, or should reasonably have become apparent to him that the regular progress of the Works or any part thereof has been or was likely to be affected as aforesaid, and such application shall be formally made in writing and fully documented and costed in detail, and it shall be a condition precedent under this clause 4.21.1 ... that the Trade Contractor has complied fully with all requirements of this clauses [sic] including, for the accordance [sic] of doubt, the said time period of two months."*

Following an adjudication decision, Gear issued proceedings under Part 8 seeking a declaration that, on its true construction, McGee was required to comply with the provisions of Clause 4.21.1 as a condition precedent to its entitlement to make an application for payment. Mr Justice Akenhead noted that firstly, in order to claim loss and expense under Clause 4.21, McGee had to submit an application to the construction manager. To this end, McGee's application had to state that the regular progress of the works had been affected. Akenhead J further noted that Clause 4.21 contained the wording "provided that", which was "often the strongest sign that the parties intend that there was to be a condition precedent".

As to the requirements of Sub-Clause 4.21.1, Akenhead J considered that there was nothing particularly difficult or onerous in McGee making its application within either the general or specific timetables. Akenhead J also found that the requirement that McGee's applications should be made formally and fully documented added little to the general requirement that such applications be made in writing.

Accordingly, Akenhead J ruled that the requirement to make a timely application in writing was an effective precondition to the recovery of loss and/or expense under Clause 4.21. As such, McGee simply had no entitlement to recover such loss or expense unless and until it had made the requisite application. It was clear that the parties had intended for McGee's entitlement to operate in this way.

*It is within judicial knowledge that parties to contracts containing formal notice provisions turn immediately to their lawyers whenever there is a requirement to give notice in accordance with those provisions. But even if that were not the case, there is nothing in clause 17.6.1 that would not readily be understood by a businessman unversed in the law*

<sup>1</sup> [2010] EWHC 1460 (TCC)

## Time bars

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### *Education 4 Ayrshire Ltd v South Ayrshire Council*<sup>2</sup>

The strictness of the courts' approach to the enforcement of conditions precedent is illustrated further in this Scottish case. The dispute related to a project agreement by which the contractor had agreed to design and construct six schools for the Council. One such school was the Prestwick Academy, the completion of which had to achieve "Service Availability" on or before the "Target Service Availability Date" ("TSAD"). Clause 17.1 of the project agreement specified that upon becoming aware of a delay to the achievement of TSAD, the contractor was obliged to give written notice to the Council, setting out the reasons for the delay and its likely effect. In turn, Clause 17.6 of the project agreement specified the procedure by which the contractor could claim an extension of time and compensation if the delay constituted a "Works Compensation Event" under the contract.

Following the occurrence of a Works Compensation Event, the contractor issued a notice to the Council. The notice set out the nature of the delay and stated that it had been issued pursuant to Clause 17.1. The notice also informed the Council that the contractor would be submitting a claim for an extension of time and compensation in accordance with Clause 17.6 of the project agreement. The contractor did not, however, serve any further notices, in the absence of which a dispute arose as to whether the contractor was entitled to an extension of time and compensation. The Council argued that by failing to serve a notice in accordance with Clause 17.6, the contractor was not entitled to compensation and an extension of time. The contractor, however, sought to put the initial notice and the requirements of Clause 17 in context. Firstly, the project agreement provided for the sharing of information between the parties and imparted on the Council certain rights of inspection. Secondly, the Council had been fully informed of developments concerning the Works Compensation Event, as it had received the relevant survey report and had been informed in writing of the likelihood of delay.

Lord Glennie preferred the submissions of the Council. In circumstances where both parties accepted that compliance with Clause 17.6 was a condition precedent to the contractor's entitlement to relief under the contract, the Judge held that the sole question to answer was: "what does the clause require?"<sup>3</sup> Lord Glennie found that the contractor's entitlement to relief was subject to requirements of strict compliance, none of which were onerous. As such, the Judge reached the conclusion that where parties have laid down in clear terms what has to be done by one of them if he is to claim certain relief, the court should be slow to seek to relieve that party from the consequence of failure.<sup>4</sup>

The contractor's failure to comply with Clause 17.6 invalidated its claim for compensation and an extension of time. It is also worth noting that Lord Glennie was unsympathetic to the argument that allowance should be made for the fact that the requisite notices would be drafted by businessmen, as opposed to lawyers:<sup>4</sup>

*"It is within judicial knowledge that parties to contracts containing formal notice provisions turn immediately to their lawyers whenever there is a requirement to give notice in accordance with those provisions. But even if that were not the case, there is nothing in clause 17.6.1 that would not readily be understood by a businessman unversed in the law."*

### *City Inn Ltd v Shepherd Construction Ltd*<sup>5</sup>

This was another Scottish case. At its core, the dispute concerned the question of whether, by operation of Clause 13.8 of the contract, City Inn was entitled to deduct liquidated damages for delay to completion. Clause 13.8 contained a bespoke time bar provision, requiring Shepherd to provide details of the estimated effect of an architect's instruction within ten days. Lord Drummond Young found that although failure to comply with Clause 13.8 could debar Shepherd from claiming an extension of time, City Inn nonetheless had the power to waive or dispense with applicable procedural requirements. This was the case here, as during its discussions with Shepherd, City Inn never cited Shepherd's failure to comply with Clause 13.8 as the reason for refusing to grant an extension of time. City Inn subsequently appealed to the Inner House. In giving the leading judgement of the Inner House, Lord Osborne held that:<sup>6</sup>

*Silence in relation to a point that might be taken may give rise to the inference of waiver of that point. In my view, that equitable principle can and should operate in the circumstances of this case.*

<sup>2</sup> [2009] ScotCS CSOH 146

<sup>3</sup> [2009] ScotCS CSOH 146, paragraph 17

<sup>4</sup> [2009] ScotCS CSOH 146, paragraph 19

<sup>5</sup> [2010] ScotCS CSIH 68

<sup>6</sup> See [2010] ScotCS CSIH 68 at paragraph 75

## Time bars

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*"...the contractual provisions in [Clause 13.8], conceived in the interests of the employer, are contractual conditions capable of being waived."*

Having confirmed that provisions of Clause 13.8 were capable of waiver, the Inner House had to consider whether they had in fact been waived by City Inn. Lord Osborne noted that the parties had attended a meeting during which they discussed Shepherd's extension of time claim in considerable detail. During that meeting, however, nothing was said about the invocation of Clause 13.8. Thus, in circumstances where it would generally be presumed that City Inn were aware of the terms of their own contract, Lord Osborne agreed that:<sup>7</sup>

*"silence in relation to a point that might be taken may give rise to the inference of waiver of that point. In my view, that equitable principle can and should operate in the circumstances of this case."*

Finally, the Inner House observed that the waiver applied to all other elements of Shepherd's claims for extensions of time, and not just the gas venting instruction (with which the case was primarily concerned). Lord Osborne explained his reason thus:<sup>8</sup>

*"The position in relation to those other elements was that instructions were issued from time to time, works instructed were carried out by [Shepherd] over a period of time, without [Shepherd] seeking to operate the provisions of clause 13.8 and, thereafter an extension of time application was made by them upon the basis of the provisions of clause 25 of the Standard Form conditions. Those sequences of events are plainly inconsistent with the invocation of the provisions of clause 13.8. At no point in this sequence of events did [City Inn], or the architect, take a stand upon the basis that clause 13.8 had not been complied with and that therefore the provisions of clause 13.8.5 eliminated the possibility of any extension of time. Furthermore, clause 13.8 was not invoked, or even referred to, in any contemporaneous correspondence relating to the project involving [City Inn], or the architect. That course of action was wholly inconsistent with any insistence upon the operation of clause 13.8... In my view these circumstances clearly demonstrate that [City Inn] had altogether departed from and abandoned their contractual right to insist upon the observance of clause 13.8."*

***In my view these circumstances clearly demonstrate that [City Inn] had altogether departed from and abandoned their contractual right to insist upon the observance of clause 13.8.***

## Conclusion

The decisions in *Gear* and *Education 4 Ayrshire* demonstrate that conditions precedent continue to be held effective, so as to preclude a claimant from bringing an otherwise valid claim. In particular, the decisions demonstrate the courts' continuing tendency to enforce conditions precedent (and time bars specified therein) strictly. This includes instances where a condition precedent contains typographical errors (albeit ones that are superfluous to the contractual drafting in question), or where the employer is aware of the circumstances behind the contractor's claim for relief. Accordingly, to preserve the validity of its claims under a contract, the contractor must remain mindful of all applicable preconditions.

However, the decision in *City Inn* demonstrates that a contractor may be able to preserve the validity of its claims by arguing that applicable preconditions had been waived by the employer. The success of such an assertion would, however, depend on the actual circumstances of the case and, in particular, the conduct of the parties. In this respect, it is worth noting that, coupled with the parties' conduct, waiver can take effect through a party's silence in relation to a particular precondition. In this respect, an employer would be well advised to ensure that it does not inadvertently waive a contractor's compliance with relevant preconditions. As far as contractors are concerned, *City Inn* should not be regarded as providing a sound alternative to strict compliance with contractual requirements. Placing sole reliance on the argument that certain preconditions have been waived would constitute an unacceptable risk, as there is no guarantee that such an assertion will succeed following a court's examination of the particular facts of the case.

In short, knowing the terms and requirements of your contract and ensuring that they are strictly followed remains best practice.

<sup>7</sup> See [2010] ScotsCS CSIH 68 at paragraph 86

<sup>8</sup> See [2010] ScotCS CSIH 68 at paragraph 95

## Concurrency and apportionment

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# Assessing claims for extensions of time and disruption: concurrency and apportionment

*The long-running City Inn case did not just excite comment in relation to time bars. It also added the concept of apportionment to the debate about the assessment of extensions of time where there are concurrent delays. Dealing with concurrency is never easy. True concurrency exists wherever the effects of two causes of delay are having an effect on the project at the same time. So far so good, but where it gets more complex is when you need to deal with questions of causation – what actually caused the loss? So any judgment that deals with this issue provides a welcome forum for discussion, even if it does not provide the magic answers.*

### What do we mean by concurrent delay?

Depending, of course, on the precise terms of the contract, to obtain an extension of time a contractor will need to demonstrate both that there was an event recognised under the contract and that that event has delayed or is likely to delay the works beyond the planned completion date. A problem arises when there are two or more possible competing events arising at the same time. Which is the true cause of delay? The question has come before the courts in many different guises. In *Leyland Shipping Company Ltd v Norwich Union Fire Insurance Society Ltd*, the House of Lords adopted the “proximate cause” test when a torpedoed ship subsequently sank in the bay during a storm. In construction cases, the following approaches are often put forward:

- (i) Dominant cause. The idea here is that where there are two competing causes, the claiming party needs to establish that the other is responsible for the dominant cause. This will be a question of fact.
- (ii) The Malmaison test. This is named after Dyson J’s (now a member of the Supreme Court) approach in *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manhattan) Ltd*<sup>1</sup> where he said (and the parties had agreed to this approach):
 

*“Second, it is agreed that if there are two concurrent causes of delay, one of which is a relevant event, and the other is not, then the contractor is entitled to an extension of time for the period of delay caused by the relevant event notwithstanding the concurrent effect of the other event.”*
- (iii) First in line approach. This was the approach adopted by Judge Seymour in *Royal Brompton Hospital NHS Trust v Hammond*.<sup>2</sup> The test here proceeds on the basis that where there are two competing delay events, the one that occurred first in time is the cause of the delay.

The City Inn case reviewed all three options, soundly rejecting one of them.

### *John Doyle Construction Ltd v Laing Management (Scotland) Ltd*<sup>3</sup>

The apportionment debate perhaps began with the case of *John Doyle Construction Ltd v Laing Management (Scotland) Ltd*, where a claim for direct loss and expense was made under the equivalent of cl.26 of the JCT Standard Form 1980. The court had to consider the way in which a contractor could establish a global claim, where it is impossible to demonstrate individual causal links between events for which the employer is responsible and particular items of loss and expense. Typically when a global claim is pursued, the contractor must demonstrate that the whole of his loss and expense results from matters that are the responsibility of the employer. However, here, the court identified that that requirement might be mitigated in three ways:

*Where there is true concurrency between a relevant event and a contractor default, in the sense that both existed simultaneously, regardless of which started first, it may be appropriate to apportion responsibility for the delay between the two causes; obviously, however, the basis for such apportionment must be fair and reasonable.*

<sup>1</sup> [1999] 70 Con LR 32

<sup>2</sup> [2001] 76 Con LR 148

<sup>3</sup> [2004] BLR 295

## Concurrency and apportionment

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- (i) it may be possible to identify a causal link between particular events for which the employer is responsible and individual items of loss;
- (ii) the question of causation must be treated by the application of common sense to the logical principles of causation, and if it is possible to identify an act of the employer as the dominant cause of the loss that will suffice;
- (iii) it may in some cases be possible to apportion the loss between the causes for which the employer is responsible and other causes.

### *City Inn Ltd v Shepherd Construction Ltd*<sup>4</sup> – the facts

One of the judges in the *Laing v Doyle* case was Lord Drummond Young. He was also the Judge in the *City Inn* case. It is probably worth briefly setting out the facts of the *City Inn* case. By a contract dated 15 October 1998 and 11 November 1998, the reclaimers, *City Inn*, engaged the respondents, *Shepherd*, to build a new 168-bed hotel in Bristol. The Contract incorporated the JCT Standard Form of Building Contract (Private Edition with Quantities) 1980 Edition with bespoke amendments. Completion date was 25 January 1999 and liquidated damages were £30,000 per week.

Clause 25 provided that if and when it became reasonably apparent that *Shepherd* was likely to be delayed, it was required to give notice forthwith to the Architect, setting out the causes of the delay and whether any were relevant events. Upon receipt of such notice the Architect, if in his opinion any of the events relied upon by *Shepherd* were relevant events and that the completion date would be delayed, had to give such extension of time as he estimated to be fair and reasonable. Practical completion was achieved on 29 March 1999. In June 1999, the Architect revised the completion date to 22 February 1999, granting *Shepherd* an extension of time of four weeks. *City Inn* was therefore entitled to deduct liquidated damages of £150,000 for the five-week period from 22 February 1999 to 29 March 1999.

Various disputes arose between the parties and were referred to adjudication. The Adjudicator decided that, in addition to the four-week extension of time awarded by the Architect, *Shepherd* should be awarded a further five-week extension of time, together with prolongation costs for nine weeks in total. *City Inn* was therefore directed to repay the sum of £150,000 deducted by way of liquidated damages. During 2000 *City Inn* issued proceedings in the Scottish Court of Session. *City Inn* claimed that *Shepherd* was not entitled to any extension of time beyond 25 January 1999. *City Inn*'s claim was advanced on two bases.

First, as discussed elsewhere in this Review, it was argued that *Shepherd* did not follow the procedures specified in clause 13.8 to claim an extension of time. Second, it was argued that none of the Architect's Instructions caused any delay to completion. As a secondary argument, *City Inn* contended that if any delays had been caused by the Architect's Instructions, those delays had been concurrent with delays arising from matters that were the responsibility of *Shepherd* and that in such a case *Shepherd* was not entitled to an extension of time. *Shepherd* counterclaimed that it was entitled to an extension of time of eleven weeks to 14 April 1999 on various grounds, including a significant number of Instructions for variations and additional work and late confirmation of details of the work.

### *City Inn v Shepherd Construction Ltd* – Lord Drummond Young

At first instance, with regard to the delay claims, Lord Drummond Young held that *City Inn* was responsible for nine of the causes of delay relied upon by *Shepherd*, which were Relevant Events under the Contract. *Shepherd* was held responsible for two causes of delay. Lord Drummond Young held that *Shepherd* was entitled to an extension of time of nine weeks and loss and expense for that period. On the issue of concurrent delay, Lord Drummond Young held that the Architect, in operating clause 25, should exercise his judgment to determine the extent to which completion has been delayed by Relevant Events and that such a determination must be on a fair and reasonable basis. Lord

*The question of causation must be treated by the application of common sense to the logical principles of causation*

<sup>4</sup> [2010] Scot CS CSIH 68

## Concurrency and apportionment

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Drummond Young's basic approach was to: consider the dominant cause first; and then, if it is not possible to identify a dominant cause, all concurrent causes of delay must be considered. He said that :

*"Where there is true concurrency between a relevant event and a contractor default, in the sense that both existed simultaneously, regardless of which started first, it may be appropriate to apportion responsibility for the delay between the two causes; obviously, however, the basis for such apportionment must be fair and reasonable."*

The Judge held that the apportionment of time and prolongation costs would be similar to the apportionment of liability resulting from contributory negligence or contribution between joint wrongdoers. This required consideration of both the period of delay and the causative significance of each event on the works as a whole.

### *City Inn v Shepherd Construction Ltd – the Scottish Court of Appeal*

City Inn appealed to the Inner House or Court of Appeal. A key question was whether Lord Drummond Young's approach to concurrent delay and apportionment was correct. Lord Osborne, with whom Lord Kingarth agreed, upheld the decision of Lord Drummond Young stating that where there are two competing causes in one period of delay, neither of which is dominant and only one of which is a relevant event, the Architect should approach the issue in a fair and reasonable way and apportion the delay between the competing events. He set out five propositions relative to the proper approach to the application of clause 25:

- (i) It must be established that a relevant event has occurred and is a cause of delay, and that completion of the works is likely to be delayed or has been delayed by that relevant event.
- (ii) Whether the relevant event has had or will have any causative effect is a question of fact to be determined by common sense.
- (iii) In deciding whether the relevant event has caused delay, the architect can consider any factual evidence he considers acceptable. A critical path analysis is not essential.
- (iv) If a dominant cause can be identified as the cause of a particular delay, effect will be given to that by leaving out of account any causes which are not material. Therefore, in those circumstances, the success of an extension of time claim will depend on whether the dominant cause is a relevant event.
- (v) Where a situation exists in which two causes are operative, and one is a relevant event and the other is caused by the contractor, and neither can be described as a dominant cause, it will be open to the architect to approach the issue in a fair and reasonable way to apportion the delay between the causes.

Lord Carloway upheld Lord Drummond Young's findings, but rejected the concept of apportionment. He favoured a literal approach rather than the apportionment approach preferred by Lord Osborne. In fact, Lord Carloway said that the case all came down to what the contract said. Under clause 25 of the JCT form an architect must decide if a relevant event had occurred, if so whether it had or would cause delay to completion and then calculate the appropriate extension of time that may be due. It was not a question of concurrency at all.

The architect's sole task is to consider whether or not any one relevant event delayed completion, viewed in isolation, and if so, the architect should award a fair and reasonable extension of time. He said that "what an architect must do is to concentrate solely on the effect of the Relevant Event in the absence of a competing default". If a relevant event has occurred, a competing event caused by the contractor is not relevant. Lord Carloway agreed, however, that the matter is one of "common sense". He said that the architect

*How to calculate a fair eot award:*

*(i) apply the rules of the contract;*

*(ii) recognise the effects of constructive change;*

*(iii) make a logical analysis of the effect of relevant events on the programme; and*

*(iv) calculate objectively, rather than make an impressionist assessment.*

## Concurrency and apportionment

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*Where a situation exists in which two causes are operative, and one is a relevant event and the other is caused by the contractor, and neither can be described as a dominant cause, it will be open to the architect to approach the issue in a fair and reasonable way to apportion the delay between the causes.*

should apply “professional judgement” and should use “his and not a lawyer’s common sense”. The case amounts to a statement that common sense, judgement and experience are to be preferred to an overly complicated analysis of causation. As such, this seems to follow Roger Toulson QC who, in the case of *John Barker Construction Ltd v London Portman Hotel Ltd*, set out the following criteria that should be considered when calculating a “fair and reasonable” extension of time:

- (i) apply the rules of the contract;
- (ii) recognise the effects of constructive change;
- (iii) make a logical analysis, in a methodical way, of the effect of relevant events on the contractor’s programme; and
- (iv) calculate objectively, rather than make an impressionist assessment of the time taken up by the relevant events.

All the judges seem to have placed great weight on the need to reach a “fair and reasonable” decision on extensions of time. Lord Osborne appears to be unimpressed by the various attempts at classification of “concurrent delay” or “concurrent delaying events”, stating that:

*“It may not be of importance to identify whether some delaying event or events was concurrent with another, in any of the possible narrow senses described, but rather to consider the effect upon the completion date of relevant events and events not relevant events. For that reason, discussion of whether or not there is true concurrency, in my opinion, does not assist in the essential process to be followed under clause 25.”*

### ***Royal Brompton Hospital NHS Trust v Hammond***

The judges in the Scottish Court of Appeal disapproved the decision of HHJ Seymour QC in the Royal Brompton Hospital case. Thus they disagreed that if a relevant event occurred during a period of delay caused by a pre-existing contractor default, then the relevant event should be disregarded and no extension of time allowed for that period. Indeed, Lord Osborne said that this interpretation was unnecessarily restrictive and did not allow for a common sense view of the cause of the delay.

## Conclusion

Whilst, as a Scottish decision, this is not binding on English courts, the *City Inn* judgment has excited much comment and it is only a matter of time before it is argued as being persuasive before the English courts. The Inner House confirmed that Lord Drummond Young’s test of a fair and reasonable apportionment of competing delay events was a valid one. One might ask the extent to which the courts were influenced by the wording of the JCT contract which requires that the architect or contract administrator should award such extension of time as he “estimates to be fair and reasonable”. Lord Osborne’s five principles set out a common sense approach to be followed when assessing extensions of time for delays caused by more than one event.

This decision supporting a fair and reasonable assessment and an apportionment of competing delays does not mean that the days of critical path analyses are numbered. Whilst all three judges agreed that a critical path analysis was not essential to carry out the exercise, they could see that such an analysis may well be relevant. Detailed analyses of delay events should still be carried out where the information is available. Indeed, both Lord Drummond Young at first instance and the judges in the Inner House considered the parties’ expert evidence on delay in some detail. Detailed and supportable delay analysis showing the critical path through the works will therefore continue to play a central role in claims for extensions of time. However, where it is not possible to prepare an accurate critical path analysis, this judgment suggests that this will not necessarily be fatal to any claim for an extension of time.

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## Procurement - pre-contract safeguards

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### *Look before you leap - pre-contract safeguards*

*Whilst tender procurement is perhaps a more mundane subject than other forms of transactional activity that pass for procurement, it is nevertheless of great significance in influencing successful project delivery. Sound tendering and construction procurement are all about identifying and appointing an appropriately skilled team, agreeing costs and a programme, and achieving an appropriate distribution of risk between the parties. As Simon Tolson noted to the audience at the 10th Annual Construction Law Summer School at Fitzwilliam College on 3 September 2010, that all sounds simple enough, but is it really?*

One only needs to think of Rafael Viñoly's £16.5m Colchester Visual Arts Facility, Wembley Stadium,<sup>1</sup> the British Library, Bath Spa,<sup>2</sup> the National Physical Laboratory, Holyrood Scottish Parliament<sup>3</sup> and T5 to think of seven humdingers, which remain useful illustrations of the impact on cost and programme of getting it wrong. We have lost in the last year the likes of Pierse, Jarvis, Verry Construction and Lancsville to bad tendering decisions. Let us hope major projects like BAA's £1 billion Terminal 2, Crossrail's £16 billion scheme and Thames's £2.2 billion Tideway Tunnel will fair better.

*The indispensable matters that you need to deal with in your tender are: the extent and scope of the work, the price, payment terms and time for completion.*

Contractors and consultants tendering for construction projects are expected these days to put together very comprehensive proposals, which not only answer the specific points raised in the tender enquiry documents, but also outline extensively the company's expertise, experience, procedures and methods for the proposed works. In certain situations, tenderers are expected to prepare, on a speculative basis, full option appraisals which require an extensive understanding of the potential client's needs. Often the extent of necessary work cannot be ascertained until the works have been started, and the design is hardly ever fully complete at the time a contract is made. This has led to contracts for pre-construction services for two-stage tendering like JCT.

It is a salutary point that a large construction project may typically take four to five years through planning, design, procurement, construction and completion, during which time the contractor may only be given four weeks within the tendering process to quantify all the risks that may impact against quality, price and time. Often the extent of necessary work cannot be ascertained until the works have been started and essential opening-up work undertaken. Moreover, the design process will never have been fully completed at the time the contract is made and so design assumptions must be prepared. Like most things in life, it is best to avoid an accident and that includes inadvertently contracting, ditto doing so on the wrong terms or at a bad price.

It is for this reason risk is the single most important aspect to consider in tendering procedure and contractual arrangements. Tender documents should be examined vigilantly to ensure that a tenderer does not oblige his or her company to do the unfeasible, such as building what is practically impossible as happened with "old" Laing and the National Physical Laboratory. In particular, contractors should have a clear understanding of those documents included within the invitation to tender which will eventually become formal contract documents. All too often in retrospect the lawyers will pour over the detail arguing which party carried what risk and why. Tendering is an area where looking left and right and up and down is obligatory before you leap.

### **Check out your putative client before you tender**

There is obviously little or no point in bidding as a tenderer and then entering into what on the face of it seems to be a rewarding and prestigious project unless there is a realistic prospect of being paid for the work done. During the past year, Haymills, Banner Holdings, Spiller Builders, Harry Neal, Frank Galliers have all gone to the wall, taking others with them. A basic point, and one I find all too rarely, is that putative clients / paymasters are not investigated for form by contractors and consultants. An oligarch from some oil-rich state may turn up in a swanky motor, with all the trappings, but will he and can he pay?

<sup>1</sup> Original construction cost £376m with a completion date of May 2006; the employer paid an extra £36m and the contractor lost £150m (completed March 2007).

<sup>2</sup> Originally £13m with the completion date of August 2002, finally open August 2006, £40m over budget and still riddled with defects.

<sup>3</sup> Originally, £40m with a completion date of October 2001, final cost £431m and occupied autumn 2005.



## Procurement - pre-contract safeguards

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With any new client where there is no previous course of dealing, or none for some time, it is important to ascertain whether the sponsor party/invitee has sufficient resources to see the project through. Joint venture companies and companies registered overseas, particularly in the Channel Islands, BVI, Grand Cayman or similar secret or "private" registered residence, should sound warning bells. Similarly, any off-the-shelf company purchased by a developer for a particular venture is, at the end of the day, no more than a shell. Contractors should not be scared of asking for security in these circumstances, be it by advance payment bond, PCG, escrow account, project bank account or legal charge over property by securing all monies/ securing a fixed sum etc.

*Play deal, no deal; never forget, sometimes no deal is your best deal when tendering.*

If in doubt do some basic research. There are a number of searches that can be made online for a fee, e.g. through Dun & Bradstreet, Experian, Equifax, Jordans, etc. A search on the web using a good search engine might also pull up some leads. It is free or low cost to undertake these searches, and whilst historically the evidence provided by them will not be "live/real time", it can provide you with important information at the outset which will help you decide on how to proceed. County Court Judgments, Directors Disqualifications and insolvency portfolios are all indicative of folk who may not have the golden touch. It is always worthwhile carrying out a company search to find out who the main players are and an officer search can be made against the directors to see what other directorships they may hold. This may be helpful in determining whether there have been any previous hospital jobs that go with the men in the grey suits.

### Read the tender documents

I will not apologise for repeating that risk is the most important factor to consider in tendering procedure and contractual arrangements. Whilst it may seem an obvious precaution to read tender documents very carefully, in my experience it is surprising how, time and again, contractors get into difficulties because they do not follow this basic rule. It is generally too late to ask your lawyers to try and get you out of a contractual condition to which you are already bound. Here are the cardinal rules to avoid taking on liability inadvertently.

- When preparing a tender, read the documents you receive carefully, including the small print. If reference is made to documents not supplied to you, request copies.
  - Query anything that is ambiguous or unclear. Some documents are incomprehensible in parts. This is often because they include provisions cut and pasted from other documents.
  - Once you have had a response to queries, make it clear what you have and have not taken into account and what qualifications you need to make.
  - Tenders are hardly ever rejected if the qualifications are reasonable. In fact, it shows that you know what you are doing and may earn you some respect.
  - The indispensable matters that you need to deal with in your tender are: the extent and scope of the work, the price, payment terms and time for completion.
  - Regarding the scope of the work, identify the documents you have priced and note anything you have excluded.
  - If you price a bill of quantities, make it clear that you have based the estimate upon the quantities given and ideally seek a contract that is subject to re-measurement.
  - Are you taking on any design responsibility? If the invitation to tender is ambiguous, clarify the position either by querying it or by making a positive statement as to whether or not you have taken it into account.
  - If you have design obligations, verify that you have professional indemnity or product liability insurance in place. The extent of any design responsibility should be clearly defined in the final contract documents: do you have design responsibility for the whole of the work or only part?
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*It is always worthwhile carrying out a company search to find out who the main players are and an officer search can be made against the directors to see what other directorships they may hold. This may be helpful in determining whether there have been any previous hospital jobs that go with the men in the grey suits.*

<sup>4</sup> Gable House Estates Ltd v Halpern Partnership (1996) 48 Con. L.R. 1 at 103. Where an architect draws up a scheme for redevelopment, his duties may include a duty in relation to estimates of the lettable area.

<sup>5</sup> In a judgment handed down on 2 April 2008 in Tyco Fire & Integrated Solutions Ltd v Rolls-Royce Motor Cars Ltd [2008] EWCA Civ 286 the Court of Appeal overturned the first instance decision of Judge Gilliland QC [2007] EWHC 3159, and held that a contractor (Tyco) under a construction contract was, on a true construction, liable to indemnify its employer (Rolls-Royce) for damage to existing structures caused by Tyco's negligence, despite a contractual requirement for Rolls-Royce to maintain a joint names insurance for specified perils.

<sup>6</sup> Section 106 of the Town and Country Planning Act 1990 allows a local planning authority (LPA) to enter into a legally binding agreement or planning obligation with a land developer. S.106 agreements can act as a main instrument for placing restrictions on the developers (who pass the risk down to contractors), often requiring them to minimise the impact on the local community and to carry out tasks, that will provide community benefits.

<sup>7</sup> As used by the likes of the Olympic Delivery Authority, see <http://business.london-2012.co.uk/eTendering-Service/> and the likes of Davis Langdon, CB Richard Ellis and Land Securities.

<sup>8</sup> [1978] 1 All ER 18. Smith overhauled South Wales Switchgear Ltd's electrical equipment for some years. The company wrote to Smith asking him to carry out the overhaul of equipment. A purchase note requesting work which read "subject to our general Conditions of contract 2400, obtainable on request" was sent to Smith. He carried out the instructions as requested but did not request a copy. An unrequested copy of the 1969 conditions was sent to him. There were two other versions of the conditions including the March 1970 revision. Held: The reference in the purchase order incorporated the March 1970 revision. There were three reasons for the decision:

- 1) It was clear how Smith could have ascertained the terms.
- 2) It was common knowledge that conditions of contract change over time.
- 3) If he had asked for the conditions he would have received a copy of the current one.

## Procurement - pre-contract safeguards

- You should also make sure that the responsibility for interface with other work is clear, as this is invariably where issues arise between trades, specialist or building mediums. There may be other matters to be addressed such as who provides what on site, for example attendances, and who pays for it.
- Liquidated damages for delay - on subcontract work - are often hidden in the main contractor's documents.
- What is reasonable for a main contractor is not necessarily reasonable for a subcontractor. If bonds or warranties are required, what are the terms?
- Consider whether you want to include any limitations on your liability, either in the contract itself or in any warranties you are being asked to provide.
- Check tolerances; check for provisions which require gross internal or net lettable areas<sup>4</sup> to be achieved or in default of the obligation to pay iniquitous damages.

It is helpful to have an internal checklist so that you adopt a systematic approach for enquiry documents.

- Include your standard terms and conditions with your tender where possible. If you do not have them, consider having a set prepared which also covers matters that in your experience commonly arise in relation to your work. Your standard terms may not be accepted wholesale but they will be a basis for negotiation.
- Above all, do not be bashful; it is a mistake not to mention in your tender or estimate something of importance for fear of being seen as difficult. It is much easier to put down a marker about such issues earlier rather than later.

One area that consistently holds contractors to ransom is the risk in dealing with existing structures. The problem is compounded when the property concerned is listed or constructed from unusual or deleterious materials (early clinker concretes, post-tensioned floor slabs and beams, timber framing or cladding, thatch, for example). It is important to take an early stand and to give positive reasons to the offeree why a new provision should not be introduced. At its heaviest, you can decide not to proceed further with the tender. In other cases, you may well be able to agree an amendment but you need to undertake a risk assessment and price for it accordingly. Look at the insurance coverage position carefully when tendering in light of recent authority on co-insurance and the contractor's liability in negligence under a construction contract<sup>5</sup> for existing structures risk.

## References to other documents

Although I have mentioned references to other documents in passing above, it is so important it warrants its own heading, such are the times it comes to haunt contractors. Sometimes the terms on which the work is to be let are referred to in correspondence passing between the parties, so watch out for this where the letter is made a contract document, particularly if that is not what you want. This often happens with drawings, planning documents/requirements, highway and s.106 issues,<sup>6</sup> EIAs and geotechnical/ground investigation reports. You will typically see references to documents "which are available for inspection by appointment". If that is the situation make damn sure that an appointment is made and copies taken. If they are available on an intranet or some downloadable source evoked with modern e-tendering<sup>7</sup> bespeak the password and download them. Parties often make reference in contractual documents to the contract being "subject to conditions available on request". Such a reference, when brought to the notice of the other party, is enough to incorporate the current edition of those conditions of contract. This rule was decided in *Smith v South Wales Switchgear Ltd*.<sup>8</sup>

## Conclusion

Play deal, no deal; never forget, sometimes no deal is your best deal when tendering. In fact, some companies will not bid on certain contracts because of suicide bids by others to win work in this recession.

## Procurement: documents and disclosure

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# Challenging the tender process: documents and disclosure

*Over the past few years the majority of reported cases have tended to focus on two issues: changes made during the tender process without telling the tenderers, or cases where the contracting authority has judged tenders by reference to criteria which it had not disclosed<sup>1</sup>. In 2010, as Jeremy Glover explains, a new issue came to the fore, namely documents and disclosure. What (possibly confidential) documents might the contracting authority have to provide to an aggrieved tenderer?*

Questions about documents are frequently raised. What documents must be disclosed by a contracting authority? What limits are there on documents that discuss how bids were treated or evaluated? What documents are disgruntled tenderers entitled to see? What if the documents requested contain confidential information – confidential to other tenderers or information that is commercially sensitive to the contracting authority? Will a contracting authority be able to withhold documents on grounds of public interest immunity (“PII”)?

*Mr Justice Coulson began by looking at disclosure tests imposed by Part 31 of the CPR, namely relevance and proportionality.*

These issues have been discussed in a number of cases and not just cases brought under the Public Contracts Regulations 2006. These judgments are important because they help to clarify the extent to which documents relating to a contracting authority’s decision-making have to be disclosed. And in short, if a dispute does arise about a contract award procedure, the contracting authority should be aware that it may well be required to disclose a very broad range of documents relating to its internal decision-making process. Contracting authorities should also be aware that the PII defence is unlikely to assist in preventing the disclosure of internal documents. A good example is *Amaryllis Ltd v HM Treasury (No. 2)*<sup>2</sup>, a decision of Mr Justice Coulson following an application for disclosure and inspection of documents made in a claim brought by a furniture supplier against HM Treasury for an alleged breach of the public procurement rules.

### *Amaryllis Ltd v HM Treasury (No. 2)*

Amaryllis maintained that HM Treasury (HMT) failed to deal with its first-stage tender in an equal, transparent and non-discriminatory way. Ultimately the claim for damages was said to be worth some £11 million. Close to trial, disputes arose about HMT’s disclosure. HMT had objected to disclosing a number of documents, including, pre-tender supplier meetings; pre-qualification development and evaluation documents; and the original version of the pre-qualification report (HMT having sent a redacted version to Amaryllis following a request for information made under the Freedom of Information Act).

HMT gave a number of reasons for refusing to produce the documents as follows:

- i) that inspection of the documents would damage the public interest. Disclosure of that information would seriously if not irreparably damage the reputation of the Defendant leading to a loss of confidence in the wider market place if information that the Defendant had received from other potential suppliers at the PQQ stage were to be released to a competitor;*
- ii) that the matters contained are highly commercially sensitive and confidential and to disclose them to a competitor would undermine not only the present procurement decision but also HM Government’s public procurement processes generally, all of which being clearly damaging to the public interest;*
- iii) that the documents are irrelevant to the litigation given the nature of the allegations as pleaded and/in the alternative the alleged breaches complained of by the Claimant are particular to its own circumstances so that the details of its competitors’ bids are also irrelevant to the claim.”*

<sup>1</sup> See by way of example, *Lianakis v Alexandroupolis* [2008] EUECJ C-532/06, or *Letting International Ltd v London Borough of Newham* [2008] EWHC 1583 (QB)

<sup>2</sup> [2009] EWHC 1666 (TCC)

## Procurement: documents and disclosure

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### Disclosure under the Civil Procedure Rules (CPR)

In response to an application to CPR 31.12 seeking an order for disclosure, HMT issued a separate application for an order pursuant to CPR 31.19 that it be permitted to withhold inspection or disclosure of the documents because “disclosure would damage the public interest”. Whilst the focus of the arguments between the parties was on the public interest issue, Mr Justice Coulson began by looking at disclosure tests imposed by Part 31 of the CPR, namely relevance and proportionality. He noted that in the majority of procurement disputes arising out of the treatment or evaluation of one company’s tender, comparisons with at least some aspects of the tenders of other third party companies are almost inevitable. Here, some of the allegations in relation to timber sustainability and business activities raised a direct comparison issue. The Defence, too, raised issues about the comparison and evaluation of the tenders. Therefore, the other PQQs and HMT’s evaluation regime were prima facie relevant documents in these proceedings. The documents sought included:

*[a] mixture of redactions and substitutions will be more than sufficient to ensure that such confidential information as there might be is not unnecessarily disclosed, whilst at the same time ensuring that the Claimant is given sufficient information to make its full case by reference to all the relevant material.*

- (i) Documents previously provided in redacted form  
These included the Marked Version of the Amaryllis PQQ. The Judge was in no doubt that this - a document evaluated by HMT, and from which the claim actually stemmed - was highly relevant and should be disclosed in unredacted form. The same was true of HMT’s PQQ Evaluation Report and PQQ Scoresheet.
- (ii) The so-called Appendix B documents, which included:
  - Pre-tender supply meetings: HMT had meetings with around 30 suppliers before the PQQ process commenced, although not with Amaryllis. Whilst some of the issues discussed at the meetings were irrelevant, those parts which were plainly relevant to the issues in this case should be disclosed.
  - Pre-qualification evaluation: Amaryllis sought here the PQQs provided by the other suppliers, the notes prepared by the HMT team relating to Amaryllis’s PQQ and the PQQs of the other suppliers. In terms of relevance and proportionality, the PQQs of the other suppliers were said to be plainly disclosable documents, albeit that there remained questions about confidentiality. The same was true of the notes prepared by the members of HMT’s team. Amaryllis needed to know precisely how its own PQQ was evaluated and these notes might provide some insight into that process. However, the Judge doubted whether HMT’s evaluation notes relating to the PQQs of the other suppliers were of much (if any) relevance to this case. Further, he was firmly of the view, particularly in view of the lateness of this application, that it was not proportionate to require HMT to disclose them.
- (iii) Other documents  
The evaluation report of 12 March 2008 came with three attachments: the marking and weighting criteria spreadsheet; the evaluation results spreadsheet; and the project plan and timescales. As the report was plainly a relevant and disclosable document, so were the attachments. It was not, however, relevant to know precisely how percentages and weightings were calibrated in advance of the PQQ; what mattered were the percentages and weightings that were actually applied to Amaryllis’s tender and to the tenders of the other suppliers who completed the PQQ. In addition, HMT had “a product and supplier strategy” which contained “a high level view” of its aims. That was relevant.

### Confidentiality and public interest immunity

The second issue the court had to consider was the question of public interest immunity (“PII”) and confidentiality. The general principle in the UK is that a litigant is not entitled to claim privilege for documents and information merely because they were supplied to him in confidence by a third party. Although there are exceptions to this principle, the only relevant exception in the present case, in the view of Mr Justice Coulson, appeared to be the alleged public interest in their non-disclosure.

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## Procurement: documents and disclosure

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*That the matters contained are highly commercially sensitive and confidential and to disclose them to a competitor would undermine not only the present procurement decision but also HM Government's public procurement processes generally, all of which being clearly damaging to the public interest;*

The situation regarding PII was more complex. In 1996, the then Attorney General, Sir Nicholas Lyell QC announced that the process of claiming PII would involve three distinct steps. First a decision would be taken as to relevance. Only then would a decision be taken as to whether the document attracted PII. In doing this, one should ask whether disclosure of a particular document would cause real damage to the public interest. Third, if the document attracted PII, the decision-maker would need to undertake a balancing exercise between the public interest in non-disclosure and the public interest in the proper administration of justice and the need for a fair trial.

There was, in this case, no evidence that any senior official had considered these issue at all. This was of some concern to the Judge. Indeed, until the day before the hearing, HMT no application had been made to withhold disclosure of documents on PII grounds. Therefore, the Judge did not see how HMT could confirm, on the one hand, that they were committed to open government and compliance with Regulation 4(3) of the Public Contracts Regulations 2006, and then to assert, on the other, apparently without proper consideration, that it would cause real damage to the public interest if the public knew how this part of HMT had approached and performed such an important procurement task. The way in which HMT went about the evaluation exercise lay at the heart of this case. In those circumstances, it would be a truly exceptional case where there was some form of public interest in keeping secret any aspect of that internal evaluation process.

Further, the Judge noted that General Instruction 7 in the PQQ made plain that "any information submitted to [HMT] may be subject to disclosure in response to a request under the Freedom of Information Act". Tenderers were asked to identify and explain (in broad terms) what harm may result from disclosure if a request is received, and the time period applicable to that sensitivity. Even then, HMT made it clear that they still may be required to disclose it. There was no evidence that any of the other suppliers had said that the information in question was confidential. Therefore the Judge ruled that:

*"[a] mixture of redactions and substitutions will be more than sufficient to ensure that such confidential information as there might be is not unnecessarily disclosed, whilst at the same time ensuring that the Claimant is given sufficient information to make its full case by reference to all the relevant material."*

### Conclusion

Typically in these types of case, the key issue is whether the tender process has been carried out in a fair and transparent way. This can only be ascertained if the evaluation process carried out by the contracting authority can be assessed and reviewed. In terms of Public Interest Immunity, this means that it is most unlikely (or in Mr Justice Coulson's words "a truly exceptional case") that there would be any public interest in keeping secret the internal evaluation process. Therefore public authorities should take care to remind everyone concerned in the tender process that internally generated documents are, more likely than not, going to be classed as "disclosable".

However, parties should not forget that the usual starting point for the court will be the usual disclosure rules to be found in Part 31 of the CPR. The courts will, if asked, carry out a two-stage test. First they will look to see whether the documents requested are actually relevant to the dispute in issue. Is the disclosure and inspection necessary for disposing fairly of the proceedings? Here it is important that those making the requests, make them at an early stage in proceedings and draft their requests as tightly as possible, otherwise they may fall foul of the principles of proportionality. Second the courts will consider questions of confidentiality and also whether any special measures (i.e. limiting the class of people who can review the documents) should be adopted.

So, tenderers must be careful as it does appear that where disputes arise from complaints about the bidding process then a very broad range of documents and information could potentially be disclosable. Tenderers too should not assume that commercially sensitive information disclosed to the contracting authority will automatically benefit from confidentiality in the context of a legal dispute.

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## The 2010 Bribery Act

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### The 2010 Bribery Act

*In 2010, the UK government passed a new Bribery Act, which is due to come into effect in April 2011. This Act, which is an attempt to bring together all existing legislation, has attracted a lot of attention. In the main this is because of the breadth of the legislation, which will make companies liable for the conduct of those “associated” with their business. And that can mean not just employees, but maybe agents, partners or subsidiaries. Jeremy Glover looks at the new Act and also sets out some practical advice on the steps a company can take to both detect corruption and provide a defence against the new legislation.*

First, do not be under any illusion. The government is serious. Richard Alderman, Director of the Serious Fraud Office, who will be tasked with enforcing the new legislation, said:

*“Society is entitled to expect of the corporates these days that they have adequate anti-bribery processes and that those processes are carried out throughout the corporation. If there is a significant failure, then it is a board level failure.”*

### The Standard Forms - FIDIC and the World Bank

The standard forms do of course deal with corruption. Clause 15.6 of the FIDIC Pink Book<sup>1</sup> notes that the Employer shall be entitled to terminate the Contract if the Contractor:

*“If the Employer determines that the Contractor has engaged in corrupt, fraudulent, collusive or coercive practices, in competing for or in executing the Contract, then the Employer may, after giving 14 days notice to the Contractor, terminate the Contractor’s employment under the Contract and expel him from the Site, and the provisions of Clause 15 shall apply as if such expulsion had been made under Sub-Clause 15.2 [Termination by Employer].*

*Should any employee of the Contractor be determined to have engaged in corrupt, fraudulent or coercive practice during the execution of the work then that employee shall be removed in accordance with Sub-Clause 6.9 [Contractor’s Personnel].”*

Note that this sub-clause is widely drawn, as it refers to both “competing for” and “executing” the Works. The Multilateral Development Bank (MDB) FIDIC contract is particularly pertinent as during 2010, the World Bank revised its Guidelines for the “Selection and Employment of Consultants” to reflect an agreement amongst the MDBs to cross-debar firms and individuals found to have violated the fraud and corruption provisions of their respective procurement guidelines. Paragraph 1.11(e) states that:

*“A firm or an individual sanctioned by the Bank in accordance with subparagraph (d) of paragraph 1.22 of these Guidelines or in accordance with the World Bank Group anti-corruption policies and sanction procedures shall be ineligible to be awarded a Bank-financed contract, or to benefit from a Bank-financed contract, financially or otherwise, during such period of time as the Bank shall determine.”*

The World Bank duly keeps an open register of debarred firms on its website.

### The Bribery Act 2010

This was passed on 8 April 2010 and comes into force in April 2011. It is very widely drawn and is not just restricted to the UK or UK companies. It seems that the UK courts will have jurisdiction if an offence is committed by someone with a close connection with the UK or by a corporation that does business in the UK regardless of where the alleged offence was carried out. The new Act covers the following offences:

Section 1: Bribery - the offering, promising or giving of an advantage;

Section 2: Being bribed - requesting, receiving or agreeing to receive an advantage;

Section 6: Bribery of foreign officials; and

Sections 7-9: Corporate offence of failing to prevent bribery.

*The new law will introduce a clear and robust approach and is intended to encourage commercial organisations to take steps to address the risks of bribery.*

<sup>1</sup> The version of the Red Book approved by the World and other Multilateral Banks.

## The 2010 Bribery Act

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Potential penalties range from unlimited fines for companies to 10 years' imprisonment and unlimited fines for individuals. For companies there is another potential penalty. Regulation 23(1)(c) of the Public Contracts Regulations 2006 in the UK states that a public authority shall treat as ineligible and shall not select a contractor if that public authority has actual knowledge that the contractor or any of its directors or any other person who could be said to represent the contractor has been convicted of bribery. That said, it is the new offence of failing to prevent bribery that has attracted the most comment, mostly along the lines of what does it actually mean?

### What does this mean?

On 14 September 2010, the Ministry of Justice launched a consultation about the make-up of the proposed Guidance<sup>2</sup> about procedures which commercial organisations can put in place to prevent bribery. It is intended that this Guidance will assist companies with putting proper bribery prevention procedures into place, in other words providing a defence to the section 7 offence of failing to prevent bribery. The consultation runs until 8 November 2010 and the Government will then publish the guidance as section 9 of the Bribery Act 2010 before the Act comes into force in April 2011. The Consultation Paper confirms how seriously the Government takes the new legislation, noting that the new criminal offence of a failure to prevent bribery under section 7 of the Act:

*"reflects a general recognition that there is an important role to be played by business itself in ensuring that commerce is undertaken in an open and transparent manner. The new law will introduce a clear and robust approach and is intended to encourage commercial organisations to take steps to address the risks of bribery."*

Unfortunately the Guidance, in its current form, is pitched at quite a high level. The use of "may" rather than "should" suggests that it is not intended to provide an exhaustive prescriptive set of rules. The reason given for this is the wide variety of type and size of organisations which the Guidance needs to address. In particular the Guidance provides no answer to the question of when, under section 7, a person will be considered to be "performing services on behalf of the organisation". In other words, it does not explicitly address the parent/subsidiary or joint venture partner difficulty caused by the new offence of failing to prevent bribery. What the Consultation Paper does do is to provide details of Six Principles for Bribery Prevention. These are:

(i) Risk Assessment

This is the key part of the Guidance. Items 2-6 are in actuality part of the risk assessment process. This process is stated to mean that organisations should "regularly" and "comprehensively" assess the nature and risks relating to bribery to which they are exposed. What does this mean? The key is perhaps to understand your own business profile and the associated risks. For example, the construction industry is deemed a high-risk area, particularly where public procurement and the need to obtain licences and permits are involved. It is also the case that transactions involving political or charitable contributions can be an area where corruption is an issue.

Equally, what about where a company operates? How transparent is the government? It is possible to find out where there are perceived high levels of corruption and therefore risks from league tables and indexes published by organisations such as Transparency International - [www.transparency.org.uk](http://www.transparency.org.uk). You also need to consider the type of work your company does. If you enter into partnerships or joint ventures, how well do you know those partners? What about suppliers? Where do they operate? So having carried out your risk assessment, what do you do next to ensure that you have "adequate procedures" in place to act as a defence? This is, at least in part, answered by the final five principles which deal with the development and maintenance of effective anti-bribery policies.

(ii) Top level commitment

This is a fairly simple process, namely the establishment of a culture across the entire organisation which makes it clear that bribery is never acceptable. The first step is the establishment of a code of conduct, the second is of course ensuring that it is enforced.

***Section 7: a company will be guilty of an offence if "a person associated with" that company bribes another person intending to obtain or retain business for that company.***

<sup>2</sup> See [www.justice.gov.uk/consultations/briberyactconsultation.htm](http://www.justice.gov.uk/consultations/briberyactconsultation.htm)

## The 2010 Bribery Act

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### (iii) Due diligence

The Guidance describes “due diligence” as ensuring that you know and understand the extent of your business relationships. What are the risks that a particular business opportunity might raise? What are the locations of the business opportunity and potential business partners? Do your partners have their own anti-bribery codes of conduct? Does your joint venture agreement address anti-corruption procedures?

### (iv) Clear, practical and accessible policies and procedures

The Guidance recommends that the policy documentation could<sup>3</sup> include guidance on, • political and charitable contributions, gifts, promotional expenses and hospitality and on what to do if faced with blackmail or bribery. The policy should also include commitment to the Public Interest Disclosure Act 1998 which gives protection to whistle-blowers.

The question of gifts is always a tricky one. Here the Appendix to the Guidance says that “reasonable and proportionate hospitality and promotional expenditure which seeks to improve the image of a commercial organisation, better to present products or services, or establish cordial relationships, is recognised as an established and important part of doing business.” To amount to a bribe, such hospitality must be intended to induce a person to perform a function improperly. It is interesting here that these policies are stated to take account of “all employees, and all people and entities over which the commercial organisation has control.” This is as close as the Guidance gets to answering the question as to when a person can be said to be “performing services on behalf of” an organisation when it comes to mounting a prosecution for a Section 7 breach.

### (v) Effective implementation

The Guidance specifically and unsurprisingly says that it is not enough to leave the procedures on the shelf. The implementation of the strategy needs to be brought to life. This means that thought must be given to communicating policies (both internally and externally, for example as part of the tender process), setting up training and putting in place proper reporting structures.

### (vi) Monitoring and review

Here the Guidance draws attention to the need to ensure effective financial monitoring and auditing. Following the money, and being able to spot unexpected variations, is not just sound accounting practice, it may expose corruption. However, to ensure that proper “adequate procedures” are put in place, milestones need to be set up and a formal process put in to place to review what has happened and see what lessons can be learnt for the future, particularly if there is a change in the nature of your company’s business which might be said to introduce new risks.

## Conclusions

As can be seen, the Guidance does not provide any detailed mandatory assistance, or get-out-of-jail-free card, in establishing what procedures need to be in place to provide a defence in the event of a section 7 prosecution. The Guidance is set at a high level, dealing in principles, not details. In particular, it is silent on the key question as to when a person can be said to be “performing services on behalf of the organisation”. It provides no guidance on whether, or at least in what circumstances, a parent of a joint venture partner might find itself liable for the actions of others. The only help can be found in Principle 4 which refers to the concept of “control”. There is also reference in Principle 5 to the provision of support to external business partners, even to the extent of sharing in training.

Once the Government consultation period comes to an end, it is possible that the Guidance will be modified before the Bribery Act comes into force in April 2011. However, it seems unlikely that there will be any significant change. What is important, therefore is that any company that has any dealing with the UK, takes steps to ensure that, at the least, it has an Anti-Corruption Policy in place - and that it is one which is monitored, implemented, revised and reviewed.

*“Section 7 ... reflects a general recognition that there is an important role to be played by business itself in ensuring that commerce is undertaken in an open and transparent manner”:  
Kenneth Clarke, Lord Chancellor.*

<sup>3</sup> But not, it should be noted “should”. The Guidance is advisory not mandatory.



## FIDIC

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### *The new FIDIC subcontract*

*There have been a number of developments at FIDIC over the past 12 months. These include the introduction of a new subcontract for use with the Red Book – the FIDIC Construction Contract, 1st Edition 1999 - and also some changes to the Pink Book, the version of the Red Book used by the Multilateral Development Banks.*

The need for FIDIC to produce a subcontract for the Red Book came about for a variety of reasons, primarily perhaps because FIDIC had not produced one since 1994, and that was designed for use with the old 4th Edition of the Red Book. But also, this new draft is particularly important to the Multilateral Development Banks, who required that subcontracts issued under their forms be in an “internationally recognised form”. The new subcontract, currently available as a test edition, is called the FIDIC Conditions of Subcontract for Construction.

In short the subcontract is intended to operate in the usual back-to-back basis, and, unsurprisingly, the subcontract provides for a direct total pass down of risk, with the subcontractor assuming the duties and obligations of the contractor under the main contract for the subcontract works. This includes a fitness for purpose obligation in respect of any design work, something which is not in the 1994 version.

This principle also applies to payment and one thing that will be of particular note to those operating in the UK market is inclusion of pay-when-paid conditions. This of course conflicts with the payment requirements of the Housing Grants Act. FIDIC has included guidance notes and particular sample conditions to assist parties working in the UK<sup>1</sup> and other jurisdictions with similar legislation. However, subcontractors used to practising in the UK market will need to take especial care to see what the main contract says about payment.

There are a number of new provisions, including at sub-clause 8.4 additional programming obligations, and at 15.3 the right of a subcontractor to recover loss of profit, if the Contractor is entitled to recover loss of profit under the Red Book termination provisions. Whilst under clause 16, the subcontractor can suspend performance and ultimately terminate in the event of persistent non-payment.

As always, FIDIC has given considerable attention to the dispute resolution provisions of the subcontract. The subcontract contains its own dispute resolution procedures. The time limits for notifying and dealing with claims are shorter in the subcontract than the main contract, no doubt to enable the subcontractor claims to be passed up the line. The subcontractor should take careful note that it will only be entitled to extra time or costs, if it complies with the main contract notice requirements. Further, the subcontract contains a suspension period which requires that once a claim is notified, the parties must defer any DAB proceedings (and the DAB here is an ad hoc one in contrast to the standing DAB typically favoured under the Red Book) under the subcontract for 112 days, in order to give the contractor the time to resolve the dispute under the main contract. Thus this suspension period “quantifies” the simple “best endeavours” obligation that is included in other standard forms requiring the contractor to pursue subcontractor entitlements under the main contract.

In addition, the subcontract contains alternative dispute resolution options for use in subcontracts where (i) the subcontract is such that the parties might prefer a simpler dispute resolution process (i.e. just arbitration and amicable settlement) or (ii) it can be anticipated that complex subcontractor claims are likely to arise that will be “related” to contractor’s entitlements under the main contract (including utilising the main contract DAB).

This new subcontract is a further step along the FIDIC road to standardisation and as such it is a welcome addition as it has been specifically drafted to comply with the Red and Pink Books. Of course, to fully understand the risks and liabilities, as with every subcontract, the onus will be on all parties to read the subcontract together with the applicable main contract.

*The payment terms include pay-when-paid clauses - a sign that the FIDIC form is rarely used in the UK.*

<sup>1</sup> Although of course FIDIC is rarely used for UK projects.

## FIDIC

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### *FIDIC: recoverability of “cost”*

*Frederic Gillion and members of the Fenwick Elliott team, including Tom Young and Rebecca Saunders, have written a number of articles on the FIDIC form of contract for the Practical Law Website ([www.practicallaw.com](http://www.practicallaw.com)). Here, in one of these articles, Tom Young considers the definition of “cost” in the current suite of FIDIC forms of contract and reviews the circumstances where “cost” might be recovered.*

#### Definition

The definition of “cost” in the current suite of FIDIC contracts is the same in every contract. The definition provides that:

*“Cost” means all expenditure reasonably incurred (or to be incurred) by the Contractor, whether on or off the Site, including overhead and similar charges, but does not include profit.”*

#### Development of the definition from previous forms

The definition of cost in the current suite of FIDIC contracts has remained relatively unchanged since the publishing of the fourth edition of the Red Book in 1987, which was the first time the definition expressly excluded profit. The fourth edition provides that:

*“cost” means all expenditure properly incurred or to be incurred, whether on or off the Site, including overhead and other charges properly allocable thereto but does not include any allowance for profit.”*

The differences between the definition in the fourth edition of the Red Book and the current suite of contracts are minimal, but include:

- that expenditure must be “properly incurred” under the fourth edition, whereas under the current suite it must be “reasonably incurred”
- that cost is defined as “including overhead and other charges properly allocable thereto” under the fourth edition, whereas under the current suite it is defined as “including overhead and similar charges”.

The final step towards the definition in the current suite occurred when FIDIC published the new Orange Book in 1995, in which the only difference was that expenditure must be “properly incurred” rather than “reasonably incurred”.

#### What is recoverable as cost?

In the current suite of FIDIC contracts the features of the definition of cost are that:

- expenditure must be incurred and must be reasonably incurred;
- expenditure can be on or off site;
- overhead and similar charges included; and
- profit is excluded.

Whilst the definition does expressly refer to financing charges, the FIDIC Guide first edition 2000 explains that overhead charges may include reasonable financing costs incurred by reason of payment being received after expenditure. The FIDIC Guide also notes that in some countries financing costs might be included within cost, even though funds were not borrowed because the contractor had sufficient funds at his disposal.

#### Exclusion of profit

One of the main features of the definition of “cost” is that it does not automatically include any element of profit. In order to ascertain whether an element of profit is recoverable one needs to look at the actual wording of the individual sub-clauses. In general terms,

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*The contractor’s entitlement to cost is subject to the strict notice provisions of sub-clause 20.1.*

## FIDIC

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and as noted by the FIDIC Guide, an element of profit is recoverable in addition to cost where the employer is blameworthy. Where neither party is at fault then it is usually only cost that is recoverable.

The current suite of FIDIC contracts use slightly different wording where it is stated that profit is recoverable in addition to cost:

- “Cost plus reasonable profit” is used in the Red Book, Yellow Book and Silver Book.
- “Cost plus profit” is used in the MDB Harmonised Edition of the Red Book and is further defined to require ...“this profit to be one-twentieth (5%) of this Cost unless otherwise indicated in the Contract Data”.
- “Cost plus profit” is used in the Gold Book and is further defined as “Cost plus the applicable percentage agreed and stated in the Contract Data. Such percentage shall only be added where the Sub-Clause states that the Contractor is entitled to Cost Plus Profit.”

In the event that the parties to a contract using the Red Book, Yellow Book or Silver Book wish to specify the amount of profit recoverable, the FIDIC Guide recommends that the following amendment can be included at sub-clause 1.2:

*“In these Conditions, provisions including the expression ‘Cost plus reasonable profit’ require this profit to be [one-twentieth (5%)] of this Cost.”*

***“Cost” means all expenditure properly incurred or to be incurred, whether on or off the Site, including overhead and other charges properly allocatable thereto but does not include any allowance for profit.***

### When is cost recoverable?

The circumstances in which the contractor is able to recover cost varies between the different forms in the current suite of contracts to reflect the different allocation of risks. By way of example, under the Red Book the contractor is able to recover cost for unforeseen ground conditions, whereas under the Silver Book unforeseen ground conditions is a risk assumed by the contractor and as such cost is not recoverable.

Under the Red Book cost is recoverable under the following provisions:

- 4.12 [Unforeseen Physical Conditions];
- 4.24 [Fossils];
- 8.9 [Consequences of Suspension];
- 13.7 [Adjustments for Changes in Legislation];
- 17.4 [Consequences of Employer’s Risks]; and
- 19.4 [Consequences of Force Majeure] subject to exceptions.

As the definition excludes profit, in each of the above circumstances there is the potential for the contractor to incur significant expenses without profit.

### Recoverability of cost is subject to clause 20.1

The contractor’s entitlement to cost is subject to the strict notice provisions of sub-clause 20.1 of the FIDIC forms. Sub-clause 20.1 sets out the procedure that the contractor must follow in order to claim additional payment.

Under sub-clause 20.1 the contractor must give notice of the event or circumstances giving rise to its claim as soon as practicable, and not later than 28 days after the contractor became aware, or should have become aware, of the event or circumstances.

In the event the contractor fails to comply with the notice requirements set out at sub-clause 20.1, the contractor shall not be entitled to any additional payment.

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## International arbitration - case law update

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# International arbitration - case law update

*Last year, our round-up of developments in international arbitration concentrated on the impact of the European Court of Justice ("ECJ") decision in the West Tankers case. The case concerned anti-suit injunctions. Just because a contract contains an arbitration clause parties will on occasion try to take disputes to court. In some jurisdictions, courts are prepared to disregard arbitration clauses, particularly if they provide for the dispute to be determined abroad, and try the matter themselves. The anti-suit injunction is a means to try and protect arbitration clauses. The idea is to prevent a party from continuing proceedings commenced in another jurisdiction in breach of an exclusive jurisdiction clause providing for litigation in England or in breach of an arbitration agreement providing for arbitration in England (a right enshrined in section 44 of the 1996 Arbitration Act). The ECJ removed the right – in cases involving the courts of the European Union – in respect of litigation at the start of this century. Unsurprisingly, in 2010, there have been further developments.*

### *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC<sup>1</sup> - anti-suit injunctions*

JSC were effectively owners and grantors of a 20-year concession to operate hydroelectric plant and equipment and produce hydroelectric energy in Kazakhstan and AESUK were effectively grantees and lessees of that concession. The Concession Agreement contained an arbitration clause ("Clause 32") which provided for ICC arbitration in London. A number of disputes arose between the parties which were referred to the courts in Kazakhstan. In January 2004 the Supreme Court of the Republic of Kazakhstan ruled clause 32 to be invalid. In June 2009 JSC commenced proceedings against AESUK in the Specialist Inter-District Economic Court of East Kazakhstan Oblast ('the Economic Court') due to AESUK's failure to comply with repeated requests for information by JSC about the value of the concession assets. AESUK challenged the proceedings by reference to clause 32, but were unsuccessful. AESUK then applied, *ex parte*, to the Commercial Court in London for the grant of an anti-suit injunction, which it obtained. This was not recognised in Kazakhstan and the Economic Court continued with the proceedings, ruling in JSC's favour. AESUK appealed to the Regional Court, again relying on clause 32. AESUK's appeal was dismissed. Following the grant of the *ex parte* injunction, the matter moved to an *inter partes* hearing in the Commercial Court. AESUK sought two declarations. Firstly, that clause 32 was valid and enforceable and secondly, that the dispute between the parties fell within clause 32. AESUK also sought an injunction against JSC commencing or pursuing legal proceedings before the Economic Court or elsewhere in respect of any matters which AESUK and JSC had agreed to arbitrate.

JSC opposed the declarations and injunction sought on a number of grounds including the 'Arbitration Claim Issue' and the 'Gateway Issue', which were dealt with together by the judge. Relevant to these issues are CPR Part 62 and s.44 of the Arbitration Act 1996 ('the 1996 Act'). CPR Part 62 defines arbitration claims in the High Court and provides 'gateways' through which relief can be granted for such claim. One such gateway is at Rule 62.5 which sets out rules for service of an arbitration claim form outside of the jurisdiction. Rule 62.5(1)(b) states that the court may give permission for service of an arbitration claim form outside the jurisdiction if the claim is for an order under s.44 of the 1996 Act. Section 44 gives the court the same power to make orders in relation to arbitral proceedings about matters listed in s.44 as it has to make orders about the same matters in legal proceedings. Rule 62.5(1)(c) states that the court may give permission for service of an arbitration claim form outside the jurisdiction if (i) the claimant seeks some other remedy or requires a question to be decided by the court affecting an arbitration (whether started or not), an arbitration agreement or an arbitration award; and (ii) the seat of the arbitration is or will be within the jurisdiction or the conditions in s.2(4) of the 1996 Act are satisfied.

*This case also demonstrates that the English courts will still grant anti-suit injunctions in relation to decisions of courts, provided they are decisions outside of the EU.*

<sup>1</sup> [2010] EWHC 772 (Comm)

## International arbitration - case law update

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JSC argued that AESUK's claim, the injunction and the gateways for relief relied upon in the CPR through Part 62 were based in part upon s.44 of the 1996 Act. JSC went on to argue that it was clear from the wording of s.44 and Part 62 that there had to be an arbitration in existence or intended or proposed arbitration proceedings. JSC contended that as there was no arbitration in existence and it was clear that AESUK did not propose or intend to commence such proceedings then relief could not be granted.

The issue before the Court was this. Where arbitral proceedings are neither commenced nor proposed, can an anti-suit injunction be obtained by reference to s.44 of the 1996 Act? The answer was no. However, where arbitral proceedings are neither commenced nor proposed, in England and Wales, an anti-suit injunction can be obtained by reference to s.37 of the Supreme Court Act 1981.

This case was brought by the party against whom claims were being made and who wanted to preserve its right under the contract to have those claims heard in arbitration. The High Court determined that an anti-suit injunction can be granted in these circumstances and used s.37 of the Senior Courts Act 1981 to assist in establishing the necessary "gateways" for the purposes of CPR Part 62. Burton J was keen to stress that there should not be an usurpation or ouster of the very arbitration jurisdiction that AESUK were seeking to enforce and engage. He went on to agree with the general principle set out by Thomas J in *Vale de Rio* that a party should commence arbitration proceedings before seeking declaratory relief, but stated that in the case of a party seeking to demonstrate that it wishes to be sued in arbitration then that party does not need to commence arbitration proceedings. This case also demonstrates that the English courts will still grant anti-suit injunctions in relation to decisions of courts, provided they are decisions outside of the EU. Remember that following, the *West Tankers* decision, if a party issues court proceedings in an EU state then, pursuant to Council Regulation 44/2001 (on the recognition and enforcement of judgments), the EU court cannot be restrained by an anti-suit injunction obtained from an English court.

*The arbitration clause restricted the offer of employment as arbitrator purely on religious grounds. It was therefore void.*

### *Jivraj v Hashwani*<sup>2</sup> - appointment of arbitrators

The parties here entered into a joint venture agreement to invest in real estate property in various parts of the world including Canada. The agreement included an arbitration clause. The parties terminated their venture and the matter was referred to arbitration. Mr Hashwani appointed Sir Anthony Coleman as arbitrator and asked Mr Jivraj to appoint an arbitrator. There would then have been a third appointment as chairman of the arbitration panel. However, Mr Jivraj said that Sir Anthony Coleman's appointment was invalid because of the terms of the arbitration agreement. The arbitration agreement required that the dispute would be referred to three arbitrators, one to be appointed by each party and the third to be the president of the H.H. Aga Khan National Counsel for the United Kingdom. However, the clause also declared:

*"All arbitrators shall be respected members of the Ismaili community and holders of high office within the community."*

Mr Jivraj sought a declaration that the appointment of Sir Anthony Coleman was not valid because he was not a member of the Ismaili community. The key issue before the CA was whether the agreement (although lawful when it was made) had become unlawful and void because it contravened the Employment Equality (Religion and Belief) Regulations 2003 and the Human Rights Act 1998. The Regulation arose from an EU Directive concerning discrimination on the grounds of religion or belief, disability, age or sexual orientation. The Regulation was aimed at making void agreements which sought to refuse or deliberately omit to offer employment on the grounds of religion or belief. The Court of Appeal considered that the arbitration clause restricted the offer of employment as arbitrator purely on religious grounds. It was therefore void. The second question was whether that final sentence in the arbitration clause could be severed, so leaving the rest of the arbitration clause intact. The Court of Appeal considered that if they simply deleted the final sentence then the agreement would be substantially different from that which had been originally intended. As a result, the arbitration clause was void in its entirety.

<sup>2</sup> [2010] EWCA Civ 712

## International arbitration - case law update

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### *Chalbury McCouat International Ltd v PG Foils Ltd*<sup>3</sup> - failure to identify the seat of the arbitration

Here Chalbury McCouat, an English company with its principal place of business in England, entered into a contract on 8 February 2008 (“the contract”) with PG Foils Ltd to dismantle its manufacturing plant in Vaassen in the Netherlands. PG Foils Ltd is an Indian company operating in Rajasthan and the parties had entered into a further, separate agreement by which the plant would then be reassembled in India. A dispute arose in relation to the payment under the contract. Chalbury McCouat attempted to invoke the arbitration clause in the contract which stated that the dispute was to be referred to “arbitration as per prevailing laws of European Union in the Europe”. However, PG Foils Ltd withheld its consent to appoint the arbitral tribunal, alleging that since the performance of the contract was to be completed in India and that the contract was signed and executed in India, either an “Arbitral Tribunal in India” should be appointed, or the provisions of the Indian Arbitration and Conciliation Act 1996 should apply. Chalbury McCouat subsequently issued an arbitration claim form, obtained permission to serve the claim outside the jurisdiction and then applied to the court to exercise its powers under section 18 of the 1996 Act to appoint the arbitral tribunal.

The dispute resolution clause within the parties’ agreement was clear that, failing resolution by discussion, the dispute should be referred to arbitration. However, the arbitration clause was silent as to the seat of the arbitration. Accordingly, in order for Mr Justice Ramsey to appoint the arbitral tribunal by virtue of section 18 of the 1996 Act, he first had to consider whether or not there was a connection with England and Wales, in accordance with section 2(4) of the 1996 Act. Mr Justice Ramsey referred to the Departmental Advisory Committee’s Report of January 1997 and the Court of Appeal’s decision in *International Tank & Pipe SAK v Kuwait Aviation Fuelling Co KSC* (1975) and found there would be a sufficient connection with England and Wales if the proper law of the contract were English law. However, in this case, there was no express choice of law stating what law (*lex causae*) was to be applied to the substance of the dispute.

*The reference to “arbitration as per prevailing laws of European Union in the Europe” meant that the seat of arbitration was likely to be Europe, possibly England, and unlikely to be India.*

As the law to be applied to the procedure of the arbitration (*lex fori*) was the law of the European Union, the judge found that this suggested that the proper law to be applied to the dispute should be determined under the law of the European Union, as set out in the Rome Convention. In accordance with Article 4 of the Rome Convention, the performance of the work of dismantling the plant was to be carried out by Chalbury McCouat, an English company with its principal place of business in England. Mr Justice Ramsey therefore considered that the contract was most closely connected with England and the arbitral tribunal were likely to find that the proper law was English law. So far as the seat of the arbitration is concerned, he found that the reference to “arbitration as per prevailing laws of European Union in the Europe” meant that the seat of arbitration was likely to be Europe, possibly England, and unlikely to be India. Further, the fact that payment under the contract was made in England was further evidence of a connection with England.

Accordingly, Mr Justice Ramsey held that because of the connection with England, it was appropriate for the court to exercise its powers under section 18 of the 1996 Act. He ordered that the President (or in his absence the Vice-President) of the London Court of International Arbitration (LCIA) make the necessary appointment of a sole arbitrator. In this case, the parties’ resolution of their dispute was ultimately prolonged by the fact that their contract had failed to identify the choice of law to be applied to the substance of the dispute, as well as failed to identify the seat of arbitration. This resulted in further disagreements regarding the appointment of the arbitral tribunal and potentially further costs. This exemplifies the importance of discussing and agreeing your dispute resolution clause at the outset of any project. In addition, this case is a further demonstration of the English court’s support of the arbitral process. Though there had been some difficulty in the interpretation of the parties’ contract, Mr Justice Ramsey nevertheless stated:

*“When parties have agreed to arbitrate then I consider that the court should strive to give effect to that intention and should seek to support the arbitral process.”*

<sup>3</sup> [2010] EWHC 2050 (TCC)

## NEC3

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### *The continued rise of the NEC3*

In recent years, particularly in the wake of the Latham and Egan Reports, the construction industry has been getting to grips with collaborative procurement. Chris Farrell takes a look at the apparent rise in use of the NEC3 form and also discusses the references made, not always in flattering terms, to that contract by the courts during 2010.

There have been several high-profile clients that have embraced collaborative procurement. BAA did so when procuring both Heathrow Terminal 5 and Terminal 2; the Office of Government Commerce (OGC) publicly endorses collaborative procurement, and notably the Olympic Delivery Authority (ODA) has done so in procuring the 2012 Olympic Games.

*Is one measure of the NEC's success, how infrequently the NEC3 has come before the courts?*

In fact the OGC and the ODA went one step further and endorsed one particular suite of contracts to procure the majority of their works, the New Engineering Contract, third edition (NEC3). The NEC3 suite of contracts has also been endorsed by numerous organisations and individuals, not least Michael Latham himself, the author of the influential report. The NEC3 is now seen as the contract of choice in many projects and, as the title suggests, particularly those with an emphasis on civil engineering. The reason why the contracts are well liked by employers and contractors alike is due to the way in which the NEC3 approaches risk management:

*"The key to the success of NEC contracts is they enable the contracting parties to adopt a far more positive culture and mindset than is normally the case ... NEC contracts may initially appear to be similar in concept and language to other standard forms, but in reality they are radically different. In particular they involve moving away from reactive, hindsight based management and decision-making to an approach that is informed, proactive and foresight based."*

This is one particular aspect the NEC3 prides itself on, the language of the contract. It is written in non-legalistic language, in short sentences and, most noticeably, in the present tense. These are all meant to make it easier to use for the people who are actually operating the contract on site, as opposed to many other industry standard forms which show their age after over half a century of evolution. However, this form of drafting has not met with approval from all quarters. In the 2010 case of *Anglian Water Services Ltd v Laing O'Rourke Utilities Ltd*<sup>1</sup>, the newest full-time TCC judge, Mr Justice Edwards-Stuart had this to say about the NEC3:

*"I have to confess that the task of construing the provisions in this form of contract is not made any easier by the widespread use of the present tense in its operative provisions. No doubt this approach to drafting has its adherents within the industry but, speaking for myself and from the point of view of a lawyer, it seems to me to represent a triumph of form over substance."*

This was perhaps no more than an aside, and certainly did not directly impact upon the decision in that case. So, should this matter though? As the Judge himself concedes, construction industry professionals are the people whose opinions should matter the most. It is a point sometimes lost on lawyers that a dispute is not an inevitable part of a construction project and should not be thought of as such. This is brought acutely into focus on projects such as Wembley Stadium and the Olympics, where the time for completion and cost overruns can become issues of national importance.

So, can all these construction professionals be wrong? Indeed, the NEC3 is proving so popular that in August this year, the Institute of Civil Engineers removed its backing from the ICE Conditions of Contract and publicly endorsed the NEC3 suite. It is not that there are no disputes on projects using the NEC3 form, but that the contract enables quicker and different methods to resolve those disputes.

For example, the NEC3 contains a risk register. This register catalogues risks that may occur during the works, and identifies how the parties are going to deal with each item. Not

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<sup>1</sup> [2010] EWHC 1529 (TCC)

## NEC3

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only does the risk register include items agreed as risk items at the outset of the contract, but it also allows for the project manager to add items throughout the works, in response to early warning notices issued by the contractor. If items cannot be solved by reference to the risk register, then the contract also provides for a risk reduction meeting so that the parties can sit down informally and discuss the problems that have arisen. This can help to prevent parties' positions becoming entrenched, as they can with continued and often repetitive correspondence.

### *RBG Ltd v SGL Carbon Fibers Ltd*<sup>2</sup>

One measure of its success is how infrequently the NEC3 has come before the courts. In fact one of the only cases where its terms have actually been analysed in court was in the recent Scottish adjudication enforcement case of *RBG Ltd v SGL Carbon Fibers Ltd*. RBG was engaged by SGL to perform certain works at SGL's premises. The contract incorporated the NEC3 target cost option. Disputes arose over RBG's entitlement to payment for certain invoices and the effect of the NEC3 Option C payment mechanism under clauses 50 and 51. The judge had to consider whether the adjudicator should have taken an earlier overpayment into account, when considering the amount due to RBG, as alleged by the responding party in the ensuing adjudication.

*I have to confess that the task of construing the provisions in this form of contract is not made any easier by the widespread use of the present tense in its operative provisions. No doubt this approach to drafting has its adherents within the industry but, speaking for myself and from the point of view of a lawyer, it seems to me to represent a triumph of form over substance.*

NEC3 provides that the amount due at the assessment date is the Price for Work Done to Date ("PWDD"), plus other amounts to be paid to the Contractor less amounts to be paid by or retained from the Contractor. CI 11.2(29) defines PWDD as "the total Defined Cost which the Project Manager forecasts will have been paid by the Contractor before the next assessment date plus the Fee".

The judge agreed that the contractual mechanism under the NEC3 for the assessment of payments is based on an accumulating "PWDD". Assessment of PWDD required consideration of the Defined Cost (clause 11.2(23)) less Disallowed Cost (clause 11.2(25)). The quantity surveyor makes an assessment of the PWDD as at the assessment date, and can make further contractual additions or deductions to this figure. This mechanism requires the quantity surveyor to calculate the PWDD as an accumulating balance, and allows him to correct any earlier mistakes. The NEC3 adjudication provisions effectively require the adjudicator to perform the same task. Therefore, the judge decided that in order to calculate the PWDD, the adjudicator had to have regard to the earlier overpayments.

Accordingly, the adjudicator's decision was not enforced. In adjudication terms, whilst it should always have been open to SGL to raise the overpayment as a defence, following *Cantillon v Urvasco*, the case confirms that if the level of PWDD is challenged by either party, then the adjudicator is required to make his own assessment. Further, each party should be prepared to substantiate their position with all the relevant paperwork, and cannot simply rely on the quantity surveyor's assessment.

Equally, this case highlights as well the importance for contracting parties, contract administrators and adjudicators of the need to be aware of the differences in operating, or resolving disputes over, whatever form of contract may have been used.

## Conclusion

It seems the NEC3 is becoming increasingly popular within the industry. We are seeing an increase in clients seeking advice on entering into an NEC3 contract or avoiding formal legal proceedings. However, giving clients' firm advice on the NEC3 is made more difficult due to the lack of judicial guidance on its terms. One of the main advantages of the JCT suite of contracts is that the language has been tested time and again by the courts and, whilst it might be more legalistic, lawyers can be more confident of advising on its interpretation. However, with the increased use of NEC3, on the 2012 Olympics in particular, inevitably more judicial guidance will follow, and the likely effect of that is that its use should only increase.

<sup>2</sup> [2010] ScotCS CSOH 77



## RIBA Agreements 2010

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# *The RIBA Agreements 2010: are we there yet?*

*Over the past two years, Stacy Sinclair has followed the heated battle between the RIBA and the Association of Consultant Architects (ACA) over the Architect's standard form of appointment. In 2007, the RIBA launched a new suite of agreements which received a lukewarm welcome from the industry. The ACA refused to give its support and went on to publish its own standard form in 2008, the ACA SFA/08. Finally, in June 2010, the RIBA published a new suite of agreements, this time with the endorsement of the ACA. This year, Stacy looks at the new RIBA Agreements 2010, and asks, is this it? Are we there yet?*

### An Overview

The recently released RIBA Agreements 2010 is a customised suite of contracts, tailored to the appointment of an Architect. The suite attempts to maintain a fair and balanced position between both the Architect and the client and is recognised as a standard industry document. Like the 2007 Agreements, the 2010 suite consists of appointments for 'the Architect' and 'the Consultant' and is offered in 'Standard', 'Concise' and 'Domestic' forms. In addition, a sub-consultant agreement is also available. The RIBA Agreements 2010 are now shorter and more user-friendly appointments, whilst still maintaining the flexibility and clarity the 2007 Agreements sought to provide. Indeed, the RIBA has taken on the suggestion to consolidate the Project Data, Services and the Fees and Expenses schedules into one document, another improvement over the previous edition.

A table highlighting the significant changes from the RIBA Agreements 2007 is helpfully provided at the front of each appointment. Key amendments include:

- Termination: Unlike the 2007 Agreements, the Architect now has the right to terminate the contract in the same circumstances as the client. Either the client or the Architect may, by giving reasonable notice to the other, terminate performance of the services. (See clause 8.2). This does provide further rights and protection for the Architect; however, as commercial clients are likely to object to this, Architects may find themselves having to negotiate to keep this clause in the appointment.
- Interest for late payment: In the RIBA Agreements 2007, only the Architect was entitled to claim 5% above the Bank of England's base rate. Now, either party may claim 8% above the Bank of England's base rate. In addition, the 2010 agreements enable the payee to recover costs reasonably incurred in obtaining payment of any sums due under the agreement. (See clause 5.19). Again, Architects should be forewarned that many commercial clients may be unwilling to pay interest at this level and will seek to amend the standard form. At the moment, the Bank of England's base rate remains low; however, should there be an upwards adjustment in the future, 8% above the base rate could be particularly punitive and therefore result in further negotiations over this clause.
- Consumer contracts: Clause 10 takes into account the Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008 (SI 2008/1816). Where the project relates to the client's home and the client is a consumer acting outside of his or her business, the consumer client has the right to cancel the agreement for any reason within 7 days of when the agreement was made.

### Further protection for the Architect

Some of the new amendments do provide additional protection for the Architect:

- Limit of liability: Clause 7.2.1 introduces the provision that the consultant's liability for loss or damage will not exceed the amount of its professional indemnity cover, provided its insurers have been notified. In the RIBA Agreements 2007, the parties were free to choose the cap on the Architect's liability.
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*The RIBA Agreements 2010 are now shorter and more user-friendly appointments, whilst still maintaining the flexibility and clarity the 2007 Agreements sought to provide.*

## RIBA Agreements 2010

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- Warranties: Clause 3.10 now provides that the Architect/consultant does NOT warrant that:
  1. planning permission or other approvals from third parties will be granted at all, or within a given timeframe; and
  2. compliance with the Construction Cost and/or Timetable, as it may need to be reviewed for such matters as approved variations, delays caused by others, etc.
- Limited right to withhold payment: Clause 5.16 now expressly limits the client's right to withhold payment 'unless the amount has been agreed with the Architect or decided by any tribunal'. As with the RIBA Agreements 2010, the client's common law or equitable rights of set-off are still excluded.
- Confidentiality: The confidentiality obligations are no longer absolute. Under Clause 2.9 they are now subject to reasonable skill, care and diligence.
- Fee adjustment: Clause 5.8 now provides further protection to the Architect's Basic Fee. In particular, Clause 5.8.2 states that the Architect's Basic Fee shall not be adjusted simply because of a deflation in the Construction Cost due to market conditions. This could prove beneficial for Architects, particularly if the UK faces a double-dip recession as predicted by some.

*Though the suite purports to allocate risk in a fair and balanced manner, the amendments discussed above do tend to favour the Architect and reinforce the perception that RIBA agreements are consultant-friendly. Accordingly, this may deter developer or commercial clients from choosing the RIBA.*

### Not necessarily for everyone...

As one can see, though the suite purports to allocate risk in a fair and balanced manner, the amendments discussed above do tend to favour the Architect and reinforce the perception that RIBA agreements are consultant-friendly. Accordingly, this may deter developer or commercial clients from choosing the RIBA Agreements 2010, in favour of a bespoke appointment, an alternative standard form or a highly amended RIBA agreement.

For example, with the increased use of the NEC3, Architects and consultants may be requested to use the NEC3 Professional Services Contract ('NEC3 PSC'). The NEC3 PSC has been drafted so that it sits squarely within the NEC3 suite of contracts. As such, it aims to promote the ethos of collaborative working and it emphasises project and risk management. Its terminology and structure closely resemble the NEC3 contracts with its straightforward language and use of the Main and Secondary Option clauses. As a result, this appointment reads very much like a typical building contract and requires its users to be proactive in its contractual procedures. It is clearly a different ball game from the RIBA Agreements 2010 and consultants should ensure they understand how it operates.

If the bargaining position of the client is strong, as is likely to be case in today's financial market, there may be little the Architect or consultant can do to influence the choice of their appointment. Not all sophisticated clients will accept the RIBA form of appointment and accordingly consultants should of course seek advice when amendments to standard forms are imposed, be it the RIBA Agreements 2010 or any other standard form.

### Conclusion: are we there yet?

The recently released RIBA Agreements 2010 are proving more successful than its 2007 predecessor. The strongest evidence of this is the ACA's endorsement. Architects can now rest assured that more of their interests are protected with the new standard form and furthermore, the contracts are now easier to assemble.

So are we there yet? The new suite has certainly alleviated many of the Architects' concerns and arguably is likely to achieve a status of general acceptance in the industry, similar to that of the older RIBA SFA/99. However, that unfortunately also means that, like the SFA/99, large sophisticated and commercial clients will continue to either amend the 2010 version or opt for bespoke appointments. Either way, the RIBA Agreements 2010 are off to a good start.

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## Sierra Leone

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### Sierra Leone

*As we discussed in last year's Review, Fenwick Elliott are pleased to be contributing to the work of the charity CODEP, the Construction and Development Partnership in Waterloo, Sierra Leone. Jeremy Glover, who has visited Waterloo first hand to see what is being done, sets out some of the achievements of the past 12 months.*

The current foundation of the project is the development of the Equiano Centre - a learning and literacy resource centre, which is being built in the town of Waterloo, Sierra Leone, some 30km outside the capital, Freetown.

#### Equiano Centre

Construction has started on the first phase of the project and we hope that the new children's library will be ready to open in early 2011. Work is progressing well. One of the features of the project has been that CODEP have been able, thanks to the support of the contractor (Kamal Nasser of Sierra Construction Systems), and the local technical college, GTZ in Waterloo, to establish a series of apprenticeships. Due to a lack of resources, the technical college whilst able to provide lessons on theory, is not able to provide practical on-the-job experience. At the same time, the site team themselves have organised, with the assistance of CODEP, its own evening classes. The site foreman agreed to pass on the team's skills to the labourers with practical lessons during construction, together with evening classes which take place weekly after work has finished on site.

There have been a number of unexpected challenges on site. These range from the importance of keeping all the surrounding land cut back - otherwise snakes tend to move in - to the dilemma posed by the provision of PPE - in the form of hard hats. The hard hat of course provides the protection required on building sites but also presents a new risk. By providing the hard hats and setting rules that the workers must wear the hard hat whilst on site, we then introduce a conundrum in how they carry materials. The workers use headpans that they carry on their head. Culturally Sierra Leonians carry items on their head - from the young to the old; everyone carries nearly anything on their head. This is the most efficient method for carrying items over long distances and leaves both hands free.

This means that by introducing the new safety measures we may actually serve to increase the risk of an accident, or if the workers extend their arms above their head this will increase the strain on the shoulders something which could result in occupational health problems. Already the workers have changed the method of carrying the headpan. Prior to having to wear the hard hats they would balance the head pan on their head and keep it stable with their hands. Now they have to carry it above their head and hence all the weight is transferred through their arms increasing the strain on the shoulders. What was an efficient method of transport has become inefficient.

#### School libraries

However, CODEP's work is not restricted to the construction of the Equiano Centre. During the past 12 months, over 120 schools in the Waterloo region have been provided with libraries. This does not just mean books for their children. Typically, it is also necessary to provide furniture in the way of shelves or cabinets to store the books

At the same time, CODEP recognises that it is not enough simply to provide books and shelves. CODEP has therefore also arranged for some of the teachers at the schools to be provided with training as literacy co-ordinators. This will help ensure that the books can be used to their best effect and thereby further encourage the promotion of literacy.

If you would like to learn more about the work of CODEP or think that you may be able to help, please go to [www.codep.co.uk](http://www.codep.co.uk).

*Over the past 12 months over 120 schools have been provided with books and furniture to establish libraries.*

## Case law update

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### Case law update

*Our usual case round-up comes from two different sources. First, there is the Construction Industry Law Letter (CILL), edited by Karen Gidwani and Ted Lowery. CILL is published by Informa Professional. For further information on subscribing to the Construction Industry Law Letter, please contact Joseph Cousins by telephone on +44 (0) 20 7017 5190 or by email: joseph.cousins@informa.com.*

*Second, there is our long-running monthly bulletin entitled Dispatch. This summarises the recent legal and other relevant developments. If you would like to look at recent editions, please go to [www.fenwickelliott.com](http://www.fenwickelliott.com). 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 Dispatch. Then we set out summaries of some of the more important other cases from CILL.*

#### ADJUDICATION - Cases from Dispatch

#### The granting of an injunction to halt adjudication

#### *Mentmore Towers Ltd & Ors v Packman Lucas Ltd*

Packman sought payment of outstanding fees. In June 2009, an adjudicator agreed that the claimants should pay the outstanding sums. The claimants refused to honour the decision and Packman was forced to go to the courts to enforce the decision. Then in October 2009, the claimants issued their own claim, alleging overpayments to Packman. In November 2009 Packman applied for a stay of those proceedings pending, among other things, the claimants complying with the adjudicator's decisions. Mr Justice Akenhead duly granted the stay. Calling the claimants' conduct both "unreasonable and oppressive", he held that the failure to honour the adjudicator's decisions was a sufficient ground to stay proceedings that sought to overturn those decisions.

The claimants tried again, this time issuing adjudication notices. Having taken expert advice the claims had been reduced by about 50% from the claims issued before the courts. Packman now applied for an injunction to prevent the claimants from taking any further steps. Mr Justice Edwards-Stuart granted the application and restrained the claimants from taking any substantive steps in the adjudication. He made it clear that the injunction would only be lifted when and if the claimants complied with the previous court orders enforcing the previous adjudicator's decisions.

The Judge said that he could see no reason why a referral to adjudication that is unreasonable or oppressive should not be restrained by the application of the same principles that would apply to an application made on similar grounds for the stay of the same claim brought by way of litigation - albeit that the fact that a particular claim was being pursued by way of adjudication, rather than litigation, may affect the court's view as to whether or not it amounts to unreasonable and oppressive behaviour. That said, he noted that it may be more unreasonable to bring adjudication proceedings and gave the example of the successful respondent being unable to recover his costs of resisting the claim. Mr Justice Edwards-Stuart stressed that the courts have said, "again and again", that the decisions of the adjudicators are to be strictly enforced unless there has been some excess of jurisdiction or breach of natural justice. That is, he continued, "the 'pay now, argue later' approach that underlies the legislative purpose".

Here the claimants had persistently refused to honour the adjudicator's first decisions and put Packman to the time and expense of taking the necessary steps to enforce the awards. The Judge concluded that the referrals were simply another attempt to circumvent the machinery and policy of the HGCRA. It was therefore both unreasonable and oppressive for Packman to be subject to further adjudication proceedings when the claimants had failed to honour the original awards and subsequent court judgments.

***Mr Justice Edwards-Stuart stressed that the courts have said, "again and again", that the decisions of the adjudicators are to be strictly enforced unless there has been some excess of jurisdiction or breach of natural justice.***

## Case law update

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### Adjudication, natural justice and the slip rule

#### *ROK Building Ltd v Celtic Composting Systems Ltd*

Celtic resisted ROK's attempts to enforce an adjudicator's decision on the grounds that the adjudicator acted unfairly and contrary to the rules of natural justice. The basic issue between the parties related to whether or not ROK, as it claimed, should be treated as having completed its subcontract works on 8 June 2009. If ROK was right, Celtic was required to release half of the retention moneys. ROK issued its adjudication notice on 2 October 2009. Following various submissions, including on the part of ROK a response by way of Scott Schedule to the complaints about defects made by Celtic, the parties agreed to give the adjudicator until 1 December 2009 to make his decision. The parties had served 15 witness statements between them. There was also discussion about a meeting, which did not happen. No complaint was made about that at the time. The adjudicator duly issued his decision on time. Upon receipt of this decision, Celtic asked the adjudicator to correct it. These were some typos which the adjudicator amended. However, Celtic also invited the adjudicator to make more substantive changes. As noted in a letter sent "in the pursuit of natural justice", these included asking the adjudicator to clarify:

- (i) why he had made no reference to incomplete work, such as the absence of isolation joints, highlighted by Celtic, in the Decision;
- (ii) the relevance of ROK's own subcontractors' work. If ROK acknowledged that this was incomplete, did it accept that its own works were incomplete? What were the procedural requirements of rectifying defects retrospectively in accordance with the contract?

*As for the slip rule, the Judge thought that it must be the adjudicator who is, and was here, best placed to determine whether there really is an "accidental" error or omission.*

The adjudicator declined to consider these matters, noting that under the slip rule he was only able to clarify any simple mistake or ambiguity. In the enforcement proceedings before Mr Justice Akenhead, Celtic argued that the adjudicator failed to apply the rules of natural justice on the basis that the weight of evidence was so overwhelming that no adjudicator acting fairly could reach the decision he did. It said that as a matter of fact he simply got the maths wrong and must have ignored the clear evidence that ROK had, in effect, been paid almost all of that which was payable. This was compounded by the adjudicator's failure or unwillingness to use the contractual "slip rule" to put right the manifest errors in what he had done in the first version of his Decision. It was wrong and unfair that he permitted ROK to serve its Scott Schedule and that he failed to call a meeting during the adjudication in effect to test the evidence.

The Judge noted that the TCC and the appellate courts will be very slow to characterise even glaringly obvious errors made by adjudicators acting within their jurisdiction as breaches or evidence of breaches of the rules of natural justice to which all adjudicators are subject. As for the slip rule, that relates to accidental errors or omissions. The Judge thought it was necessary to consider whether there had really been any mistakes, obvious or otherwise, made by the adjudicator. He noted that the payment and certification position was confused and unclear and that nothing simple was put before the adjudicator. In any event, the mere fact that there was an error, and the Judge was not saying that there was such an error, even if it was a glaring and serious error, should not affect the enforceability of the decision. Further, it was clear that the adjudicator had not acted contrary to the rules of natural justice. It was not a decision on the facts which no adjudicator acting fairly and reasonably could not have reached.

*"He reviewed the evidence and arguments obviously with real care and attention. He, as many arbitrators and judges would do, applied significant weight to the contemporaneous documents and the inferences to be drawn about what the parties said and did or did not say and do at the time. Faced with witness evidence from each party which was diametrically opposed, no proper criticism can be made of him for doing so."*

It is not necessary for adjudicators in their decisions to give reasons as to why they found some evidence compelling and other evidence not so. The fact that no meeting was held

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## Case law update

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is not obvious evidence that the adjudicator failed to comply with the rules of natural justice. He was not obliged under the agreed adjudication rules to have a meeting, although he had the power to do so. There was no objection taken when the idea of having a meeting was dropped. As for the Scott Schedule, all that ROK was doing was setting out in a schedule each of the principal defects or incomplete works relied upon and put forward by Celtic itself and putting its comments against each item. It would have been a breach of natural justice if the adjudicator had refused to allow ROK to respond to these assertions by Celtic.

As for the slip rule, the Judge thought that it must be the adjudicator who is, and was here, best placed to determine whether there really is an "accidental" error or omission. The Judge noted that Celtic was not without remedies. If the adjudicator had made an error of the magnitude suggested, it could institute arbitration proceedings to produce a final correction on the state of account between the parties.

### Delivery of the decision

#### *Lee v Chartered Building Properties (Building) Ltd*

Ms Lee engaged Chartered to carry out refurbishment works on the basement and ground floors at a residential property. Chartered completed the works and submitted its final account. Ms Lee disagreed with the final account, and instructed the architect to discuss this with Chartered. In mid-2009, the parties agreed to drop the claims they had against each other. An email from Chartered stated that the parties should exchange formal letters to this effect; however, this did not take place. Subsequently, Chartered purported to refer the final account dispute to adjudication.

After two abortive adjudications, Chartered commenced a third adjudication. The adjudicator awarded Chartered a total of £73,982.38. Ms Lee did not pay the amounts awarded and commenced proceedings in the TCC. Chartered counterclaimed for the enforcement of the adjudicator's decision. Ms Lee resisted enforcement on six grounds, namely, that the appointment of the adjudicator was invalid; no dispute had crystallised; Chartered had referred more than one dispute; the dispute between the parties had been settled; there was a breach of natural justice by the adjudicator; and that the adjudicator issued his decision out of time. Mr Justice Akenhead held that the decision should not be enforced because the adjudicator did not deliver his decision as soon as possible after he had reached his decision. The parties had agreed that the adjudicator could issue his decision by Friday, 13 November 2009. At 2.48pm on 13 November, the adjudicator advised he had now reached his decision but it would be issued on Monday 16 November 2009. Chartered had consented to this timing, but Ms Lee had not. The Judge considered that 74 hours was not necessary for typing and proof reading a decision:

*"There seems to be no obvious good reason why with some effort and application the decision could not have been communicated on 13 November; there is no obvious explanation as to why virtually the whole of the working day of 16 November was required before the Decision was sent out."*

The Judge also decided that Ms Lee had demonstrated that there were other triable issues which could not be decided by way of summary judgment. Firstly, the Judge found that there were factual discrepancies in the account given by Chartered as to whether or not the notice of adjudication had been delivered to the nominating body prior to the application for nomination. Secondly, the email correspondence in mid-2009 may have resulted in a settlement of the dispute. The surrounding circumstances of the emails and the factual discrepancies in the account needed to be explored and this was not something that could, or should, be performed at a summary judgment. The remaining grounds were dismissed. The Judge considered that the dispute had crystallised by the time the adjudication was commenced and did not consider that more than one dispute had been referred. He also held that there had not been a breach of natural justice by the adjudicator. Finally, Mr Justice Akenhead held that Ms Lee had not been ambushed as there was clearly a significant and long-standing dispute.

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*There seems to be no obvious good reason why with some effort and application the decision could not have been communicated on 13 November; there is no obvious explanation as to why virtually the whole of the working day of 16 November was required before the Decision was sent out.*

## Case law update

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### Adjudication - interest and Tolent clauses

#### *Yuanda (UK) Co Ltd v WW Gear Construction Ltd*

Here, Yuanda, a curtain walling contractor, had been engaged by Gear on the Westminster Bridge Park, Plaza Hotel project and had signed up to a JCT Trade Contract with two significant amendments in relation to adjudication and interest on late payment:

- (i) the clause in relation to adjudication, permitted the joining of members of the professional team (who were not parties to the Contract) in what was described as a “multi-party dispute situation” and required that Yuanda meet Gear’s legal and professional costs of any reference Yuanda made to adjudication, regardless of the outcome; and
- (ii) the clause in relation to interest on late payment was amended by Gear from the JCT standard of 5% above the base rate to 0.5% above the base rate.

Yuanda had not appreciated the commercial consequences of the amendments to the Contract until a dispute arose with Gear. Yuanda then realised that it could not refer disputes to adjudication unless it was to pay Gear’s legal and professional costs (which were not limited by the Contract). The lack of reciprocity meant that Yuanda’s right to adjudicate was fettered in a way that Gear’s was not. Yuanda also noted that the rate of interest was very low and would not compensate them for late payment or act as an incentive for prompt payment by Gear. Therefore, Yuanda had no real option but to commence CPR Part 8 proceedings claiming that the two Contract clauses were void and invalid, and should be struck out by the court. Specifically, Yuanda asked the TCC that:

- (i) the clause on adjudication should be ousted and replaced wholesale by the Scheme because it was incompatible with the HGCR 1996; in the alternative
- (ii) the term of the adjudication clause that permitted a “multi-party dispute situation” was void for uncertainty and the whole clause should be struck out and replaced by the Scheme; or in the further alternative
- (iii) the requirement to meet Gear’s costs was an unreasonable contract term and void as defined by s.3 of UCTA 1977; and
- (iv) that the clause relating to interest should be declared void in accordance with s.8 and s.9 of the Late Payment of Commercial Debts (Interest) Act, as it submitted that 0.5% could not be regarded as a substantial remedy.

Mr Justice Edwards-Stuart decided that although, on the facts, the adjudication clause was not unreasonable within the meaning of UCTA, it did fail to comply with the HGCR. He cast doubt on the judgment in the broadly similar case of *Bridgeway Construction Ltd v Tolent Construction Ltd*, observing that this was an early case decided before the full commercial impact of adjudication had been properly understood, and where the facts were materially different because the relevant clause applied to the parties equally. He said that “if a party knows that it will have to pay the other party’s costs of any referral to adjudication, irrespective of the outcome, then it will not be worth making a referral unless the sum it expects to recover will significantly exceed the likely costs of the other party” – and it would not be able to estimate those costs (which the other party would have no incentive to minimise). Therefore, the clause in this case did fall foul of HGCR as inhibiting the entitlement to adjudicate. Thus the overriding importance of this case is that, in anticipation of the forthcoming revisions to the HGCR, it undermines attempts by contract drafters to deny a party the right to adjudicate by oblique means and gives guidance as to what interest rates on non-payment may be of sufficient substance to be upheld in the construction industry.

The Judge also agreed that in view of the fact that the 0.5% interest rate had been effectively imposed on Yuanda, it failed to constitute a substantial remedy for the purposes of the Late Payment of Commercial Debts legislation. Therefore the statutory rate, of 8% above the base rate, would be substituted. Obiter, he indicated that interest

***If a party knows that it will have to pay the other party’s costs of any referral to adjudication, irrespective of the outcome, then it will not be worth making a referral unless the sum it expects to recover will significantly exceed the likely costs of the other party***

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fixed below the statutory rate (even as low as 3% to 4%) might constitute a substantial remedy in appropriate circumstances.

### Other cases

#### Construction Industry Law Letter

##### Service of notices

#### *Anglian Water Services Ltd v Laing O' Rourke Utilities*

Technology and Construction Court: before Mr Justice Edwards-Stuart: judgment delivered 25 June 2010

##### *The facts*

AWS engaged LOR to design and construct a number of tanks at AWS's Saltfleet Sewage Treatment Works in Lincolnshire. The contract incorporated the terms of the second edition (1995) of the NEC Engineering and Construction Contract ("the Contract"). Clause 13 required all communications required by the Contract to be in writing and provided that such communications would only take effect when received at the last address notified for service or, if no address was notified, the address stated in the Contract Data. The address stated in the Contract Data for LOR was its office at St Neots. The express adjudication provisions within the Contract did not comply with Part II of the HGCR so the Scheme applied. Clause 93.1 of the Contract required a party who wished to challenge an adjudicator's decision to serve a notice of dissatisfaction within four weeks of the date of the decision. During December 2009 AWS commenced an adjudication claiming losses said to have been caused by a reactor collapse. Both parties instructed solicitors to represent them in the adjudication.

*This case illustrates the importance of satisfying all of the relevant criteria when issuing contractual notices. Having failed to serve the notice of dissatisfaction on the St Neots office in time, AWS were required to take their chances in court.*

On 17 December 2009 LOR's solicitors (based in Bristol) confirmed that they would accept service of the referral notice and "any other documentation relevant to the adjudication" on behalf of LOR. The adjudicator issued his decision on 24 February 2010. AWS decided to challenge the decision and on 22 March 2010 AWS's solicitors faxed a letter to LOR's solicitors. The letter amounted to a notice of dissatisfaction and enclosed a Notice of Intention to Refer a Dispute to Arbitration. LOR's solicitors replied with a one line email that confirmed safe receipt and at the same time they forwarded the letter and Notice to the relevant LOR personnel at LOR's Dartford office. On 30 March 2010 AWS served the letter and Notice directly upon LOR at its office in St Neots. LOR contended that AWS's right to arbitrate was barred where it had not served its notice of dissatisfaction at the correct address within four weeks of the date of the adjudicator's decision. AWS commenced proceedings seeking declarations that it had validly notified its intention to refer a dispute to arbitration by 23 March 2010, alternatively that it was entitled to an extension of time to serve the notice pursuant to section 12 of the Arbitration Act 1996.

##### *Issues and findings*

Did receipt of the notice of dissatisfaction at LOR's solicitors' office amount to valid service?

Yes. AWS's notice of dissatisfaction fell within the definition of "any other documentation relevant to the adjudication". The last address notified for service of such a notice pursuant to clause 13 was therefore LOR's solicitors' office in accordance with the confirmation provided on 17 December 2009.

If receipt of the notice of dissatisfaction at LOR's solicitors' office had not amounted to valid service, did the fact that the notice was received by the relevant individuals at LOR within the four-week period make it an effective communication?

No. Strict compliance with the prescribed method of service in the Contract was required.

If receipt of the notice of dissatisfaction at LOR's solicitors' office had not amounted to valid service, would it have been appropriate to grant an extension of time under s.12 of the Arbitration Act 1996?

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Yes. Under s.12(3)(b) of the Arbitration Act it would have been unjust to hold AWS to the strict provisions of clause 93. LOR's solicitors' unqualified acknowledgement entitled AWS's solicitors to assume that service upon LOR at the St Neots address was not required.

### *Commentary*

AWS argued that as a matter of construction clause 13.2 did not preclude effective communications being made by means other than by service upon the addresses set out in the Contract Data. Edwards-Stuart J rejected this submission, concluding that the purpose of clause 13.2 was to enable the parties to fix the moment in time upon which a communication became effective. Strict compliance with clause 13.2 was therefore required. Hence, for the purposes of compliance with clause 13.2, it was irrelevant that AWS's notice of dissatisfaction had been provided (via LOR's solicitors) to the relevant LOR personnel within the four-week period.

In the event, Edwards-Stuart J applied the Contract mechanism, finding that LOR had notified an address for service superseding that set out in the Contract Data when their solicitors had confirmed on 17 December 2009 that they had instructions to accept service of any documentation relevant to the adjudication. Edwards-Stuart J concluded as a matter of impression that a notice of dissatisfaction was a document relevant to the adjudication because it prevented the decision from becoming final and binding.

Although Edwards-Stuart J did not have to decide the point under s.12 of the Arbitration Act, he indicated that on these facts he would have exercised his discretion to grant an extension of time in accordance with s.12(3)(b) since he considered that LOR's conduct had contributed to AWS's failure to serve the notice at the address stipulated in the Contract Data. This was because where AWS had previously effected service of documents upon LOR's solicitors with no question of the validity of service being raised, AWS were entitled to assume that their letter of 22 March 2010 had also been validly served in the absence of any qualification in LOR's solicitors' acknowledgement. Edwards-Stuart J found that but for this acknowledgement, AWS would have served the letter on LOR at the St Neots office.

Many construction contracts that include time bar provisions also include express terms requiring notices to be served in a certain manner and/or sent to a certain address. This case illustrates the importance of satisfying all of the relevant criteria when issuing contractual notices. Having failed to serve the notice of dissatisfaction on the St Neots office in time, AWS were required to take their chances in court. Ultimately, the Judge's favourable view of the particular facts of this case ensured that AWS were not time barred from commencing arbitration.

## Best and reasonable endeavours

### *CPC Group Ltd v Qatari Diar Real Estate Investment Company*

Chancery: before Mr Justice Vos; judgment delivered 25 June 2010

#### *The Facts*

During 2007 the Qatari Diar Real Estate Investment Company ("QD") and CPC entered into a joint venture through a company called Project Blue (Guernsey) Limited ("PBGL") for the redevelopment of the Chelsea Barracks site in London. QD was a subsidiary of the Qatar Investment Authority, a sovereign wealth fund. In April 2007 PBGL bought the Chelsea Barracks site and in April 2008 applied to Westminster City Council ("WCC") for planning permission to redevelop the site on the basis of a design by Rogers Stirk Harbour and Partners ("RSHIP"). On 6 November 2008 CPC and QA entered into a Sale and Purchase Agreement ("the SPA") pursuant to which CPC sold its interest in PBGL to QD for an initial consideration of £37.9m and a deferred consideration totalling a maximum of £81m, depending on future progress being made in obtaining planning permission for the development. Under the SPA, QD owed CPC various obligations, including an obligation

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*Strict compliance with the prescribed method of service in the Contract was required.*

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to use all reasonable but commercially prudent endeavours to enable the achievement of the thresholds for the payment of the deferred consideration. In addition, both parties owed each other an express duty to act in the utmost good faith.

Paragraph 5(aa) of Schedule 4 to the SPA provided that QD could at any time pay CPC the sum of £68.5m following which its obligations to CPC set out in that schedule to the SPA would fall away. The obligations in that schedule included paragraph 5(f) which stated that the planning application would not be withdrawn unless (i) the Mayor indicated that he intended to exercise his power to direct WCC to refuse the planning application; and (ii) the Planning Consultant named in the SPA recommended to QD and CPC jointly that a revised planning application stood a better chance of delivering a planning permission rather than the pursuit of an appeal of the previous planning application.

On 1 March 2009 His Royal Highness the Prince of Wales (“the Prince of Wales”) wrote to QD’s Chairman, His Excellency Sheikh Hamad Bin Jassim Bin Jabr Al-Thani (“Sheikh Hamad”), the Prime Minister of Qatar and a cousin of His Highness the Emir of Qatar (“the Emir”), expressing his dislike of RSHP’s design for the Chelsea Barracks development. On 11 May 2009 the Emir met the Prince of Wales and they discussed the proposals for the Chelsea Barracks development. Following that meeting, discussions took place about, among other things, introducing a new outline planning proposal. On 12 June 2009, QD withdrew the planning application.

CPC alleged that QD was not entitled to withdraw the planning application and that such withdrawal was a breach of QD’s obligations under the SPA. The matter proceeded to the High Court. A number of issues were raised. For the purpose of this report, the editors have concentrated on the issues concerning the meaning of the terms “all reasonable endeavours” and “utmost good faith”, which were considered under issues 3 and 4 in the litigation.

### *Issues and Findings*

What is required to comply with a duty of utmost good faith?

Such an obligation is to be read in light of the commercial context of the contract. Further, it is difficult to see how, without bad faith, there can be a breach of a duty of good faith, utmost or otherwise.

In using “all reasonable endeavours” must a party, if necessary, subordinate its own financial interests to obtaining the desired result?

No. Such an obligation does not mean that a party is to act to its commercial detriment. In this case, this was made clear in any event by the use of the words “commercially prudent endeavours”.

### *Commentary*

This high profile and lengthy case provides useful dicta on two provisions often used in commercial and construction contracts. Imposing a duty to act in “utmost good faith” is rarer than the obligation to use “reasonable” or “best” endeavours, but both are subjects upon which there is relatively little case law. With regard to good faith, the Judge summarised English, Australian and US case law to conclude that the obligation must “take its colour from the commercial context of the contract”, although the Judge also queried whether there could be a breach of such an obligation without bad faith. On the facts, the judge concluded that QD were put in a difficult position by the intervention of the Prince of Wales and that they were observing reasonable commercial standards of fair dealing. Accordingly, QD did not breach this obligation.

In addressing the interpretation of the “endeavours” obligations, it is noteworthy that whilst the Judge rejected the argument that the obligation to take “all reasonable endeavours” required the obligor to sacrifice its own commercial interest, he did not expressly endorse the position that an obligation to take “all reasonable endeavours”

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*In using “all reasonable endeavours” must a party, if necessary, subordinate its own financial interests to obtaining the desired result?*

## Case law update

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equates to an obligation to take “best endeavours”. In this case, however, the reasonable endeavours obligation was qualified by the words “commercially prudent” and this in itself was sufficient to ensure that QD was not required to forgo its commercial interests. Again, on the facts, the Judge held that, on this issue, QD was not in breach of contract.

### Contract formation: battle of the forms

#### *GHSP Inc v AB Electronic Ltd*

Commercial Court: before Mr Justice Burton: judgment delivered 20 July 2010

##### *The facts*

During late 2003 GHSP invited AB to submit a quote for the supply of three-track throttle pedal sensors for use in the car industry. GHSP issued the invitation in expectation of receiving an order from Ford. GHSP's invitation to tender provided that the quote was to be provided on GHSP's terms and conditions which included a provision for unlimited liability on the supplier in the event of relevant breaches of contract. On 10 November 2003 AB provided a quote based on its own terms and conditions that, among other things, excluded any liability for consequential loss or damage and (in limited circumstances) restricted liability to the costs of rectification or repair. When submitting its quotation, AB stated that it would need a cap on liability. In its response, GHSP stated that any exceptions to its terms and conditions would need to be documented and agreed in a contract. Over the next few months there were further discussions about whether a cap on liability could be negotiated but these petered out, with both parties leaving it up to the other to come forward with some acceptable proposal.

Discussions continued between the parties' engineers and the design of the sensor was changed and the unit price increased. On 29 October 2004 GHSP received authorisation from Ford to proceed and forwarded to AB a Purchase Order based upon AB's most recent quotation dated 7 October 2004. GHSP provided a further revised Purchase Order on 18 November 2004. Both Purchase Orders were expressed to be subject to GHSP's terms and conditions. On 23 November GHSP forwarded a Production Schedule to AB. This document expressly referred to the GHSP terms and conditions.

On 3 December 2004, in answer to a specific request, AB confirmed that it would be shipping the sensors against GHSP's Production Schedule. Later on 3 December 2004, AB despatched to GHSP an Acknowledgement of Order that referred to (and contained on the reverse side) AB's terms and conditions. There was no further response from GHSP and AB commenced supplying the sensors on 30 December 2004 in accordance with GHSP's Production Schedule. There were two further meetings in January 2005 at which AB maintained the position that it wanted a cap on liability. These meetings did not lead to any agreement on this point. During December 2006 AB supplied a defective batch of sensors which caused mechanical problems in the engines into which they were installed. These problems required Ford to carry out inspections of a large number of trucks and organise replacement parts for its customers. Ford therefore submitted a significant claim to GHSP who commenced proceedings against AB. It was common ground that a contract had been formed but there was a dispute as to the terms that applied.

The parties agreed that as a preliminary issue, the court should determine whether the contract made between AB and GHSP incorporated (i) GHSP's terms and conditions; or (ii) AB's terms and conditions; or (iii) some other terms and if so, which.

##### *Issues and findings*

Which terms and conditions applied?

Where each party had made it clear that it was not prepared to agree the other's terms and conditions and where there was no evidence of any conduct by either party that, viewed objectively, amounted to acceptance of the other's terms and conditions, neither

*The Judge noted that at an early stage the parties had reached an acknowledged deadlock on the issue of limitation of liability but both had sat back hoping that this would not be a problem, or that if a problem arose it could be settled by agreement.*

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GHSP's nor AB's terms and conditions were incorporated into the contract. The contract was therefore subject to the terms and conditions implied by the Sale of Goods Act 1979.

### *Commentary*

Although this decision concerned a supply contract for automotive parts, the situation in which both sides attempt to contract on their own terms and conditions is common in the construction industry. The leading authority in these so called "battle of forms" cases is *Butler Machine Co Ltd v Ex-Cell-O Corporation (England) Ltd*<sup>1</sup>. This decision establishes the general principle that in most cases a contract will be formed as soon as the last set of terms and conditions is sent and received – the "last shot" – without objection being taken to them. That principle is, however, subject to the particular facts of each case.

In this instance, the Judge found on the facts that both sides had on numerous occasions recorded their objections to the other's terms and conditions. Whilst AB had fired the "last shot" (in the form of its Acknowledgement of Order dated 3 December 2004), AB knew that GHSP was not prepared to accept the terms and conditions appearing on the reverse of the Acknowledgement of Order. Conversely, GHSP knew that AB would not accept its terms and conditions unless some form of cap on liability could be agreed. In these circumstances it could not be said that there was any express or implied acceptance of either side's terms and conditions, nor was there any acceptance by conduct. The Judge therefore concluded that neither side's terms and conditions were incorporated, with the result that the contract was subject to the terms implied by the Sale of Goods Act 1979.

This is another example of a case in which there was contractual uncertainty that required ultimate resolution by the court. The Judge noted that at an early stage the parties had reached an acknowledged deadlock on the issue of limitation of liability but both had sat back hoping that this would not be a problem, or that if a problem arose it could be settled by agreement. In the event, the size of the claim being advanced by GHSP made it unlikely that the dispute could be resolved by agreement, leaving the parties to take their chances in court.

### Tenders: rectification of mistakes

#### *Traditional Structures Ltd v HW Construction Ltd*

Birmingham County Court, TCC Specialist List: before HHJ David Grant: judgment delivered 26 May 2010

#### *The facts*

In early 2008 HW Construction Limited ("HW Construction") was preparing a tender for the main contract works for a new business development centre in Sutton Coldfield. HW Construction invited Traditional Structures Limited ("Traditional Structures") to submit a tender for a subcontract for the supply and installation of the structural steelwork and roof cladding. On 15 April 2008 Traditional Structures submitted their tender. In that tender they detailed the scope of supply, referring to both structural steelwork and roof cladding. On page 3 of the tender, under the heading "Prices", Traditional Structures set out their budget prices for the works. In the copy kept on file, under the heading "Prices" were the following words:

*"For the supply and delivery of structural steelwork and claddings erected onto prepared foundations (by others) to form the proposed buildings as detailed above, our budget prices would be:-*

*Steelwork £37,573.43 + VAT*

*Claddings £32,365.83 + VAT"*

However, the copy sent to HW Construction did not include the last line, the specified price for claddings. On 29 April 2008, having submitted its main contractor's tender, HW Construction emailed Traditional Structures requesting some further clarification on

*Where each party had made it clear that it was not prepared to agree the other's terms and conditions and where there was no evidence of any conduct by either party that, viewed objectively, amounted to acceptance of the other's terms and conditions, neither GHSP's nor AB's terms and conditions were incorporated into the contract.*

<sup>1</sup> [1979] WLR 401

## Case law update

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*An “honest and reasonable man” would have made enquiries as to whether the price included in the tender was for both items of work.*

Traditional Structures’ tender. In particular, HW Construction requested confirmation of “how long your quotation of £37,573.43 plus VAT for the floor support beams and roof structure is open for”.

HW Construction were awarded the main contract and, after a telephone conversation, HW Construction accepted Traditional Structures’ tender. On 2 July 2008, Traditional Structures sent HW Construction revised prices incorporating variations to the steelwork and cladding. These revised prices included separate prices for the steelwork and claddings and totalled £76,638 plus VAT. HW Construction protested that Traditional Structures’ quotation was for a total of approximately £38,000.

Given the timescales under the main contract, HW Construction proceeded with the order with Traditional Structures, reserving its right to claim against them subsequently. Traditional Structures eventually referred the matter to the TCC. They claimed that a mistake was made when they sent the tender to HW Construction which omitted the price for the cladding. Traditional Structures sought payment for the cladding element of the works on two bases. Firstly, that there had been a concluded subcontract and there was an implied term under s.15 of the Supply of Goods and Services Act 1982 that a reasonable price would be paid for the cladding work. Secondly, Traditional Structures sought rectification of the subcontract on the grounds of unilateral mistake. HW Construction argued that the tender contained one price, which it accepted for all the work which it had invited Traditional Structures to tender for.

### *Issues and findings*

Should the subcontract be rectified on the ground of unilateral mistake?

Yes. The subcontract should be rectified to add the missing line in the tender referring to the price for the cladding work.

Should Traditional Structures be paid a reasonable price for the cladding element of the works?

Yes. Even if the subcontract had not been rectified, Traditional Structures were entitled to be paid a reasonable price for the works in accordance with s.15 of the Supply of Goods and Services Act 1982.

### *Commentary*

In this decision, the Judge applied the test for unilateral mistake set out in *Thomas Bates & Son Ltd v Windhams (Lingerie)* [1981] 1 WLR 50. The Judge found that HW Construction’s behaviour indicated that HW Construction had actual knowledge of the mistake in the quotation, in the sense that HW Construction would have known or appreciated that a mistake had been made. The Judge rejected the evidence of HW Construction’s managing director, finding that there was a “palpable inconsistency” between elements of his evidence and concluding that any reasonable reader of the subcontract tender would have immediately appreciated the mistake. An “honest and reasonable man” would have made enquiries as to whether the price included in the tender was for both items of work. Further, the Judge was satisfied that the behaviour of the managing director was unconscionable, finding that it went “beyond the boundaries of fair dealing, even having regard to the fact that the parties here were involved in an arms length commercial transaction”.

This is another decision that reflects the importance of contractual certainty. If a party to a contract turns a blind eye when the other party has made an obvious mistake, they can no longer rely on the fact that they are trading at arm’s length. Rather, parties should act honestly and reasonably and make enquiries as to whether the “mistake” is, in fact, truly an error. If they do not do so, commercial relationships (such as the long-standing commercial relationship in this case) may be put at risk. It’s also worth noting that at trial the parties agreed that a reasonable price for the cladding was £34,754.17. The costs and resources incurred in having the tender error issue resolved by the court must have far exceeded this figure.

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**Fenwick Elliott**

The construction &amp; energy law specialists

## Fenwick Elliott News

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# Fenwick Elliott update

As Simon Tolson said in his introduction on page 2, it has been a busy year at Fenwick Elliott and as a consequence we continue to grow. In February 2010 we welcomed a new partner Frederic Gillion. With dual qualifications in English and French law, Frederic regularly acts for major contractors in Central and Eastern Europe.

We are also pleased to announce the appointment in May 2010 of two new associates: Claire King and Rebecca Williams, who have been with us since 2008. In addition, we have welcomed three new assistants: Andrew Davies and Lucy Goldsmith, who joined during 2010 and Chris Farrell who qualified as a solicitor in August 2010.

## Romania

During 2010, Fenwick Elliott boosted its Eastern European coverage by forming an association with Bucharest firm SDC & Partners (Soimulescu Dragin Costin). SDC was established in 2005 as the first construction and engineering law specialist in Romania. With our combined resources, our firms have the largest and most highly rated construction law specialist teams in Romania, offering an integrated legal service to international clients operating or investing in the region. If you would like to know more please contact Frederic Gillion - fgillion@fenwickelliott.com

## Seminars

We continue to host our regular seminars throughout the year. These include our:

- Construction Law Update Seminar;
- Adjudication Update Seminar;
- Procurement Seminar; and
- Capital Projects in the Education Sector Seminar.

These seminars are intended to be both informative and practical, and we are fortunate to have external speakers renowned within the construction industry participate at our conferences, including current and previous Technology and Construction Court judges.

We also host various other events throughout the year to discuss and debate topical construction and energy industry issues. For example, we often conduct in-house seminars for our clients on topics you want us to address. If you would like us to come and speak at your organisation or want any more information about our seminars, then please contact Susan Kirby - skirby@fenwickelliott.com.

## Website and resource material

Our website figures show a regular increase in the number of unique visitors. One reason for this, we believe, is that we continue to build up on the website, a valuable archive of newsletters, papers and articles written by the Fenwick Elliott team. The "Articles and Papers" section of our website is regularly updated and covers a wide breadth of topics including international arbitration, litigation and adjudication as well as alternative dispute resolution and contract issues. Examples of these articles can be found throughout this Review.

As you may know, *Dispatch*, our monthly newsletter, continues to highlight some of the most important legal developments during the previous month, across the building, engineering and energy sectors. If you would like to receive a regular copy please contact Jeremy Glover, the editor - jglover@fenwickelliott.com. Look out too in 2011 for our new *International Quarterly* which will focus on issues of particular relevance to overseas projects.

Further details on all our events and publications can be found on the Fenwick Elliott website, just click on [www.fenwickelliott.com](http://www.fenwickelliott.com).

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*A valuable archive of newsletters, papers and articles written by the Fenwick Elliott team.*





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