FENWICK ELLIOTT

The construction & energy law specialists

Annual Review 2017/2018

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

Contents

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It is my great pleasure to introduce to you the 2017/18 edition of the *Fenwick Elliott Annual Review*. This is our 21st annual publication, for some of you the former age of majority!

It is always an undertaking to squeeze into one journal the legal highs and lows of the year. Our purpose is always to mark out to you areas of the law and practice that we hope are valuable to your business or endeavour. We understand that while you need to make sure you avoid getting on the wrong side of a contract, we are all aware that you can't run with the hare and hunt with the hounds in the real world.

I know construction activity across the building sector is shrinking, for the first time in 13 months (since just after the Brexit vote). Builders interviewed by Markit say they have suffered a drop in workload due to "fragile confidence and subdued risk appetite" among clients, especially in the commercial building sector. No doubt the election did not help things either. That said, there is reason to be hopeful after Britain leaves the EU. Divorce I am sure will be a catalyst for positive change. We will all make it be so, it is the way of our peoples.

I am pleased to say that UK legal services "reign supreme" despite Brexit, none more so than our international work and practice in and around London, the South East and regions.

The courts have been busy this year as you will see from the remainder of the *Review*. One highlight stands out. Following on from the 2015 case of *Arnold v Britton*, in *Wood v Capita Insurance Services Ltd* the UK Supreme Court revisited the balance to be struck between the language used and the commercial context in which a clause was drafted when deciding between competing meanings of a clause. This case highlights the importance of careful drafting. Leaving a clause opaquely and unclearly drafted can result in your agreement being open to the interpretation of the courts, who will not necessarily decide in your favour. It is no surprise that a number of articles in this year's *Review* make reference to all this.

The case of *Kersfield Developments (Bridge Road) Ltd v Bray and Slaughter Ltd* is one of the latest in a long line of disputes about payment applications becoming due automatically in cases where the paying party has failed to give a payment notice and pay less notice on time or at all. This case serves as a reminder that:

- The content of Interim Applications must be clear and unambiguous;
- The parties must comply with the deadlines for notices/payments defined in the building contract;
- When applying for a stay on enforcement, evidence to enforce the stay must be solid;
- As an Employer, it is crucial to serve any notices in response to Interim Applications on time; and
- Estoppel arguments will not succeed where an application is fundamentally invalid.

There have of course been some highlights here at Fenwick Elliott since our last *Review*:

- October 2016: Fenwick Elliott moves into its new open plan offices designed with major input from the company as the client!
- January 2017: James Mullen and Robbie McCrea become Senior Associates. Aleem Shahid joins our Dubai office as an Associate.
- February: the Society of Construction Law (SCL) publishes a long-awaited update to its advisory protocol on delay and disruption events – the second edition. As we discuss on page 40, rather than overhauling the original protocol, the second edition updates and clarifies guidance around issues including concurrent delay, disruption analysis and record-keeping.
- March: Fenwick Elliott expands to its largest size ever.
- March: electronic working becomes compulsory for professional users of the Rolls Building Courts, now called the Business and Property Courts. This came as a shock to some people, although we have been using the scheme for nearly two years. We have embraced it, finding that it saves time and costs as well as huge amounts of photocopying.
- April: James Cameron joins us.
- May: JCT announces it has now released all of the 2016 edition of its standard form suite of construction contracts.
- June: after 12 years of NEC3 and its approach to proactive project and risk management, NEC4 becomes available for use by the industry.
- July: Laura Bowler completes her training as a Solicitor and becomes an Associate;
- July: the ICC announces that it is setting up an office in Abu Dhabi's financial free zone, the Abu Dhabi Global Market. This exciting move by the ICC, which we discuss on page 32, is a boost for the UAE's ambition to become a global leader in dispute resolution and gives arbitration users in the region greater choice.
- August: Jock Hamilton and Ciaran Williams join us as Associates and James Cameron becomes a Senior Associate.
- October: Lyndon Smith becomes our 19th partner;
- October: the DIFC Courts in Dubai announce the introduction of a new Technology and Construction Division;
- October: the Health and Safety Executive (HSE) will focus on how construction sites are managing health as well as safety risks as part of its second wave of targeted site inspections;
- December: FIDIC will finally be releasing the second edition of their Rainbow Suite.

Our team is truly international; our work continues to cover dispute avoidance strategy, litigation, international arbitration, adjudication and all forms of ADR/mediation. Our projects team is thriving. Fenwick Elliott fully intends to hold its leading central London position in the league tables, whether for our dispute resolution work here in London or as a global leader in commercial dispute resolution. But so importantly, I want to thank all of you for the opportunities you have given us to resolve your legal problems this past year, through both London and Dubai and points in between. Long may this continue and be to our common advantage.

Welcome to the 21st 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, from page 42, our customary summaries of some of the key legal cases and issues, taken from both our monthly newsletter *Dispatch* as well as the *Construction Industry Law Letter*.

Jeremy Glover
Partner, Editor

This year's *Review* features a wide range of articles, which reflects the diverse range of issues we have found ourselves looking at over the past year. We could not of course ignore Brexit, and Edward Colclough starts us off on pages 4-5 by discussing what the possible impact of Brexit will be for the construction industry. Apparently, for all the talk, Brexit simply means: the withdrawal of the United Kingdom from the European Market.

The year 2017 has seen the release of a number of new contract updates. On pages 21-23 we compare and contrast some of the changes made by the NEC, who released NEC4 in June, and FIDIC, who are finally releasing the second edition of the Rainbow Suite in December. Both have given extra importance to dispute avoidance, with FIDIC introducing early warning provisions and the NEC introducing a Dispute Adjudication Board. With that in mind, on pages 6-7 we look at the latest encouragement being given to mediation by the courts.

FIDIC and the NEC also have well-known notice provisions. In 2017, the Northern Ireland courts were the scene of an interesting decision where, as Keegan J said, one party seemed to have overlooked the notice requirements amid a mass of claims. We review the decision on pages 30-31.

Questions of unforeseeable ground conditions are often associated with notice disputes. Sarah Buckingham, on pages 18-20, looks at some of the ways in which the different forms of construction contract address this issue, as well as discussing what happens where this is not dealt with at all.

Our new office in Dubai has been open for over two years now and goes from strength to strength. Offering a fully integrated specialist construction law and arbitration practice operating from the DMCC, we have Arabic speakers with knowledge of local laws and practices, as well as international expertise in construction law. At pages 32-33 you can find an update on the latest developments in the UAE which may affect international arbitration.

On pages 27-29 we also review the way concurrent delay is treated in the UAE, as well as in England and Scotland. This follows a rare decision from the TCC on the topic, which came out in September 2017. The dispute came about following an amendment to a contract seeking to make the contractor responsible when there was concurrent delay. The SCL Delay and Disruption Protocol of course also deals with concurrency. A second edition of this protocol came out in February 2017 and we review some of the changes on pages 40-41. With delay in mind, Andrew Weston looks at how the Court of Appeal treated the concept of a contiguous extension of time on pages 13-15.

That decision was one of many during 2017 that followed the Supreme Court's decision in *Arnold v Britton* which we featured in our 2016 *Review*. Instead of looking at the surrounding circumstances or commercial common sense to interpret contractual provisions, the courts have underlined the primacy of language even when this results in a one-sided or unfair decision. Karen Gidwani, on pages 36-39, discusses the impact of the fitness for purpose debate. Claire King, too, looks at another Supreme Court decision, involving the alleged negligence of a gynaecologist. Claire explains on pages 16-17 why this decision may be very relevant to construction professionals.

Claire is also the editor of our monthly newsletter *Insight* which provides practical information on topical issues affecting the building, engineering and energy sectors – https://www.fenwickelliott.com/research-insight/newsletters/insight. In February 2017, following a successful Court of Appeal case, Claire wrote about the FIDIC Yellow Book, termination and letters of credit. Find out more on pages 24-26.

Dr Stacy Sinclair has in previous years provided valuable updates on the progression of BIM. This year is no exception. On pages 34-35 Stacy looks at the first English court decision where BIM featured. Access to the model was withdrawn following a dispute about, amongst other things, payment. On pages 8-9 Martin Ewen reviews the law relating to product liability in England and Wales.

No *Annual Review* would be complete without a round-up of the latest adjudication news. This is provided by James Mullen on pages 10-12. Absent agreement, it looks like 2017 might be the year which puts paid to the idea that a party can recover its costs associated with running an adjudication.

We have also started a Fenwick Elliott Blog – https://www.fenwickelliott.com/blog – which Andrew Davies keeps a watchful eye over. We have included a sample for you on page 52.

Our website (www.fenwickelliott.com) keeps track of our latest legal updates or you can follow us on Twitter or LinkedIn. As always, I'd welcome any comments you may have on this year's *Review*: just send me a message by email to jglover@fenwickelliott.com or on Twitter @jeremyrglover.

Brexit means…?

Amidst a spectrum of bold political promises, rhetoric and catchphrases, we now know exactly what Brexit means. The recent addition of "Brexit" to the Oxford English Dictionary is very simply defined as: "The withdrawal of the United Kingdom from the European Union". Yet, aside from its honorary inclusion into the English language, as **Edward Colclough** explains, much still remains uncertain about Brexit and its implications for the UK construction industry.

"Although uncertainty has the potential to hinder the industry in the short term, the construction sector has a golden opportunity to market itself post-Brexit to a global audience."

Following the UK's vote to leave the EU on 23 June 2016, by a slim majority of 51.9% to 48.1%, in March this year the UK Government formally triggered Article 50. In doing so, it commenced a two-year negotiation period to implement what is meant by Brexit. With the pressure of a two-year deadline to negotiate a divorce settlement with the EU under way, this June saw a Brexit-induced snap general election. The outcome, a result the pollsters miscalculated almost as much as the Brexit vote just 12 months before, a hung parliament. With no political party able to secure a clear majority to govern, the UK Government's hand at the Brussels' negotiation table has been weakened and further uncertainty cast on what Brexit will ultimately mean for the UK.

Responding in a keynote speech in Florence this September, the Prime Minister, Theresa May, put forward a proposal to postpone a full Brexit until 2021 by asking the EU member states to agree to an additional two-year transition period. During such a transition period the UK will have left the EU, but only in name. All UK payments into the EU budget, the free movement of people and the jurisdiction of the European Court of Justice would continue whilst more time is given to implement a Brexit deal. What is clear is that any certainty over Brexit will not be known in the immediate future. In the words of the "European Council (Art. 50) guidelines for Brexit negotiations", "nothing is agreed until everything is agreed".

When uncertainty is the only certainty

With UK PLC now calling for confidence to be instilled into a turbulent and uncertain market, attempts to predict the true impact of Brexit on the UK construction industry remain the subject of speculation and crystal ball gazing. This is unfortunate as the construction industry builds on certainty and market confidence.

Although little has changed in terms of day-to-day policy since the Referendum vote (with some still seeking to prevent a Brexit from happening at all), the political uncertainty of Brexit is very much taking its toll. Following a positive start in Q1 of 2017 there has been a deceleration in growth since June's election, with private, commercial and industrial sectors seeing the most significant reduction in output.

The UK property market, a traditional prop to the construction industry, has itself been a casualty of the Brexit vote, with developers now tempering construction plans and taking longer to commit to new projects in order to reduce their market exposure and mitigate widespread concerns that companies may rent less space or simply relocate from the UK altogether. Doubts are also surfacing over the Government's commitment to building one million new homes this Parliament due to Brexit uncertainty, a jittery home buyers' market together with stamp duty and pending interest rate hikes. On the back of a weakened pound, funders are also tightening their lending criteria making it more difficult to secure finance for new projects. With the construction sector now seen to be flirting with a recession, in the eye of this perfect storm is the political uncertainty surrounding Brexit.

The Business, Energy and Industrial Strategy Committee provided some comfort to business in its recently launched inquiry into the implications of Brexit, which seeks to establish how the interests of different sectors should best be pursued in both the negotiating process and post-Brexit. In doing so, the Committee will examine a range of key issues relating to market access, non-tariff barriers, regulation, skills, R&D, trade opportunities and transitional arrangements. The major concern for construction is that it did not even make the cut of sectors within the remit of the inquiry – with only the nuclear, automotive, processed food and drink, aerospace and pharmaceuticals sectors on the Committee's agenda. It is increasingly clear that the construction industry will have to take the initiative itself to get its points of view across and onto the Brexit agenda.

For an industry that has been reliant on the EU for investment, labour and materials, the following section identifies some key areas of uncertainty to be addressed in the Brexit negotiations:

- **Workforce**

Free movement of labour has been one of the most valuable assets of EU membership for the UK construction industry. So much so that the use of EU labour has managed to paper over the cracks of a sustained lack of skilled UK labour, an ageing workforce and a failure to invest in training and development to encourage the best home-grown talent into construction. This is perhaps the biggest obstacle Brexit creates for the industry.

RICS has already identified the UK's skill shortage as the primary risk to jeopardising a predicted £500 billion pipeline of projects, on the basis that there are not enough British workers to meet even the current demands of the industry. With 194,000 EU

workers currently working in the UK construction sector we are utilising an EU workforce large enough to deliver 16 Crossrail projects. It is further expected that 430,000 domestic workers will have retired between 2010 and 2020, meaning the industry will need to find the next generation of workers to plug this gap. Until a solution is found to enable workforce supply to meet the demand of the construction sector, labour costs will continue to increase and impact on the competitiveness of projects.

- Materials

Following the pound's depreciation since the EU Referendum, one of the strongest cost pressures on the construction industry has been the rising prices of imported materials. With 64% of construction materials used in the UK being imported from the EU, any loss of tariff-free access to the single market will only increase the cost of resources and the profitability of projects until adequate trade agreements are negotiated and put in place. In contrast 63% of construction materials exported from the UK go to the EU and have the potential to be exposed to heavy duties. Comfort needs to be provided in relation to the accessibility and affordability of construction materials in a post-Brexit construction industry, as this is a substantial pricing risk that investors, employers and contractors will all look to avoid.

- EU procurement/red tape

A common criticism of the EU from the construction sector was the perception of extensive red tape and convoluted procurement regulations which resulted in inefficiencies due to the cost of bureaucracy. While Brexit may appear to offer the opportunity to streamline the existing EU requirements with a more flexible approach, the Government's White Paper, *The Great Repeal Bill*, seems to suggest it will be business as usual on this front. The White Paper indicates that the Government will seek to convert directly applicable EU law into UK law. In the long term the extent to which the current law is rewritten is likely to depend on the nature of the Brexit deal the UK gets.

- Funding

The UK has been one of the biggest net beneficiaries of EU funding from the likes of the European Structural Investment Fund and the European Regional Development Fund. While leaving the EU will close the door on such investments pools, which have supported projects such as Crossrail and HS2, it opens up the potential for foreign investment opportunities. Investors will be paying careful attention to the health of the UK construction industry over the coming months, meaning the sector must be able to sell itself as a collaborative and successful investment choice. While foreign investors will be cautious of the uncertainty surrounding Brexit, the weak pound has been able to maintain the UK as an attractive investment opportunity. It is essential that the Government, and the sector itself, is able to maintain the UK construction sector as a good investment opportunity on a global stage.

> *"nothing is agreed until everything is agreed"*

Brexit-proof contracts

A key purpose of construction and engineering contracts is to allocate risk between the parties throughout the duration of a project. While contracts have inbuilt mechanisms for addressing changes in law, taxes, labour supply, the costs and/or availability of materials and acts of force majeure, the problem with Brexit is that it stacks so much uncertainty against these items. The major concern is that these are all risks which are becoming increasingly difficult for parties to predict, manage or price against. In a culture of fixed price lump sum contracts, where these risks are typically thrown down to the contractor, this approach will most likely have to change.

What happens next?

By general consensus the construction sector favoured the "remain" vote. Brexit, however, as defined by the *Oxford English Dictionary*, is not in itself a bad thing for the industry. Whether Brexit proves to be good or bad for the construction industry will be dictated by the terms of any Brexit deal and the construction industry's ability to capitalise and adapt to the changes it faces. Although uncertainty has the potential to hinder the industry in the short term, the construction sector has a golden opportunity to market itself post-Brexit to a global audience. In doing so it must set out in no uncertain terms what it requires a prosperous post-Brexit construction sector to look like. Once it has done this, it will then be over to the Brexit negotiators to deliver.

What constitutes an unreasonable failure to mediate?

In the 2013 case of *PGF II SA v OMFS Co and Anr*[1], the Court of Appeal had to consider whether silence in response to a mediation proposal was the equivalent of a refusal to mediate. It was. There have been two cases in 2017 where it was suggested that one of the parties had, instead of ignoring the mediation proposal, unreasonably delayed or dragged their feet. Was that also equivalent to a refusal to mediate? All three cases provide a valuable reminder of both the circumstances when a party might be considered to have unreasonably refused to mediate and the current position being adopted by the courts.

"I would be astonished if a skilled mediator failed to bring the parties to a sensible settlement"

PGF II SA v OMFS Co and Anr

Here, on 10 January 2012, the day before the trial was due to start, PGF accepted a Part 36 offer that had been made on 11 April 2011. This left the question of costs. At the time OMFS made their Part 36 offer, PGF proposed mediation. No response was received. PGF tried again in July 2011. Again no response was received. PGF relied on the well-known Halsey principle which says that, as an exception to the general rule that costs should follow the event, a successful party may be deprived of its costs if it unreasonably refuses to mediate. In other words, PGF argued that OMFS should not have the benefit of the usual costs protection provided by successful Part 36 offers. At first instance the TCC agreed. It was appropriate to depart from the usual principles and OMFS were not entitled to their costs for the period from 21 days following the date the offer was made.

In the Court of Appeal PGF argued that the silence of OMFS was tantamount to a refusal to mediate and that the silence was itself unreasonable. LJ Briggs stated that:

"silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable..."

There was a practical reason for this. The fact of the refusal meant that an investigation of alleged reasons for the (alleged reasonableness of the) refusal advanced for the first time, possibly months or even years later, at a costs hearing, when none had been given at the time of the original invitation, raised forensic difficulties for the court in establishing what had actually happened. Of course, those difficulties fall on the party asserting that its refusal to mediate was justified. If, and there can certainly be reasons why ADR is premature, a party refuses an invitation to mediate, then it is sensible to explain why at the time.

Whilst there was nothing especially unsurprising in the decision, it serves as a useful reminder of the support that the courts in general provide to all forms of ADR. Whilst the court cannot compel a party to mediate, it can penalise in costs a party who unreasonably refuses to see whether there is an alternative way to resolve the dispute in question.

There are policy reasons for this. Lord Justice Briggs referred to the constraints that now affect the provision of state resources for the conduct of civil litigation, which he said call for an ever-increasing focus upon means of ensuring that court time, both for trial and for case management, is proportionately directed towards those disputes which really need it. With proportionality in mind, Lord Justice Briggs also noted:

"A positive engagement with an invitation to participate in ADR may lead in a number of alternative directions, each of which may save the parties and the court time and resources. The invitation may simply be accepted, and lead to an early settlement at a fraction of the cost of the preparation and conduct of a trial. ADR may succeed only in part, but lead to a substantial narrowing of the issues. Alternatively, after discussion, the parties may choose a different form of ADR or a different time for it, with similar consequences."

Finally, Lord Justice Briggs said that:

"this case sends out an important message to civil litigants, requiring them to engage with a serious invitation to participate in ADR, even if they have reasons which might justify a refusal . . . The court's task in encouraging the more proportionate conduct of civil litigation is so important in current economic circumstances that it is appropriate to emphasise that message by a sanction which, even if a little more vigorous than I would have preferred, nonetheless operates pour encourager les autres."

It should be noted that whilst Lord Justice Briggs emphasised the need for the courts to encourage parties to embark on ADR in appropriate cases and said that silence in the face of an invitation to participate in ADR should, as a general rule, be treated as unreasonable regardless of whether a refusal to mediate might in the circumstances have been justified, he did not say that a failure to engage, even if unreasonable, automatically results in a costs penalty. It is simply a factor to be taken into account by the judge when exercising his costs discretion.

In the case of *Gore v Naheed and Anr*,[2] the Court of Appeal agreed with the approach of the Judge at first instance that it was not unreasonable for Mr Gore to have declined to mediate. His solicitor had considered that mediation had no realistic prospect of succeeding and would only add to the costs. The Judge at first instance said that he considered that the case raised quite complex questions of law which made it unsuitable for mediation. That approach could not be said to be wrong in principle. The *Car Giant* case is another example of the court considering quite carefully the actions of the parties during the case in question.

1. [2013] EWCA Civ 1537.
2. [2017] EWCA Civ 369.
3. [2017] EWHC 464 (TCC).
4. [2017] EWCA Civ 117
5. The quote is taken from the Court judgment.

Car Giant Ltd and Anr v London Borough of Hammersmith[3]

This was a costs' judgment, where judgment had been given in favour of Car Giant in the sum of £180k. However, LBH had made a Part 36 offer of £250k in April 2014. It was common ground that Car Giant should pay LBH's costs from 7 May 2014 together with interest on those costs at 1% above base rate. However, it was also suggested that these costs should be paid on an indemnity basis. Defendants, unlike claimants, are not presumed to be entitled to indemnity costs from the date of expiry of the relevant period for their Part 36 offers. Instead, the court has a discretion to make an order for indemnity costs depending on the parties' conduct.

Here, it was suggested that there had been an unreasonable delay in agreeing to mediate or take part in some form of ADR. The delay was from 15 May 2015 until October 2016. Deputy Judge Furst QC was clear that a court should be slow to conclude that the delay was unreasonable or such as to justify an order for indemnity costs.

The Judge did not consider that it could be said here that had mediation taken place in about May 2015 it would have been or was likely to have been successful. The delay in mediating could not be shown to have caused any increased costs. In this case, the Judge said that:

"The courts should be slow to criticise a party's behaviour where decisions such as when to mediate are matters of tactical importance where different views may legitimately be held".

Car Giant had taken the view that mediation was more likely to succeed when the experts' views had been fully set out. That, on the evidence before the court, was a perfectly acceptable point of view. Here, LBH had indicated in April 2014 that it would not provide its valuation evidence, even on a without prejudice basis, and that it was without a valuer between about August 2015 and July 2016 which might have made discussions possible.

Whilst there was some delay on the part of Car Giant's solicitors in responding to letters on this topic, that delay was not so great that it justified an order of indemnity costs. At around the time that Deputy Judge Furst was considering this case, the Court of Appeal had a similar case before them.

Thakkar and Anr v Patel and Anr[4]

This was an appeal against a costs order. One of the principal issues was the consequences of failure to mediate. The claim in question was a dilapidations claim for £210k which was met by a counterclaim of just over £40k. In their allocation questionnaires, both parties requested a stay for ADR. In the Court of Appeal, Lord Justice Jackson noted that there seemed to have been a desire to settle on both sides. Both parties, initially at least, expressed a willingness to mediate. The claimants were proactive in making arrangements for a mediation and identifying possible mediators for consideration by the defendants. The trial Judge contrasted that with the approach of the defendants who were "slow to respond to letters and raised all sorts of difficulties". Eventually, the claimants decided that no progress was possible and explained why in a letter[5] as follows:

"Our clients have made all reasonable attempts to arrange a mediation but have been thwarted by your clients' conduct. Since April 2012 countless weeks have been lost through having to chase for responses. When your client finally gave a clear window of availability we tried to fix a mediation within that period a variety of excuses have been given as to why that date could no longer go ahead.

Understandably, our clients no longer have any confidence that a mediation can be arranged given your clients' conduct..."

The ADR stay was lifted and the trial took place. The claimants were awarded £45k, the defendants, £17k, leaving a balance owing to the claimants of £28k.

This left the question of costs. The trial Judge described the defendants as having been "relatively unenthusiastic or lacking in preparedness to be flexible" but also noted that it was the claimants who had closed down the ADR. He concluded that there were real prospects of settlement if a mediation had taken place. And this is the crucial difference with the Car Giant case. After weighing up all the circumstances, the Judge ordered the defendants to pay 75% of the claimants' costs of the claim. He ordered the claimants to pay the defendants' costs of the counterclaim. The defendants appealed.

Lord Justice Jackson agreed with the trial Judge that if there had been a mediation there would have been a real chance of achieving a settlement. The dispute was a commercial one, being purely about money. The offers that had already been made were close. The costs of the litigation were vastly greater than the sums in issue. Bilateral negotiations had been unsuccessful. The Judge at first instance had said that:

"Any mediator would have had both parties in the room with him. He would have let them have their say. He would then have pointed out (a) the small gap between their respective positions, and (b) the huge future costs of the litigation. In those circumstances I would be astonished if a skilled mediator failed to bring the parties to a sensible settlement."

Lord Justice Jackson referred to the PGF II case, noting that here the prospects of a successful mediation were good. The defendants did not refuse to mediate:

"they dragged their feet and delayed until eventually the claimants lost confidence in the whole ADR process".

Conclusion

Lord Justice Jackson said that the trial Judge's order was a "tough" one, but it was within the proper ambit of his discretion. Finally, in a comment which should be read with the words of Lord Justice Briggs, who said:

"The message which this court sent out in PGF II was that to remain silent in the face of an offer to mediate is, absent exceptional circumstances, unreasonable conduct meriting a costs sanction, even in cases where mediation is unlikely to succeed. The message which the court sends out in this case is that in a case where bilateral negotiations fail but mediation is obviously appropriate, it behoves both parties to get on with it. If one party frustrates the process by delaying and dragging its feet for no good reason, that will merit a costs sanction. In the present case, the costs sanction was severe, but not so severe that this court should intervene."

"The court's task in encouraging the more proportionate conduct of civil litigation is so important in current economic circumstances that it is appropriate to emphasise that message by a sanction."

Product liability

Martin Ewen reviews product liability law in England and Wales and also whether there is a limit on the level of damages awarded in actions for wrongful death arising from defective products.

"If it is established that there is a defect in a building product, liability accrues to any party responsible for the defect, and there is no cap on damages for death or personal injury."

A building (or any other) product liability claim can be based on one or more of the following grounds: (i) negligence; (ii) the Consumer Protection Act 1987; (iii) the Fatal Accidents Act 1976; (iv) contract; and (v) criminal liability.

(i) Negligence

Since 1987 England and Wales have had strict liability legislation (the Consumer Protection Act 1987) to deal with claims by those who have suffered damage caused by a defective product. Under that legislation liability is dependent not upon fault, but upon mere defectiveness.

Claims brought on the basis of fault liability or liability in negligence are primarily concerned with the question of whether the defendant breached his duty of care by failing to act to an acceptable standard (otherwise known as acting with reasonable care), rather than whether the product was defective. In negligence, an injured party has a direct right of action against any person in the chain of supply who has breached his duty to the injured party.

The primary remedy for a claim in negligence will generally be damages for the losses sustained by the claimant.

An action under the Consumer Protection Act 1987, with its strict liability, is generally far more likely than a claim in negligence. The primary reason for this is because in negligence a claimant must prove that the manufacturer breached his duty of care, whereas under the Consumer Protection Act 1987 it is enough simply that the product is defective (strict liability).

(ii) Consumer Protection Act 1987

As touched on above, strict liability is a concept whereby a successful claim does not depend on proof of the existence of a contract or of fault, and liability accrues to any party responsible for a defect in a product which causes injury. Strict liability, however, is not the same as absolute liability; the burden of proof still lies with the consumer and there are several defences available to a strict liability claim.[1]

Strict liability in the European Union is based on the Product Liability Directive (85/374/EEC). Member states of the European Union have the option under the Product Liability Directive to fix a cap of ECU 70 million (70 million euros), for liability resulting from death or personal injury *"caused by identical items with the same defect"* (Article 16(1)). This option has not been exercised by the United Kingdom. There is no cap on damages that can be awarded in wrongful death actions in the United Kingdom under the Product Liability Directive, as implemented in the United Kingdom by virtue of the Consumer Protection Act 1987.

The Consumer Protection Act 1987 introduced statutory liability for defective products. A claim can be brought for death, personal injury or damage to private property. The Consumer Protection Act 1987 imposes no financial limit on the producer's total liability.

Section 2(1) of the Consumer Protection Act 1987 provides that *"where any damage is caused wholly or partly by a defect in a product, every person to whom subsection (2) below applies shall be liable for the same damage"*. Subsection (2) includes the producer of the product, any person who has put his name to the product and held himself out to be the producer of the product, and any person who has imported the product.

Builders generally face no liability under the Consumer Protection Act 1987 for the design and construction of the things they build. However, *"movables"* or substandard materials may give rise to liability.

The presence of a defect is essential if there is to be liability under the Consumer Protection Act 1987.

Section 5(1) of the Consumer Protection Act 1987 defines *"damage"* as *"death or personal injury or any loss of or damage to any property (including land)"*.

Section 7 of the Consumer Protection Act 1987 prevents liability being excluded by any contract term, notice or other provision. This applies to any person who has suffered damage wholly or partly from a defect in a product as well as any dependant and relative.

Calculation of personal injury damages and those arising from wrongful death is a complex process with many factors and will be different in each case. There is no overall limit on the level of damages.

(iii) Fatal Accidents Act 1976

If a product causes the death of someone, there is the added possibility of a claim by dependants under the Fatal Accidents Act 1976.

Section 1(1) of the Fatal Accidents Act 1976 provides that:

1. These include compliance with mandatory rules, non-supply of the product in question, not defective at time of supply, among others set out in section 4 of the Consumer Protection Act 1987
2. [1964] A.C. 1129

"If death is caused by any wrongful act, neglect or default which (if death had not ensued) would have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured."

Therefore an action could be brought by the deceased's dependants under the Fatal Accidents Act 1976.

(iv) Contract

A claim for breach of an express or implied term of a contract can be brought on a strict liability basis. Liability is established on proof of breach of contract and the claimant does not need to prove that the seller/producer was negligent.

Damages under contract are not limited to compensation for personal injury, physical damage to property and consequential loss. Pure economic loss (usually loss of profits) can also be recovered in a contractual claim.

A third party who suffers loss as a result of a defective product generally has no right of contractual action; only the purchaser of the product who suffers loss may sue in contract.

Therefore unless there is a direct contractual link between the manufacturer and consumer (e.g. a guarantee), it will not generally be possible for a consumer to bring a contractual claim against a manufacturer.

It is worth mentioning the General Product Safety Regulations 2005 ("GPSR"). These Regulations implemented the revised EU General Product Safety Directive.

The GPSR requires producers and distributors (including, in certain circumstances, individual directors, managers or other similar officers) to ensure that their products are safe. If products are not safe, the GPSR allows courts to impose fines or, in certain cases, even a term of imprisonment (Regulation 20). They impose a general safety requirement on producers, obliging them to place *"safe"* products on the market. A product is *"safe"* if, under normal or reasonably foreseeable conditions of use, it presents no risk or *"only minimum risks compatible with the product's use, considered to be acceptable and consistent with a high level of protection for the safety and health of persons"* (Regulation 2). Various matters are taken into account when assessing a product's safety and a product will be presumed to be safe if, for example, it conforms to a UK national standard giving effect to a European standard.

The GPSR specifies the types of conduct that will amount to an offence and which may be punished by a fine or imprisonment (or both). These include the placing on the market by a producer of a product that does not conform to the general safety requirement and the supply by a distributor of a product that he knows or should have presumed to be dangerous (Regulation 20(1)).

Products used in the workplace are subject to the Health and Safety at Work Act 1974. Therefore where products are to be sued in the workplace, the provisions of this legislation should be given careful consideration.

(v) Criminal Liability

Manufacturers and suppliers of products may face criminal, as well as civil, liabilities if their products are defective.

The Corporate Manslaughter and Corporate Homicide Act 2007 sets out that the offence of corporate manslaughter is committed where the way in which a company's activities are managed or organised both:

- causes a person's death; and
- amounts to a gross breach of a relevant duty of care owed by the company to the deceased.

Individual directors cannot be convicted of an offence, only the company.

The court may impose an unlimited fine upon a company convicted of corporate manslaughter, the scale of which will be determined by reference to the facts of a particular case and the company's annual turnover in accordance with sentencing guidelines effective from 1 February 2016.

Are punitive damages available in wrongful death products liability or construction matters in the UK?

The primary objective of an award of damages is to compensate the claimant for the harm done to him. A possible secondary objective is to punish the defendant for his conduct in inflicting that harm. Such a secondary objective can be achieved by awarding, in addition to the normal compensatory damages, damages which are punitive. Punitive damages tend to come into play whenever the defendant's conduct is sufficiently outrageous to merit punishment.

The leading case in the area of punitive damages is *Rookes v Barnard*[2]. In this case the House of Lords held that, except in a few exceptional cases, it was no longer permissible to award punitive damages against a defendant, however outrageous his conduct. The exceptional circumstances set out in that case are very unlikely to arise in the context of a building product liability claim.

Concluding remarks

Those concerned in the supply and production of building products should pay particular attention to the Consumer Protection Act 1987. If it is established that there is a defect in a building product, liability accrues to any party responsible for the defect, and there is no cap on damages for death or personal injury.

If a product causes the death of someone, there is the added possibility of a claim by dependants under the Fatal Accidents Act 1976.

Consideration must also be given to the GPSR, where an offence can be punished by a fine or imprisonment (or both).

Criminal liability under the Corporate Manslaughter and Corporate Homicide Act 2007 could result in an unlimited fine, based on the company's turnover. Clearly this could result in a fine of a very substantial sum of money.

It is important to remember that it must be established that a building product is in fact defective. If a product satisfies relevant legislation and regulations and then following an event it is considered that a different product would have been better suited, that in itself will not establish that the product used was defective.

"It is important to remember that it must be established that a building product is in fact defective."

Adjudication update

There continues to be a steady stream of adjudication enforcement cases going through the courts, which tend to suggest that adjudication remains a popular form of dispute resolution. **James Mullen** looks at some of the most important developments from the last few months, starting with the question about whether a party can recover the costs incurred during the adjudication process.

Adjudication Costs

It is well established that a party's ability to recover its adjudication costs is limited. However that has not stopped parties from trying to assert that they are entitled to payment of their costs. A decision from Mrs Justice O'Farrell has provided important guidance and clarity on this issue.

It is generally accepted amongst legal practitioners that the wording of section 108A of the Housing Grants, Construction and Regeneration Act 1996, as amended ("Construction Act"), prevents parties from agreeing that an adjudicator can allocate party costs unless there is a written agreement made after the start of the adjudication.

Such agreements rarely happen in practice meaning that in the vast majority of cases, each party bears its own adjudication costs. However, whilst adjudication is intended to be a quick and inexpensive dispute resolution process, the costs can be significant. As a result, parties have come up with various arguments to try to recoup their adjudication costs.

For a while during the past year, it was thought that a party may be able to recover its adjudication costs as a debt under the Late Payment of Commercial Debts (Interest) Act 1998 ("Late Payment Act").

Support for this line of thought was reinforced by the case of *Lulu Construction Ltd v Mulalley & Co Ltd*.[1] Here, Mulalley (who were effectively the paying party) commenced adjudication proceedings to resolve the value of Lulu's claim under the parties' subcontract. In its rejoinder, Lulu included for the first time a claim of £48k for "*debt recovery costs*" claimed under the Late Payment Act.

The adjudicator awarded Lulu its debt recovery costs. Mulalley argued that the head of claim was not within the scope of the referral and was not something which could be run as what might be called a defence. The Judge disagreed, finding that the costs were clearly connected with and ancillary to the referred dispute and must properly be considered part of it. Therefore the adjudicator had jurisdiction to decide that element of the dispute.

However, the TCC has recently firmly shut the door on this potential route of recovery in *Enviroflow Management Ltd v Redhill Works (Nottingham) Ltd*. Although the case is unreported it appears that the adjudicator had awarded Enviroflow £81k plus interest and also its reasonable costs of recovering the debt in the amount of £14,900 plus VAT under the Late Payment Act.

On enforcement, it seems that Mrs Justice O'Farrell referred to:

(i) section 5A of the Late Payment Act which implies a term into a contract that a successful party is entitled to its reasonable costs of recovering a debt; and

(ii) section 108A of the Construction Act which says that the costs of an adjudication can only be awarded where such a provision has been made in writing.

Therefore, whilst Enviroflow was entitled to seek its reasonable costs by the implied term under section 5A of the Late Payment Act, such an implied term was caught by section 108A of the Construction Act and is therefore ineffective unless agreed in writing. It was common ground that there was no written agreement and so the adjudicator did not have jurisdiction to award Enviroflow its debt recovery costs.

Parties have also attempted to recover adjudication costs as part of the costs of subsequent legal proceedings opening up the results of the adjudication (i.e. not enforcement proceedings). In *WES Futures Ltd v Allen Wilson Construction Ltd*,[2] Mr Justice Coulson had to consider whether a Part 36 offer included adjudication costs. Here, there had been a number of disputes between the parties, including adjudications. In February 2016, WES made a Part 36 offer which said that if:

"this offer is accepted at a point which is more than 21 days from the date of this offer, you will be liable for all our client's legal costs incurred in this case".

Unexpectedly, Allen Wilson accepted the offer. Both parties agreed that there was a binding compromise but a dispute arose as to whether the agreement included WES's costs of two previous adjudications. The Judge found that WES's offer was a valid Part 36 offer. Applying CPR 36.13(1), he was clear that adjudication costs were not *"costs of the proceedings"* and so were not recoverable. The Judge also considered the position if the offer had not been a valid Part 36 offer and concluded that there was no difference because in his view "*all* [Futures'] *legal costs incurred in this case*" related to the imminent court proceedings. The offer made no reference to costs in adjudication proceedings.

Mr Justice Coulson also referred to two wider principles that supported his view:

1. [2016] EWHC 1852 (TCC
2. [2016] EWHC 2863 (TCC)
3. *Macob Civil Engineering Limited v Morrison Construction Limited* [1999] BLR 92
4. *Bouygues (UK) Limited v Dahl-Jensen (UK) Limited* [2000] BLR 522
5. Most court proceedings are brought under Part 7 of the Civil Procedure Rules. The Part 8 procedure is intended to be used for the determination of claims where there is not a substantial dispute of fact and so the claim is capable of being resolved without lengthy and complicated pleadings
6. [2017] EWHC 517 (TCC)
7. Practitioners should also note that Mr Justice Coulson confirmed that his judgment in Hutton now supersedes paragraph 9.4.3 of the TCC Guide
8. [2017] EWHC 1066 (TCC)
9. Marsh argued that the adjudicator's failure to consider the arguments must have been a slip
10. [2017] EWHC 17 (TCC)
11. This case was noted in by the Judge in *Hutton* as an example of the parties adopting a consensual process

(i) pursuant to the Construction Act, costs incurred in adjudications are not recoverable so if a successful party cannot recover its costs in the adjudication itself, it cannot recover them in enforcement proceedings either; and (ii) recoverable pre-action costs do not normally include the costs of separate, stand-alone ADR proceedings such as adjudication.

These cases reinforce the well established principle that a party's ability to recover its adjudication costs is limited.

> *"In "an ordinary case", a party seeking to recover a sum awarded by an adjudicator is not entitled to (and cannot seek) the legal costs it incurred in the adjudication itself."*

Guidance on enforcement

Having lost an adjudication, it is common for the losing party to look for ways to resist enforcement of the adjudicator's decision. However, it is important to remember that the grounds to resist enforcement are restricted. If the adjudicator has decided the issue that was referred to him and he has broadly acted in accordance with the rules of natural justice, the court will enforce the decision,[3] even if the adjudicator has made an error.[4]

It seems that the TCC has become concerned with the number of disgruntled parties looking to resist enforcement by commencing Part 8 proceedings[5] seeking declarations as to errors made by the adjudicator and/or attempting to rerun large parts of the adjudication at the enforcement hearing.

In *Hutton Construction Ltd v Wilson Properties (London) Ltd*[6] Mr Justice Coulson took the opportunity to give some helpful guidance on the appropriate use of the Part 8 procedure in adjudication enforcement. In his judgment, he noted that there had been a number of cases where a defendant had sought the final determination of disputes by way of court declarations. However, all these examples involved a large degree of consent between the parties.

Where there is no consensual process, a defendant seeking to resist enforcement on the basis of its Part 8 claim must demonstrate that:

(i) the issue is short and self-contained and that it arose in the adjudication proceedings;

(ii) the issue does not require oral evidence, or any other elaboration beyond that which is capable of; and

(iii) the issue is one which, on a summary judgment application, it would be unconscionable for the court to ignore. He also said that any Part 8 application must be issued promptly and set out the declarations sought.

Mr Justice Coulson said many of the Part 8 applications currently being made by disgruntled defendants (and which are not the subject of the consensual process) are an abuse of the court process and warned that any defendant who unsuccessfully raises this sort of challenge on enforcement will almost certainly have to pay the claimant's costs of the entire action on an indemnity basis.[7]

Waiving the right to challenge an adjudicator's decision by making a slip rule request without reserving your position

Whilst the grounds to resist enforcement of an adjudicator's decision are limited, a defendant may lose its right to raise an argument on enforcement altogether if it fails to reserve its position on the adjudicator's decision at the appropriate time. A good example of this is the case of *Dawnus Construction Holdings Ltd v Marsh Life Ltd*.[8]

Here, Marsh commenced adjudication seeking a value of the account following termination. The adjudicator decided in favour of Dawnus and awarded just under £1.5m. Both parties wrote to the adjudicator raising a number of slips: Dawnus raised some mathematical errors but Marsh raised more substantive issues, alleging a breach of natural justice on the grounds that the adjudicator had failed to consider the arguments raised by Marsh during the adjudication.[9]

Crucially, when Marsh wrote to the adjudicator it did so without a general reservation of rights. The adjudicator amended the quantum but rejected the more substantial points raised by Marsh.

At enforcement, Marsh maintained its breach of natural justice argument. However, first the Judge had to decide whether Marsh had lost the right to raise such an argument at all, having invited the adjudicator to correct errors under the slip rule without a general reservation of rights.

The Judge decided that Marsh had waived its right to challenge the adjudicator's decision, noting that the doctrine of election prevents a party from "approbating and reprobating" or "blowing hot and cold" in relation to an adjudicator's award. Marsh could have, but did not, expressly reserve its right to pursue a claim of breach of natural justice when inviting the adjudicator to make corrections under the slip rule. Absent such reservation, by inviting the adjudicator to exercise his powers under the slip rule, Marsh had waived or elected to abandon its right to challenge enforcement of the decision since it had elected to treat the decision as valid.

Whilst in this case Marsh was the referring party, it is good practice for a responding party at the outset of any adjudication to reserve its position generally on the adjudicator's jurisdiction to determine the dispute referred. In addition, when a specific ground for challenge arises (e.g. a potential breach of natural justice) it is important for that challenge to be raised promptly and for a party to reserve its position in relation to that challenge, otherwise there is a risk that a party will be found to have waived its right to raise it at a later date.

"There is a 'high threshold' to be met by any contractor who seeks to take advantage of the provisions whereby a sum automatically becomes payable if a timely pay less notice is not served."

Payment and pay less notices

"Smash and grab" adjudications have become a common occurrence over recent years. Central to these disputes is whether a valid payment or pay less notice has been served. In *Surrey and Sussex Healthcare NHS Trust v Logan Construction (South East) Ltd*,[10] the TCC gave guidance on what constitutes a valid payment and pay less notice.

The Trust had engaged Logan to refurbish various parts of a hospital. The works were certified as practically complete and the Certificate of Making Good was issued. The Final Certificate was due on 21 September 2016 and a final account meeting between the Contractor Administrator ("CA") and Logan's Quantity Surveyor ("QS") was arranged for that day. Just before midnight on 20 September 2016, Logan's QS sent an email with various attachments including one called 'Interim Payment Notice' claiming a balance due of approximately £1m.

No agreement was reached at the final account meeting and later that day, the CA issued the Final Certificate certifying a balance of approximately £14k as due to Logan. In his covering email, the CA acknowledged Logan's interim payment notice but suggested that it was "out of date and void" and that *"in any event, the details stated in the Final Certificate are the same as would have been stated in any final Interim Certificate which may have been issued"*.

Logan commenced adjudication proceedings. The adjudicator decided that Logan's interim payment notice was valid and the Trust had not served a pay less notice, so Logan was entitled to the amount claimed.

The Trust commenced Part 8 proceedings[11] seeking declarations that (i) Logan did not issue a valid interim payment notice on 20 September 2016; and (ii) the CA's email and attachments sent on 21 September 2016 constituted a valid pay less notice, which was served on time.

The Judge found that the interim payment notice was valid because it was in substance, form and intent an interim payment notice and it was clear and free from ambiguity.

Of interest, however, is the Judge's guidance on what constitutes a valid pay less notice. The Judge decided that the CA's email and attachments were a valid pay less notice.

The issue was whether the email and attachments, when read together, were intended to constitute a pay less notice. It was wrong to focus on the specific language in the covering email and instead focus on the overall message and purpose that the email and attachments would have conveyed to the reasonable recipient.

Whilst it is an essential requirement that the sender should have the requisite intention, that intention must be derived from the manner in which it would have informed the reasonable recipient. Here, the overall message and purpose conveyed by the email was that if the CA was wrong about the contractual position, he was valuing the work on the same basis as had been set out in detail in the Final Certificate and accompanying breakdown, and that this was the only sum to which Logan was entitled whether by way of final account or by way of interim payment.

The Judge also said that it is not necessary for a pay less notice to have that title on its face or to make specific reference to the contractual clause in order to be valid. Notwithstanding this, our advice to employers is that it is always best practice to ensure that a pay less notice clearly states on its face what it is.

Conclusions

Whilst these cases all deal with different issues, taken together with the additional adjudication summaries taken from our monthly newsletter *Dispatch*, to be found on page 42, they provide continued evidence of the regular use of adjudication within the construction industry and the support given by the judiciary to that use.

"Assuming that good grounds exist on which a decision may be subject to objection, in the absence of an express reservation of rights, either the whole of the relevant decision must be accepted or the whole of it must be contested."

Extensions of time: contiguous or non-contiguous? That was the question

In February 2017, in *Carillion Construction Ltd v Emcor Engineering Services Ltd*,[1] the Court of Appeal had the opportunity to consider a novel issue in relation to extensions of time: how extensions of time after the date for completion are applied.

As **Andrew Weston** explains below, this was a case in which a question was raised about whether an extension of time awarded under a subcontract should be contiguous or non-contiguous.

The essential issue for the Court to decide, where an extension of time is granted after the date for completion under a standard DOM/2 form of subcontract, was whether it must commence on what was the date for completion (i.e. a contiguous extension of time) or when the delay occurs (i.e. a non-contiguous extension of time).

To explain this a little further I will use a simplified example. Assume a delay event commences three weeks after the date for completion of the subcontract works that entitles the subcontractor to an extension of time of one week. Should that extension of time:

1. be added to the date for completion, such that the date is moved back by one week, in which case the subcontractor would be liable for the three-week delay from the revised date for completion; or

2. take effect over the period of delay such that the subcontractor is liable for the delay cause from the date for completion for three weeks until the delay event commences?

The timing of the liability has the potential to affect the extent of the liability both from the contractor to the subcontractor and/or vice versa.

This, perhaps surprisingly, was not an issue that had come before the Court prior to the matter being heard at first instance by Miss Recorder Jefford QC ("the Judge") in April 2016.

The project

The dispute arose in the context of the construction of the Rolls Building, Fetter Lane, London, the home of, amongst other courts, the Technology and Construction Court ("TCC").

Carillion had been employed by Rolls Development Limited to develop the Rolls Building for use as offices and court rooms. Carillion's contract incorporated the JCT Standard Form of Contract with Contractor's Design, 1998 edition.

The relevant provision of the main contract was clause 25.3. It included an obligation on the employer when, following receipt of a written notice of a delaying event by the contractor, that event was accepted as giving rise to entitlement to an extension of time under the contract to make "*…such extensions of time, if any, for completion of the such Section beyond the Completion Date for such Section as is then fair and reasonable, by fixing a later date as the Completion Date for such Section*".

Carillion employed two mechanical and electrical subcontractors, AECOM and Emcor. Emcor's subcontract incorporated the standard form of Domestic Sub-Contract ("DOM/2"), 1981 edition. That form of subcontract was intended to be used with the 1998 JCT contract.

The relevant provisions of the DOM/2 form were clauses 11 and 12 which included some bespoke amendments. Clause 11.3 stated:

"If on receipt of any notice, particulars and estimate under clause 11.2 the Contractor properly considers that:

1. any of the causes of delay is an act, omission or default of the Contractor, his servants or agents or his sub-contractors, their servants or agents (other than the Sub-Contractor, his servants or agents) or is the occurrence of a Relevant Event; and

2. the completion of the Sub-Contract Works is likely to be delayed whereby beyond the period or periods stated in the Appendix, Part 4, or any revised such period or periods,

then the Contractor shall in writing, give an extension of time to the Sub-Contractor by fixing such revised or further revised period or periods for the completion of the Sub-Contract Works as the Contractor then estimates to be reasonable."

The dispute concerned delays to two Sections of the works: Section B, comprising the court fit-out works, and Section C, comprising the fifth floor fit-out works. Both Sections were to be completed by 28 January 2011 under the main contract and the Emcor Sub-Contract. Liquidated damages for late completion had been agreed for the two Sections respectively at £86,000 per week and £18,000 per week.

Practical completion was achieved 182 days late on 29 July 2011. Responsibility for the cause of these delays was disputed as between Carillion, AECOM and Emcor.

"Only in exceptional circumstances will considerations of commercial common sense allow a court to depart from the natural meaning of the contract."

1. [2017] EWCA Civ 65.
2. [2015] UKSC 36.
3. (1993) 62 BLR 1.
4. [2016] EWCA Civ 990
5. See for example the articles on Fitness for Purpose and Concurrent Delay

The litigation

Following the commencement of proceedings in the TCC by Carillion, the trial of two preliminary issues was ordered. Issue 1, which is relevant to the Court of Appeal proceedings, was formulated as follows:

"On the assumption that EMCOR is entitled to an extension of time pursuant to clause 11.3 of the EMCOR Sub-Contract (as amended) by fixing such revised or further revised period or periods for the completion of its Sub-Contract Works, does the EMCOR Sub-Contract (as amended) require:

(a) that such revised or further revised periods are added contiguously to the end of the current period, so as to provide an aggregate period within which EMCOR's Sub-Contract Works should be completed (as contended for by EMCOR); or

(b) that such revised or further period or periods are fixed in which EMCOR can undertake its Sub-Contract Works, which are not necessarily contiguous but which reflect the period for which EMCOR has in fact been delayed and is entitled to an extension of time (as contended for by [Carillion])?"

Judgment was handed down on the preliminary issues on 28 April 2016. In relation to Issue 1 the Judge concluded that if Emcor was entitled to an extension of time pursuant to clause 11.3, the fixing of such revised or further period(s) for the completion of the Sub-Contract Works *"... requires that such revised or further period or periods are added contiguously to the end of the current period within which EMCOR's Sub-Contract Works should be completed"*.

The Judge's reasoning, briefly summarised, included:

1. the actual meaning of the words used in clause 11.3 meant that any extension of time awarded needed to be added contiguously;

2. although such interpretation may lead to unsatisfactory results in certain situations, such that liability incurred to the contractor may be more or less than the consequence of the subcontractor's breach, clause 11.3 was practicable and workable, and in accordance with commercial common sense;

3. applying the principle in *Arnold v Britton*,[2] the court should not depart from the natural meaning of the words used in clause 11.3; and

4. previous authorities concerning extensions of time awards (including *Balfour Beatty v Chestermount*[3]) although not directly on point, supported Emcor's argument as to how a reasonable person, with the parties' knowledge of the background, would interpret clause 11.3.

Carillion appealed.

The Court of Appeal proceedings

Carillion's appeal was made on the grounds that:

1. the Judge had erred in interpreting the natural meaning of clause 11.3;

2. *Chestermount* and other authorities cited provided no support for the Judge's interpretation of clause 11.3; and

3. the Judge's interpretation of clause 11.3 did not accord with the commercial common sense.

Counsel for Carillion raised novel arguments as to why an extension of time should be non-contiguous, suggesting by reference to other provisions of the Sub-Contract that clause 11.3 was permissive. Counsel argued that where a delaying event occurred after the date for completion the contractor had the choice to grant a contiguous or a non-contiguous extension of time.

It was argued that this interpretation accorded with the ordinary meaning of the words and, unlike the Judge's interpretation, it accorded with commercial common sense. As clause 12 required Emcor to compensate Carillion for any delay for which it was responsible, it was argued that it ought to be calculated by reference to the period when the delay actually occurred, and not an earlier period as it would be if any extension of time was awarded contiguously.

Carillion also argued that contiguous extensions of time did not sit easily with the prevention principle (whereby a party may not enforce a contractual obligation against the other party where it has prevented the other party from performing that obligation) as the contractor was in effect being made subject to obligations that it was prevented from performing.

Lastly, Carillion argued that as none of the authorities cited on behalf of Emcor dealt with the contiguous vs. non-contiguous issue, they were of no assistance. A review of the authorities presented to the court was recognised by Lord Justice Jackson as giving force to Carillion's arguments.

Counsel for Emcor supported the Judge's interpretation as the only possible interpretation of clause 11.3. Counsel argued that the interpretation did not offend commercial common sense or, if it did, it was only to a modest extent. In support of the submission that the natural meaning of the words of clause 11.3 should prevail, Counsel referred to the application of the principles in *Arnold* and to *Balfour Beatty Regional Construction Ltd v Grove Developments Ltd*,[4] a court of appeal case in which the Arnold principles were applied to a construction contract.

The Court of Appeal decision

The lead judgment was delivered by Lord Justice Jackson.

Ground 1: had the Judge erred in interpreting the natural meaning of clause 11.3?

No.

Whether read in isolation or in full context the natural meaning of the words of clause 11.3 is that any extension should be contiguous.

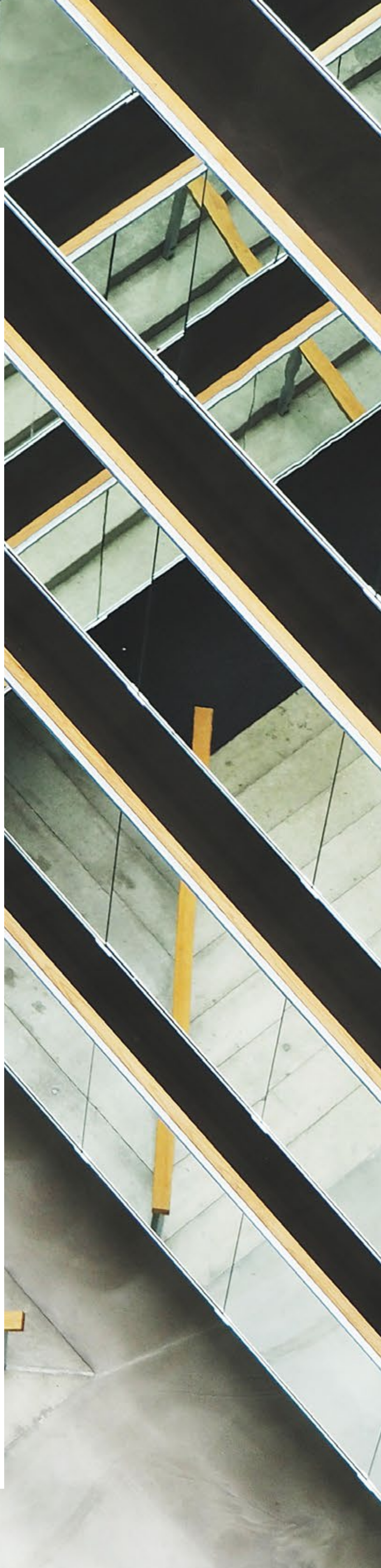
In arriving at this conclusion and rejecting the first ground of appeal Lord Justice Jackson relied, amongst other things, on the following:

1. the phrase "*any such revised period or periods*" in clause 11.3.2 as indicating that when the employer grants extensions of time he is revising a period or periods in appendix 4, not granting separate periods of justified delay with their own start and end dates;

2. the phrases "*extension of time*" and "*by fixing such revised or further revised period or periods*" in the last part of clause 11.3 have the natural meaning that the period of time allowed is longer; and

3. the notice provision in clause 11.2.2.2 including the phrase "*beyond the expiry of the period or periods stated ... or beyond the expiry of any extended period or periods previously fixed under clause 11*" indicates that if the employer has granted an extension of time, he will have increased the length of the existing period(s).

"the practice of awarding extensions of time contiguously had worked well in practice"



Ground 2: did Chestermount and other authorities cited provide support for the Judge's interpretation of clause 11.3?

Yes.

Although it was acknowledged that none of the authorities relied upon by Counsel for Emcor provided any support for Emcor's case. In Chestermount, both parties agreed that the extensions of time should be contiguous so the issue did not arise.

Lord Justice Jackson listed the authorities reviewed and observed that until the present litigation no one had ever argued that any extension of time clause requires or permits non-contiguous extensions of time to be granted.

Ground 3: did the Judge's interpretation of clause 11.3 accord with the commercial common sense?

This was not necessarily the right question.

Counsel for Carillion argued that his interpretation must prevail as a matter of commercial common sense. However, Lord Justice Jackson observed that it is only in exceptional circumstances that considerations of commercial common sense can cause the court to depart from the natural meaning of contractual provisions, and referred to the judgment in *Grove* where the Court of Appeal declined to depart from the natural meaning of contractual provisions of a construction contract.

Lord Justice Jackson acknowledged that the loss and damage suffered by the contractor was unlikely to be the same if an extension of time was granted contiguously rather than as a separate period. Accordingly one party or the other would gain a windfall benefit. On this basis the logic of the argument advanced for Carillion was accepted.

Nevertheless, he also noted that the practice of awarding extensions of time contiguously had worked well in practice and that the issue had never been argued in a reported case. Lord Justice Jackson agreed with the Judge that although awarding contiguous extensions of time caused some anomalies, those difficulties were not sufficient to displace the natural interpretation.

Although the parties were following the wording of a standard form subcontract, the parties had made a bargain which, in certain circumstances, may be a bad bargain for one of them. That was no reason to depart from the natural meaning of the words used.

Lord Justice Jackson also rejected Carillion's prevention principle argument on the basis there was a perfectly workable extension of time provision. The prevention principle did not arise simply because an extension of time was added contiguously.

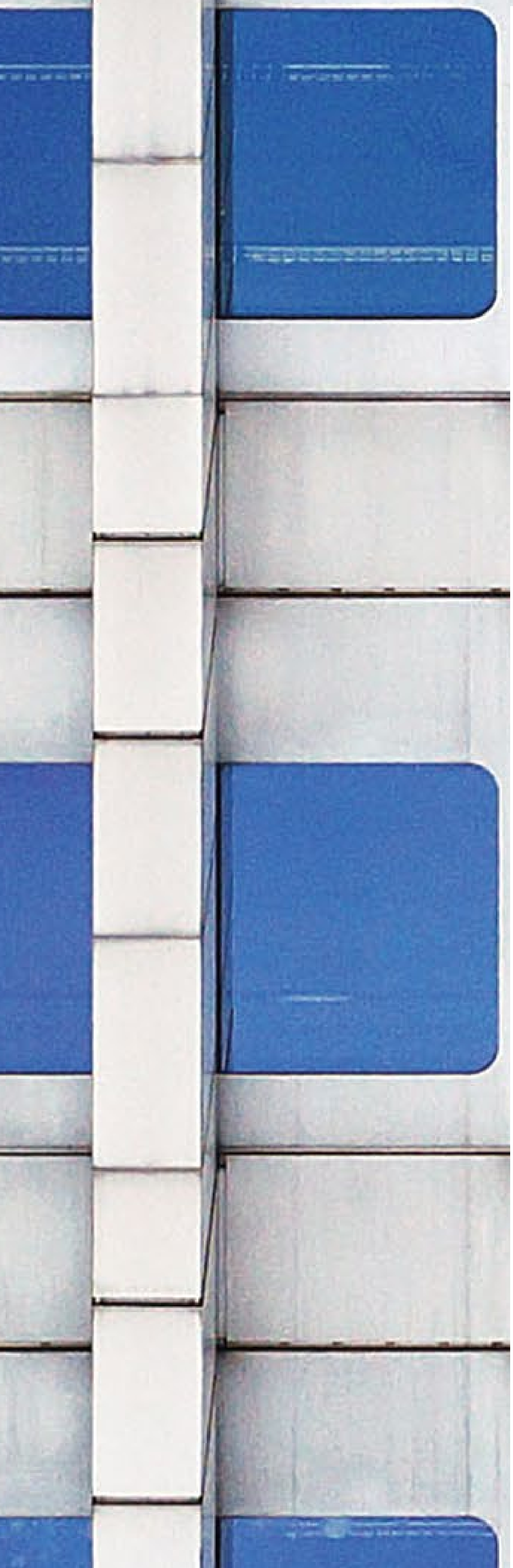
Conclusions

Lord Justices Simon and Flaux agreed with Lord Justice Jackson. Carillion's appeal was accordingly unanimously dismissed. As a result, extensions of time granted after practical completion under comparable subcontract terms and conditions should be granted contiguously.

This judgment aligns with the way most construction professionals and construction lawyers expect such a provision to operate. As the judgment highlights, where an extension of time after practical completion is granted contiguously, there is scope for a contractor to incur loss and/or damage by reason of delay for which a particular subcontractor is liable, that the contractor cannot recover from that particular subcontractor. However, could there be an appetite for subcontract provisions that allow for non-contiguous extensions of time to be awarded? On balance the answer is likely to be no, but only time will tell.

One theme in this year's *Review*[5] is the impact upon the courts of the Supreme Court decision in *Arnold*. This case is yet another where the courts have made it clear that the key consideration when considering the meaning of a particular contract is the natural meaning of contractual provisions in question.

Only in exceptional circumstances will considerations of commercial common sense allow a court to depart from that natural meaning, even if the application of those principles operates harshly against the interests of one of the parties. The task of the court is to identify and give effect to the agreement of the parties. It is not for the court to make some different bargain because it thinks that the parties or a party would have been wiser to do so.



Construction professionals beware: has the test for reasonable skill and care been weakened?

On 11 March 2015 the Supreme Court handed down judgment in the case of *Montgomery v Lanarkshire Health Board*[1]. Given that the judgment related to a claim for medical negligence and, specifically, the negligence of a gynaecologist, it is perhaps unsurprising that it did not immediately create waves in the world of construction litigation. However, as **Claire King** explains, the judgment could have potentially serious implications for construction professionals facing a professional negligence claim.

The reason for this is that the Supreme Court lay down a new "materiality test" for determining whether the professional in question had acted with reasonable skill and care. This test was substantially weaker than the Bolam Test which has been applied by the courts since the 1950s.

Since 2015, the materiality test has been applied by the courts to other types of professionals accused of negligence including financial advisors and conveyancing solicitors. Construction professionals should therefore be aware of the risk that this revised test may be argued, and potentially applied, in the field of construction.

The Bolam Test: a refresher

The common law duty of care required of a construction professional, and also implied under the Supply of Goods and Services Act 1982, is to take reasonable skill and care. The Bolam Test has, broadly speaking, been used since the 1950s to determine whether a professional has fulfilled their duty to take reasonable skill and care. The House of Lords approved the test in *Bolam v Friern Hospital Management Committee*[2]. The test laid down was as follows:

"Where you get a situation which involves the use of some special skill or competence... **the test is the standard of the ordinary skilled man exercising and professing to have that special skill.** *A man need not profess the highest expert skill ...It is sufficient if he exercises the ordinary skill of the ordinary competent man exercising that particular art."* [Emphasis added]

Whether the requisite standard has been met is generally determined by reference to expert evidence.

Montgomery v Lanarkshire Health Board

So what happened in *Montgomery v Lanarkshire Health Board*?

The facts

Mrs Montgomery sued for professional negligence after her baby was born with severe disabilities. Mrs Montgomery was a diabetic and contended that she ought to have been given advice about the risk of shoulder dystocia (the inability of a baby's shoulders to pass through the pelvis) which would have been involved in a normal birth and the alternative possibility of a delivery by elective Caesarean section. Because she suffered from diabetes she was more likely to have a large baby and there was also a risk of particular concentration weight on the baby's shoulders.

Mrs Montgomery was not told about the risk of shoulder dystocia, even though the risk was 9 to 10% in the case of diabetic mothers, because in her doctor's estimation the risk of a grave problem for the baby was very small. She considered that, if the condition was mentioned, most women would simply say they would rather have a Caesarean section.

The lower courts (in Scotland) had accepted expert evidence that a responsible body of medical opinion would have acted in a similar fashion to the doctor in this case in not warning expressly

[1] [2015] UKSC 11.
[2] [1957] 1 WLR 582, HL, 586.
[3] [2016] EWHC 2224 (QB).
[4] [2017] EWHC 314 (QB).
[5] See paragraph 89 of *Thomas v Triodos Bank* [2017] EWHC 314 (QB).

of the risk. On that basis they had concluded that the gynaecologist in question had not been negligent.

The materiality test

The Supreme Court disagreed and held that the doctor had been negligent.

In reaching their decision the Supreme Court formulated a new "test of materiality". They held that in fact the appropriate test should be:

"whether in the circumstances of the particular case, **a reasonable person in the patient's position would be likely to attach significance to the risk***, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it".*

Paragraph 93 of the Judgment noted that a departure from the Bolam Test would reduce the predictability of the outcome of litigation given the difficulty of overcoming that test in contested proceedings. The Court also noted that:

"It appears to us however that a degree of unpredictability can be tolerated as a consequence of **protecting the patients from exposure to risks of injury which they would have otherwise chosen to avoid**." [Emphasis added]

"It may be more likely that the materiality test is applied where there is an element of consumer protection involved or perhaps an issue of safety."

How has the test been applied since?

Since *Montgomery v Lanarkshire Health Board*, the materiality test has been applied not only to medical negligence cases but also to cases involving other professionals. In the case of *O'Hare v Coutts*[3] Mr Justice Kerr expressly noted that the materiality test was not only applicable in medical negligence cases. He observed that:

"203 More recently in Baird v Hastings [2015] NICA 22 , the Court of Appeal of Northern Ireland, dealing with a claim against a solicitor for allegedly negligent conduct of **conveyancing transactions***, noted the Supreme Court's decision in Montgomery and commented that while the relationship of doctor and patient is not a true analogue of that of a solicitor and client,* **'as in the medical context, the advisory role of the solicitor must involve proper communication and dialogue with the client'** *(per Girvan LJ giving the judgment of the court, paragraph 34).*

204 In the context of investment advice too, **there must be proper dialogue and communication between adviser and client.** *In respectful disagreement with Ms Oppenheimer's submission,* **I do not think the required extent of communication between financial adviser and client to ensure the client understands the advice and the risks attendant on a recommended investment, is governed by the Bolam test.**

205 While Ms Oppenheimer is right to point to differences between the medical and financial contexts, they are not such as to lead to the conclusion that how much to say to a client is a question to be decided according to whether the adviser acted in accordance with a practice accepted as proper by a responsible body of persons skilled in the giving of financial advice.

206 **The reasoning in Montgomery is not, in my judgment, irrelevant outside the medical context.** *The expert evidence in the present case tends to indicate that there is little consensus in the financial services industry about how the treatment of risk appetite should be managed by an adviser (a point to which I shall return). As in the medical context,* **the extent of required communication with the client should not depend on the attitude of the individual adviser.**" [Emphasis added]

It seems that the Judge in that case turned to the materiality test in part because there was little consensus as to how the treatment of risk appetite should be managed (i.e. the expert position was unclear).

In the more recent case of *Thomas v Triodos Bank*[4], Judge Havelock-Allan QC did not apply the materiality test directly as the case involved providing information in response to a question rather than deciding, but he did cite it with approval:

"...in case of doubt as to how far a bank should go in providing information in response to questions from the customer about a product in a non-advised transaction, I would resort to the test of materiality in the Montgomery case. **The question to be asked is: would a reasonable person, in the position of the customer, be likely to attach significance to that piece of information?**"[5] [Emphasis added]

So what has this got to do with construction professionals?

It may take a while to resolve the issue of exactly in what circumstances, and to whom, the materiality test will be applied. However, from the cases above there are a few observations that are worth making:

1. The materiality test may be more likely to be used where there is no expert consensus on how discussing a particular risk with a client should be handled.

2. The test is not confined to the field of medical negligence. It has already been applied to solicitors and investment professionals.

3. It may perhaps be more likely that the materiality test is applied rather than the Bolam Test where there is an element of consumer protection involved or perhaps an issue of safety.

As such, it is worth construction professionals taking into account the question of whether they should be disclosing information if they believe their client would consider it to be particularly significant or pertinent to the risks of what is being undertaken. If they believe their client would consider the risk to be significant then the safest course of action would be to discuss that risk with the client.

For those seeking to bring claims for professional negligence against construction professionals, the materiality test is also worth arguing in circumstances where the Bolam Test may not be decisive as to whether the professional in question has been negligent.

In the meantime, this is an area that will need to be carefully watched by construction professionals and their advisors over the next year in order to see exactly what impact *Montgomery v Lanarkshire Health Board* ends up having in construction negligence cases.

"it is worth construction professionals considering the question of whether they should be disclosing information if they believe their client would view it to be particularly significant."

Unexpected, unforeseeable, unaware? Site conditions – "contractors should beware!"[1]

As **Sarah Buckingham** explains, one of the recurring themes in many of the contract negotiations we have seen this year relates to site conditions and who is to take this risk if they turn out to be unexpectedly adverse.

Where the ground conditions or the physical state of existing structures is found to be different from expected, this can obviously have a significant effect on the project. It may result in: a need to change the working method (e.g. the line and level of a trench may remain the same but different equipment and a different working method may be required); a complete revision of the design (e.g. the design of the foundations may need to be altered due to the unexpected nature of the soil at a certain depth); or, in extreme cases, the works may need to be abandoned altogether. The key question is who bears the consequences of the associated cost and delay?

It appears that not only may the ground yield up some surprises for the parties during the course of a project but the general legal and contractual position may not be what they were expecting either. This is surprising in itself. Given how often unforeseen site conditions can have a negative impact on a project, it is odd that the position is not always clearly delineated at the outset and the parties involved do not know precisely who bears the risk. Often, the party experiencing the biggest shock is the contractor.

In this article, we look at some of the various ways in which different forms of construction and engineering contracts address the issue of adverse site (or physical) conditions and, crucially, where they do not deal with it at all. But first it is necessary to have an appreciation of the general legal position – i.e. in the absence of any express contractual provision, what does the common law say?

"an "experienced contractor" must consider and make allowance for the possibility that more adverse conditions may exist in parts of the site that have not been tested."

The general position – harsh law

The general legal position is that if a contractor promises an employer that he can build a structure then that is what he must do, irrespective of the physical difficulties involved and irrespective of whether the employer produced the design. The employer does not impliedly warrant the feasibility of the design in the contract documents,[2] nor the fitness of the site to enable the contractor to complete the work – it is for the contractor to make the call that it is "buildable" and that he can carry out and complete the works in accordance with the contract documents by the contract date and for the price.

In effect, the contractor is regarded as having warranted its possibility and the contract will not be regarded as frustrated unless the impossibility is caused by some supervening event, such as the destruction of the whole site (which makes the project itself impossible).

By way of example, in the case of *Wong Lai Ying v Chinachem Investment Co Ltd*[3], where an unforeseeable landslip above the construction site, destroying the works, meant that the timing and nature of any future development on the site was uncertain. The risk was not contemplated or allocated under the contract and it was found frustrated.

Therefore unless the contract expressly provides otherwise, the contractor is not let off the hook from his contractual obligations by saying that he attempted to build what he promised to deliver but it proved to be too difficult or impossible. It is quite simple – if he fails to build what has been described he is in breach of contract. There is a long line of case law illustrating this very point[4] and, in particular, in relation to unforeseen ground or site conditions.[5]

If no assurances are given by the employer regarding the site conditions (and which employer is going to offer such assurance?), then the law will not imply a qualification into the contractor's promise to build the works if they are discovered to be worse than anticipated. In effect, the contractor is the expert – it is up to him to decide if the works can be built (and if so, to price them accordingly). If, in his opinion, they cannot be built or there are potential risks, he should not tender or should ensure he qualifies his tender sufficiently. Back in the 1940's, Taschereau J held that:

"Expenses incurred for unforeseen difficulties must be considered as being included in the amount of the tender, and the respondent has the legal obligation to execute the contract for the price agreed upon, in the same way as would have been its indisputable right to benefit, if the soil had been more favourable and easier than foreseen."[6]

This is similar to any commercial bargain between a buyer and a seller. For example, a buyer describes something it wants to buy (a screw) and the seller agrees that it will supply the screw for the price and in so

1. Frank Kennedy, "EIC Contractor's Guide to the FIDIC Conditions of Contract for EPC Turnkey Projects (The Silver Book)", 2000, ICLR 504, p. 513.
2. *Thorn v London County Council* (1896) 1 App. Cas. 120.
3. (1979) 13 BLR 81
4. *Tharsis Sulphur & Copper Company v McElroy & Sons* (1878).
5. *Jackson v Eastbourne Local Board* (1886), *Bottoms v York Corporation* (1892), *Re Nuttall and Lynton and Barnstaple Ry* (1899).
6. *R. v Paradis and Farley Inc* (1942) S.C.R. 10.
7. (1985) 32 BLR 114
8. (1995) 66 Con LR 105 (CA), p. 108.
9. Similar provisions can be found in the other IChemE forms of contract - see, for example, the IChemE Lump Sum Contract, The Red Book, 5th edn, 2013, clause 6.3.
10. Second edition, 2003, clause 9.4 (b).
11. Similar provisions can be found in other FIDIC forms of contract – see, for example, the Red Book.
12. First edition, 1999, clause 6.1(l).
13. ICE Conditions of Contract Design and Construct, 2nd edn, September 2001, clause 12(1).
14. NEC3 Engineering and Construction Contract, April 2013, clause 60.1(12).
15. [2015] EWCA Civ 712
16. [2015] EWHC 3074 (TCC)
17. E.g. SBC/XQ 2016 Standard Building Contract Without Quantities 2016, clauses 2.29.8 and 2.29.14.
18. *Bottoms v Mayor of York* (1892), A. Hudson, *Building and Engineering Contracts*, 4th edn, p. 208.
19. Note that clause 14.2 needs to be specifically applied in the Contract Particulars.
20. MP 2016 Major Project Construction Contract 2016.
21. *Pagnan v Feed Products* [1987] 2 Lloyd's Rep. 601.

doing it is agreeing that it can deliver the screw as described in the buyer's description.

Note that there are occasions where the "buildability" risk will not be taken by the contractor, but this will be contract and fact specific. In the case of *Yorkshire Water Authority v Sir Alfred McAlpine & Son (Northern) Ltd* (1985)[7], the employer insisted on the work being done in the manner it specified which was held to be subject to a clause providing that the works must be completed in strict accordance with the contract "save insofar as it is legally or physically impossible".

One reason why this risk allocation can seem unfair in the context of construction projects, however, is because the works are being built on the buyer's site (not in the seller's factory) and, at the time of tender, the contractor may have limited knowledge of the site and/or know less about it than the employer. This is no excuse, however, so contractors should beware.

Contractual provisions – allocating the risk

The courts will not look favourably on parties who come unstuck simply because they have failed to address an issue in their contract. As Russell LJ said in *Worksop Tarmacadam v Hannaby*[8] in which a contractor tried to claim additional cost as a result of unforeseen hard rock, *"Had the plaintiffs wished to make such a provision in the event of unforeseen conditions being encountered, it would have been the easiest thing in the world for them so to have provided in specific terms. They did not do so."*

The judge's view could not have been more clearly expressed. Where the parties do not proactively insert an express clause but rather enter into a "standard" form of contract, what approach do these contracts take to the allocation of risk for unforeseen site conditions?

Determining the scope of the works is key

In determining whether the contractor is entitled to additional time and money in respect of overcoming unexpected site conditions, it is necessary to consider whether the "additional" work involved was actually part of the original scope. This not only involves an analysis of the description of the works in the technical documents, but also considering what risks the contractor has assumed under the contract – i.e. whether or not it is required to undertake work that is additional to that described in the specification and drawings forming part of the contract. The contractor's design obligation and its buildability obligation are key factors which need to be considered when interpreting the extent of the scope of works.

The approach in some standard forms

Many of the international forms of engineering contract include specific provisions on ground conditions, offering a compromise position in order to balance the risk between the employer and the contractor.

For example, the IChemE Form of Minor Works Contract (The Orange Book) 2003 provides:[9]

"The matters entitling the Contractor to apply for an extension of time are delays caused by: ...encountering conditions on the Site which could not, at the date of the Contractor's tender, have been reasonably foreseen by an experienced contractor on the basis of information in his possession at that time, or by way of a visual inspection of the Site or by way of reasonable enquiry."[10]

The FIDIC Short Form of Contract (1999) provides that:[11]

"Employer's Liabilities" include: "*physical obstructions or physical conditions other than climatic conditions, encountered on the Site during the performance of the Works, which obstructions or conditions were not reasonably foreseeable by an experienced contractor and which the Contractor immediately notified to the Employer.*"[12]

The ICE Design & Build Contract (2001) provides:

"If during the carrying out of the Works the Contractor encounters physical conditions (other than weather conditions or conditions due to weather conditions) or artificial obstructions which conditions or obstructions could not in his opinion reasonably have been foreseen by an experienced contractor the Contractor shall as early as practicable give written notice thereof to the Employer's Representative."[13]

NEC3 provides that where the following occurs, this is considered a "compensation event":

"The Contractor encounters physical conditions which

- *are within the Site,*
- *are not weather conditions and*
- *an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable for him to have allowed for them."*[14]

In all of the above contracts, the risk of adverse site conditions is placed with the contractor to the extent that it (or an experienced contractor) ought to have foreseen such conditions.

In a number of these contracts, there is no mention of the contractor's actual knowledge. However, it is generally accepted that it would not be a sensible interpretation of these clauses to discount what the contractor actually knew. Therefore the contractor's actual knowledge is deemed to be taken into account too.

Although this approach of foreseeability is a common theme, it is a compromise position involving many grey areas which can inevitably lead to argument as to what the contractor should or should not have anticipated. In two recent cases, the contractors failed to convince the court that an experienced contractor would not have foreseen the ground conditions they encountered. It was held that, in the particular circumstances of each case, an experienced contractor would have anticipated such site conditions and the contractors therefore should have anticipated the risk.

In *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar*,[15] sub-clause 4.12 of the FIDIC Red Book was considered and showed the risk of the contractor adopting and relying on (without question) information and analysis provided by others.

In *Van Oord UK Ltd & Anor v Allseas UK Ltd*,[16] a bespoke contract but similar in wording to FIDIC, it was held that an "experienced contractor" must consider and make allowance for the possibility that more adverse conditions may exist in parts of the site that have not been tested.

"Had the plaintiffs wished to make such a provision in the event of unforeseen conditions being encountered, it would have been the easiest thing in the world for them so to have provided in specific terms."

What does JCT say?

Apart from the JCT Major Project Construction Contract (see further comments below), the answer to this question is, quite simply, nothing. The JCT suite of contracts is silent on the issue of adverse site conditions. "Relevant Events", entitling the contractor to an extension of time, include "exceptionally adverse weather conditions" and "force majeure"[17] but there is no such provision in the event of unexpectedly adverse site conditions. There is also no mention of any increased compensation in such circumstances. What does this mean for the parties? As referred to above, in the absence of any express contractual provision to the contrary, the "general law" applies and the contractor takes the risk.[18]

Therefore any contractor blindly entering into an unamended JCT contract may find themselves metaphorically and literally stuck between a rock and hard place when it comes to overcoming unforeseen site conditions and there will be no helping hand to pull them out.

Note, however, that a contractor may have a claim for misrepresentation if the employer made representations as to the site conditions in the ERs. This may offer a potential route for the contractor to claim compensation. However, this will often be defeated by the insertion by the employer of a "no reliance" clause.

The JCT Major Project Construction Contract is the only JCT contract that includes an express clause dealing with ground conditions.[19] This contract is intended for use on large-scale construction projects by experienced and knowledgeable developers and contractors experienced and able to take greater risk than would arise under other JCT contracts. Clause 14.1 of the Major Projects Form provides as follows:

"If the Contractor encounters ground conditions or man-made obstructions in the ground that necessitate an amendment to the Requirements and/or Proposals he shall notify the Employer of the amendments he proposes…" which (if clause 14.2 is stated to apply) *"shall be treated as giving rise to a Change to the extent that the ground conditions or man-made obstructions in the ground could not reasonably have been foreseen by an experienced and competent contractor on the Base Date, having regard to any information concerning the Site that the Contractor had or ought reasonably to have obtained."*[20]

On the face of it, this appears to help the contractor in a similar way to the civil engineering forms of contract, offering a contractor more time and money where he encounters conditions he could not reasonably have foreseen. However, on closer analysis it may only go halfway there. Crucially, the adverse conditions encountered must *"necessitate an amendment to the Requirements and/or Proposals"*.

As mentioned in the opening paragraph of this article, huge delay and extra cost may flow from the need to change the working method without necessitating a change to the design. For example, a pipe may still be laid in the exact location, from A to B, specified in the Requirements and the Proposals (i.e. no change in design) but there is huge cost and delay involved in using different equipment to break through an unexpected subsurface obstruction which lies in the pipe's required path. The unexpected difficulty of carrying out the works may, therefore, "impact" the works but not necessarily "change" the Proposals.

If the Proposals also set out the working method then all well and good for the contractor – the unexpected conditions may therefore necessitate a change to the Proposals and he may be entitled to additional time and money.

However, if the Proposals are silent on this, and/or the unforeseen conditions are such that a change in working method is not actually required, there still may be a significant impact on the works – e.g. it may still be possible to use the same or similar equipment specified (or contemplated) in the Proposals but it may take five times as long to deal with the unforeseen conditions.

"The courts have little sympathy for parties who have struck a bad bargain"

In the situations described above, clause 14 of the Major Project Construction Contract may not come to the contractor's aid. The need for there to be a change to the Employer's Requirements or Contractor's Proposals is not a hurdle under the engineering contracts referred to above, which entitle the contractor to the cost of and time spent in "encountering" unexpected physical conditions, regardless of whether any of the contract documents have to be changed as a consequence.

Conclusion

Ultimately, it is a matter for the parties to decide between themselves who bears the risk of unforeseen site conditions. They are free to choose the terms by which they are to be bound and are to be regarded as the masters of their own contractual fate in determining which terms are essential.[21] The courts have little sympathy for parties who have struck a bad bargain.

It goes without saying that each and every project is different – unforeseen site conditions may be more of a risk in some locations than in others. An ancient sewer has almost certainly played a part in the delay caused to the ongoing works at the Victoria Palace theatre, London, delaying the opening of Hamilton by a fortnight and causing chaos for pre-booked ticket sales. The impresario Sir Cameron Mackintosh has described the refurbishment as "thrilling and fraught" – it would be interesting to know the risk allocation of ground conditions for the project and to hear the contractor's view!

However, in any project, cognisance of the default legal position means that the parties cannot afford to be complacent. Thought should be given to the potential consequences of adverse site conditions and how this risk should be allocated prior to entry into the contract (whether this be a standard, amended or bespoke form).

NEC4 and FIDIC compared

The year 2017 will see the introduction of new editions of the FIDIC and NEC forms of contract. Having been trialled last year in a pre-release version, FIDIC are launching the second edition of their Rainbow suite of contracts in December, whilst, on 22 June 2017, the NEC4 form was revealed. **Jeremy Glover** explains some of the changes to both contracts and at the same time highlights some of the differences between the NEC and FIDIC forms.[1]

"Good faith obligations do not require parties to put aside self-interests"

1. Obviously, this article is being written before the release of the FIDIC second edition. It is therefore based on the best available information, primarily the December 2016 pre-release Yellow Book.
2. Simon Worley, December 2016, FIDIC Users' Conference.
3. [2016] ZAKZDHC 3
4. [2009] EWHC 3272 (TCC)
5. Contracts, Capacity Building and Business Practice.
6. [1986] 33 BLR 103
7. [2017] EWHC 319 (TCC).
8. [2002] WASC 286.
9. Formerly clause 15.
10. http://www.eic-federation.eu/news/joint-federation-letter-fidic/ [Accessed 27 September 2017].

Use of the FIDIC and NEC forms

The first edition of the *Conditions of Contract (International) for Works of Civil Engineering Construction* was published in August 1957, whilst the New Engineering Contract ("NEC") was first published in March 1993. In the UK, NEC3 was the contract of choice of the Olympic Delivery Authority who were responsible for the planning, designing and building of the venues, facilities and accommodation, and developing the infrastructure to support these, for the 2012 Olympic Games. NEC3 is also widely used in the decommissioning of nuclear power stations and is currently being used on Europe's largest construction project, the Crossrail project in London. FIDIC is not used so much in the UK.

Since April 2015 all Hong Kong Government works departments have been required to tender new projects using the full suite of NEC3 contracts. The NEC3 has also been widely used on major projects in South Africa; the South African Construction Industry Development Board currently recommends NEC3 contracts for public sector use in South Africa. In South Africa the NEC3 form, along with FIDIC, is one of four contracts authorised for use under the Construction Industry Development Board (CIDB) Act. Against it, it has been said that more contracts are let under the FIDIC Red Book, annually by number, than any other single international form of contract and that the FIDIC Red Book has been and is being used in more countries around the world (160) than any other form of contract.[2]

When the NEC announced at the beginning of March 2017 that they were releasing the new NEC4, they said that the three core drafting principles were as follows:

- stimulus to good management;
- support the changing requirements of users; and
- improve clarity and simplicity.

The underlying philosophy behind the FIDIC 2016/2017 update is quite similar, including:

- to enhance project management tools and mechanisms;
- to achieve a balanced risk allocation. This is being achieved through more reciprocity between the Parties;
- to achieve clarity, transparency and certainty; and
- to reflect current international best practice.

At the June 2017 conference, where the new form was released, the NEC made clear that their approach was "improvement through collaboration" or "evolution not revolution". That does not appear to be the case, with the pre-release version of the FIDIC Yellow Book being 50% longer than the 1999 version. So the NEC4 is very much an update, the key features are the same and the contract unsurprisingly still adopts the same plain English style. As well as updating the existing NEC3, a new Design Build Operate contract has been introduced and the NEC are also planning to introduce an NEC4 Alliance Contract. The NEC form has also adopted gender neutral drafting, something FIDIC is expected to follow.

As with FIDIC, the NEC4 makes use of deeming provisions. A contractor's programme will be deemed to be accepted if the project manager does not respond within the contract timescales. Again, as with FIDIC, the NEC4 introduces a requirement for the contractor to prepare a quality management plan.

Structure and Format

There has been little change here. The FIDIC forms reflect different risk profiles: design and build (Yellow Book), turnkey (Silver) and build-only (Red). With the NEC, the contracts are arranged according to alternative pricing options: lump sum (option A), re-measurable (option B), target cost (options C and D) and cost reimbursable (option E).

Both FIDIC and the NEC aim for standardisation. The 1999 Rainbow Suite contracts all have 20 clauses. This will increase to 21 and there is a high degree of similarity across the suite. The 1999 FIDIC form works by having standard clauses known as general conditions and then the parties have the option to introduce Particular Conditions, which are meant to be project specific.

The foundations of the NEC form are the nine sections containing the core clauses. Beyond these, a user selects the appropriate main option clauses to produce the contract appropriate for the chosen procurement pathway. There are then a series of secondary option clauses known as X-clauses. Finally, there are the additional conditions of contract known as Z-clauses. These provide the parties, more usually the Employer, with the opportunity to insert bespoke terms or amendments into the contract.

It is then up to the project participants to put the contract together. Care needs to be exercised when doing this. In *Transnet Soc Ltd v Group Five Construction (Pty) Ltd and Others*,[3] Jeffrey AJ noted of an NEC3 contract that:

"This contract, in the result, contains a bewildering array of provisions derived from the various NEC options, several of which were incorporated into the contract by the parties and which follow neither a numerical sequence nor a uniform description. Also, the words used in the blanks completed by the parties are often couched in a cryptic shorthand style."

It is unclear from the judgment the extent to which the parties had moved away from the preferred NEC approach, but parties would do well to take heed of the words of Donald Keating as recalled by Mr Justice Coulson in the case of *Fenice Investments Inc v Jerram Falkus Construction Ltd*[4]**:**

"Donald Keating always advised parties who intended to sign up to construction contracts that they should either use an unamended standard form of contract, or their own homemade contract conditions, and that to attempt a mixture of both was usually a recipe for disaster."

Both the FIDIC and NEC Forms lean towards the use of an unamended standard form, but acknowledge that some amendment may usually be needed to take account of the particular project conditions.

> *"This contract...contains a bewildering array of provisions derived from the various NEC options...which follow neither a numerical sequence nor a uniform description."*

BIM

Previously the NEC had prepared a guide entitled "How to use BIM with NEC3 Contracts". This is no longer a part of the NEC4 contract suite. The "How to" guide had also explained how NEC3 could be used with the CIC BIM Protocol. All references to the CIC Protocol are now gone.

The new NEC4 contract instead includes a new secondary option, X10, specifically to support the use of BIM. This, the NEC have said, will provide *"the additional contract clauses required to support the production of information for BIM"*. As well as dealing with issues such as the Model, ownership and liability, under the new BIM option the Contractor will be required to provide an Information Execution Plan (the more standard phrase in general use is the BIM Execution Plan) for incorporation in the contract either from the outset, or within a period defined by the Client.

There is no mention of BIM in the pre-released second edition of the 2017 Yellow Book. That is not to say that FIDIC has neglected BIM, far from it. At least three of FIDIC's committees[5] have been asked to consider how best to deal with BIM. One particular difficulty for FIDIC is that, as an international form of contract, it is designed for use throughout the many different jurisdictions and cultures within which the engineering and construction industry operates. There is far from being any uniform or standard approach. This is why any particular amendment to the Rainbow Suite itself is not expected. FIDIC's approach is more likely to be in the form of a Guidance Note or perhaps a Protocol for use with the FIDIC form.

The programme and extension of time claims

In keeping with the trend in international contracts, and in line with the Red Book subcontract, the second edition of the FIDIC form will include increased programming obligations (16 are listed) within new sub-clause 8.3. NEC4 adopts a similar approach in clause 31.2. Although FIDIC have retained their position that the programme does not become a contract document, the Engineer is required to review the programme and say if it does not comply with the contract. If the Engineer does not do this within 21 days, then the programme is deemed to comply. There is also a positive obligation on the Contractor to update the programme whenever it ceases to reflect actual progress.

With FIDIC, there is an interesting reference to concurrent delay, with new sub-clause 8.5 saying that if a delay caused by the Employer is concurrent with a Contractor delay, then the entitlement to an extension of time shall be assessed:

"in accordance with the rules and procedures stated in the Particular Conditions".

This rather neutral comment, which does not appear in the NEC Form, will of course have the effect of raising the issue of concurrency as a matter that needs to be dealt with by the parties when they negotiate and finalise the contract.

Design responsibility

Under the FIDIC form, the Contractor will usually find itself subject to a fitness for purpose obligation in respect of anything it designs. Clause 4.1 says this:

"When completed, the Works shall be fit for the purposes for which the Works are intended as defined in the Contract."

Under English or Common law, the fitness for purpose duty is stricter than the ordinary responsibility of an architect or other consultant carrying out design where the implied obligation is one of reasonable competence to "exercise due care, skill and diligence".

In *Viking Grain Storage v T.H. White Installations Ltd*,[6] Judge John Davies said:

"The virtue of an implied term of fitness for purpose is that it prescribes a relatively simple and certain standard of liability based on the 'reasonable' fitness of the finished product, irrespective of considerations of fault and of whether its unfitness derived from the quality of work or materials or design."

The NEC scheme is not always totally clear. Design is not mentioned in the core clauses, but the secondary options do deal with design liability. Under NEC3, X15.1 provides that:

"The Contractor is not liable for Defects in the works due to his design so far as he proves that he used reasonable skill and care to ensure that his design complied with the Works Information."

The requirement that the Contractor prove that it used reasonable skill and care has been amended slightly. Under NEC4:

"The Contractor is not liable for a Defect which arose from its design unless it failed to carry out that design using the skill and care normally used by professionals designing works similar to the works."

However, regardless of whether or not the NEC contract includes X15.1, a Contractor should check to see whether the obligations in the Scope (formerly Works Information) actually impose a fitness for purpose obligation on any elements of design carried out by the Contractor.

Collaboration and good faith

Both the NEC and FIDIC contracts share an increased emphasis on collaboration. With the NEC4, an option has been included to appoint a contractor at an early stage, to participate in the development of designs and proposals. The basic idea is that this enables the contractor to consider the design at an early stage when there is still scope to introduce improvements and/or costs savings.

There is no good faith obligation in the FIDIC form, although such an obligation is implied by most civil codes. However, clause 10.1 of the NEC form does include an obligation to act in a spirit of mutual trust and cooperation. In 2017 Mr Justice Coulson had the chance to consider the meaning of this clause in the case of *Costain Ltd v Tarmac Holdings Ltd*.[7] He also noted the comment in *Keating on NEC3*, that a parallel can be drawn between "mutual trust and cooperation" and obligations of "good faith". *Keating on NEC3* refers to the Australian case of *Automasters Australia PTY Ltd v Bruness PTY Ltd*,[8] which says this:

1. *"What is good faith will depend on the circumstances of the case and the context of the whole contract.*
2. *Good faith obligations do not require parties to put aside self-interests; they do not make the parties fiduciary.*
3. *Normal reasonable business behaviour is permitted but the court will consider whether a party has acted reasonably or unconscionably or capriciously and may have to consider motive.*
4. *The duty is one 'to have regard to the legitimate interests of both the parties in the enjoyment of the fruits of the contract as delineated by its terms'."*

Mr Justice Coulson further noted that Keating also said that the term of mutual trust and cooperation suggests that:

"whilst the parties can maintain their legitimate commercial interests, they must behave so that their words and deeds are 'honest, fair and reasonable, and not attempts to improperly exploit' the other party."

Early Warning

FIDIC have included a new early warning clause (8.4) in the updated Rainbow Suite. This follows the scheme of the clause to be found in NEC3 and the FIDIC Gold Book. Under the NEC4 scheme, for clarity the risk register has been renamed as the early warning register, and under clause 16[9] the Project Manager prepares a first early warning register within one week of the starting date. Regular early warning meetings are then to be held, beginning within two weeks of the starting date.

The NEC approach is drafted to encourage the identification of problems and for the parties to work together in order to establish an early resolution. This provides that a Contractor will only be compensated on the basis that an early warning had been given, based upon the date on which an experienced Contractor would have or ought to have recognised the need to give a warning. Contractors are therefore encouraged to play their part in the early warning procedures, in order to avoid inadequate cost recovery for those problems which materialise later on. FIDIC is not so obviously prescriptive, but there is no reason why similar arguments cannot be raised.

Claims and notices

FIDIC have made it clear that a notice given under the new contract must clearly state that it is a notice and make reference to the sub-clause under which it is issued. The NEC3 form already did this. This is to try and reduce disputes about what is a notice where parties try and argue that references in a programme or progress report actually constitute notice of a claim. There is an obvious benefit in defining a notice as being one that needs to be identified as a notice and including the sub-clause. However, it is equally true that this is not the type of provision that is strictly followed. A failure to identify notices will then mean that there will be arguments about whether a particular notice is a notice or not. Any such arguments will not simply be answered by the new FIDIC definition, as local law, and the factual matrix surrounding the event may well still come into play.

Disputes as to whether a notice is a notice or not may well continue despite FIDIC's best intentions. Indeed, as we have explained in our article on page 30 of this Review, the new sub-clause 20.3 does provide the DAB with the power to waive a failure to follow a time bar requirement. This is not something to be found in the NEC4 form, which like FIDIC includes a time bar on Contractor claims.

FIDIC are clearly trying to move towards "real time" claims management. This is in line with the NEC approach and is clearly potentially a good thing, and fully in keeping with current contract trends. It is sensible to encourage the notification and early review of issues relating to extensions of time and the financial impact of change in delay as the work progresses. It is fresh in everyone's minds and it should be easy to assess. There should be benefits for everyone. For the Employer, they will be better informed about the moving contract price and likely completion date. In theory, the Contractor should then also obtain better cash flow.

However, the proposed notice and claims procedures will undoubtedly place an increased burden on both the Employer and Contractor to follow these new administrative requirements. The global construction umbrella federation, CICA, and the three international contractors' associations from Europe, Japan and Korea, EIC, ICAK and OCAJI, wrote an open letter dated 26 January 2017, calling upon FIDIC to maintain an equitable contractual standard.[10] The open letter noted that:

"the proposed contract administration under the updated FIDIC standard will become highly bureaucratic and carry the risk that the parties are drawn into time consuming, costly and labour-intensive dispute settlement alongside the ongoing project."

Dispute Resolution and Dispute Adjudication Boards

Again, as with FIDIC, there is an increased emphasis on dispute avoidance. The "Dispute Resolution" part of NEC3 has been renamed "Resolving and Avoiding Disputes" in NEC4. Under NEC3, there are two Dispute Resolution options, W1 and W2, one for use where the UK adjudication provisions, the Housing Grants, Construction and Regeneration Act 1996, apply, one for where they do not. Both provide for adjudication as a mandatory precondition to arbitration.

The NEC4 has introduced a new option of referral to senior representatives of the parties to the project. The idea is to provide for a four-week period for negotiation to see whether a more formal dispute can be avoided. This does not (and in the UK could not) affect the statutory right to refer a matter to adjudication at any time.

In addition, the NEC4 introduces a new option, W3, which provides for the use of Dispute Adjudication Boards ("DAB"). Only for use where the UK mandatory adjudication provisions do not apply, the proposed DAB is similar in form to the FIDIC DAB. Under Option W3, the NEC4 DAB will be a standing DAB, nominated by the parties at the time the contract is formed. The DAB will be encouraged to make site visits and so become familiar with the project at a time when there are no disputes. It will also be able to provide assistance and non-binding recommendations when disputes do arise.

Conclusion

It is, of course, too early to make any definitive conclusions on the new revisions.

However, the increased emphasis on dispute avoidance within both the FIDIC and NEC forms is something to be welcomed.

A Yellow Book tale: termination, letters of credit and a question of fraud

Claire King is the editor of *Insight*, our monthly newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors. In February 2017, Claire looked at a recent Court of Appeal case on On-Demand Performance Securities (specifically Standby Letters of Credit) provided by a Brazilian contractor ("Construtora" or "OAS") to the National Infrastructure Development Company ("NIDCO") pursuant to a FIDIC Yellow Book contract where Claire and Fenwick Elliott[1] acted for the successful party, NIDCO, against Santander in a claim for circa US$38 million. If you would like to receive regular copies of *Insight* please email Claire (cking@fenwickelliott.com).

1. Simon Tolson and Claire King acted for NIDCO. Anneliese Day QC of Fountain Court and Hugh Saunders of 4 New Square acted as Counsel for the first instance and Court of Appeal hearings against Banco Santander. Ben Patten QC acted as Counsel for the first instance hearing against BNP Paribas.
2. See Simon Tolson and Claire King's article on this in Building magazine dated 2 December 2016 for further details.
3. Petrosaudi Oil Services (Venezuela) Ltd v (1) Novo Banco S.A.; (2) PDVSA Servicios S.A.; (3) PDVSA Services BV [2017] EWCA Civ 9.
4. Ali Malek QC and David Quest, Jack: Documentary Credits, The law and practice of documentary credits including standby credits and demand guarantees, Tottel Publishing, Fourth Edition, 2009, chapter 12.13, page 341.
5. *Edward Owen Engineering Ltd v Barclays Bank International* [1978] 1 All ER 976 (CA).
6. Mr David Foxton QC.
7. [2016] EWHC 607 (TCC).
8. See paragraph 25 of Lord Justice Longmore's judgment in *National Infrastructure Development Company Limited v Banco Santander S.A.* [2017] EWCA Civ 27.
9. See paragraph 27 of Lord Justice Longmore's judgment.
10. See paragraph 88 of the Petrosaudi Court of Appeal judgment.
11. See paragraph 88 of the Petrosaudi Court of Appeal judgment.

NIDCO v BNP Paribas; NIDCO v Santander: the First Round[2]

NIDCO v Santander, like *Petrosaudi*[3], reaffirms the autonomy principle for On-Demand Performance Securities and the narrow scope of the fraud exception to that principle. If the party making the demand on the security honestly believed it was entitled to make the demand, fraud will not be made out, even if that party's belief proves to be wrong. It also provides some comfort to FIDIC users that the system of securities in place for contractual terminations (even if disputed) is sound.

In *NIDCO v Santander* the Court of Appeal also clarifies the law as to the proper test to be applied on summary judgment applications by beneficiaries under letters of credit. There must be a *"real prospect"* of establishing *"that the only realistic inference is that [the claimant] could not honestly have believed in the validity of the demands"*. This test will also apply where the beneficiary of an On-Demand Bond wishes to force the bank or other entity that issued it to pay out (to be contrasted with a Contractor seeking to injunct a bank from paying out to an Employer).

However, before seeking to distil the lessons learnt from the Court of Appeal, it is perhaps worth recapping on NIDCO's claims for payment against both BNP Paribas and Santander at first instance.

Santander was one of a number of banks that had provided securities (retention, advance payment and performance securities) at the request of a Brazilian contractor (Construtora) pursuant to a FIDIC Yellow Book contract (with bespoke amendments) for the construction of a major highway project in Trinidad and Tobago. The Employer for the contract was NIDCO, a corporate vehicle used by the government of Trinidad and Tobago to effect public infrastructure works.

The securities under the contract were all issued in the form of Standby Letters of Credit. They were also subject to English law and the jurisdiction of the English courts.

Standby Letters of Credit and the Autonomy Principle

For those wondering, Standby Letters of Credit are a special form of letter of credit frequently used in international trade contracts. They originate from the US where prohibitions were imposed on national banking associations from issuing bonds by way of guarantees as *"payment of last resort"*. As with both traditional letters of credit and bonds the bank gives an undertaking to pay against documents, which creates a primary obligation on the bank that is autonomous of the underlying transaction.[4] Letter of credit transactions are, by their nature, international and have retained their role as an instrumentality for the financing of foreign trade.

As such, Standby Letters of Credit are subject to the autonomy principle (as are On- Demand Performance Securities more generally under English law). Basically, if the demand made complies with the terms for making a demand on its face, then the monies claimed must be paid. The *only* exception under English law (as opposed to other jurisdictions such as Singapore and Australia where a doctrine of *"unconscionability"* has developed) is fraud.

Lord Denning famously explained this in *Edward Owen Engineering Ltd v Barclays Bank International*:[5]

"A bank which gives a performance guarantee must honour that performance guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligations or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand, if so stipulated without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice."

The Dispute

So what happened in the NIDCO cases?

Significant disputes arose in respect of the construction contract resulting in a termination notice being served in June 2016. Construtora had, prior to that, gone into the Brazilian equivalent of Chapter 11 style administration. Following the termination, an LCIA arbitration was commenced which is ongoing. NIDCO also served various demands in respect of the Standby Letters of Credit ("LoCs").

Aside from numerous LoCs issued by Citibank based in the US, the remainder of the LoCs had been provided by banks incorporated in Europe.

As is common in such transactions, the banks had taken counter-indemnities from their Brazilian subsidiaries. Typically these are then secured against monies or assets of the Contractor to ensure that the bank is not left out of pocket if a call is made on a security. The diagram shown sets out the

On-Demand Bond (International)

1. Construction contract
2. Counter-indemnity
3. Performance bond / counter-indemnity
4. Performance bond

typical contractual relationships between the parties in the context of international on-demand performance securities.

The Brazilian subsidiaries of the European banks (who had provided counter-indemnities to their European counterparts) were injuncted by the Brazilian courts from paying out to NIDCO in the first half of July 2016. The Brazilian courts later extended their injunction to cover the European banks. Both banks declined to pay out the monies demanded by NIDCO, noting that a substantial fine would be payable if they did so.

NIDCO applied for summary judgment in the sum of approximately US$58 million against BNP Paribas and US$38 million against Santander. The BNP Paribas case came before the Commercial Court on 26 September 2016, with the Santander hearing following in November.

At the first hearing in September, the issue was whether the Brazilian injunction gave BNP Paribas any arguable defence or grounds for resisting payment under English law. The Judge[6] emphasised that LoCs have a status which is the equivalent to cash and should be paid out unless the very limited exceptions applied. He noted:

"Whilst it is said that the facts of the present case are extraordinary, I suspect they would become commonplace if a party who had opened a letter of credit could defeat the bank's payment obligation to pay by obtaining an injunction against the bank in its home jurisdiction."

The Judge accordingly ordered summary judgment to be granted. He also refused permission for a stay, stating that it would be *"wrong in principle to use a stay of execution to subvert the principles of substantive law which provide very limited defences indeed to claims to enforce letters of credit"*.

BNP Paribas did not appeal the judgment, paying out shortly afterwards.

The next hearing was against Santander. To win, Santander had to distinguish its position from that of BNP Paribas. Relying on the Brazilian injunction to avoid payment clearly wasn't going to work.

As a result, less reliance was placed on the Brazilian injunction in resisting the demand for payment. Instead Santander argued that the fraud exception applied to stop payment. This was primarily on the basis that the amounts said to be due by NIDCO had not yet been subject to a final determination (the arbitration had not yet determined what was *"due and owing"*). As such NIDCO could not, they said, have an honest belief in their demands. Further, it was argued that English law should be extended to include a doctrine of *"unconscionability"* as applicable in Singapore and some other jurisdictions. Santander argued that given the Brazilian injunction and NIDCO's alleged financial status it would be unconscionable to order payment.

Santander's arguments were rejected. Mr Justice Knowles noted the recent case of *J Murphy and Sons v Beckton Energy Ltd*[7] in which Mrs Justice Carr held:

"The trigger for a performance bond is a belief on the part of the drawing party in its entitlement, not such entitlement having been subject to a final determination giving rise to a payment obligation."

There was no seriously arguable case that NIDCO did not believe in the validity of the demands and, as such, payment had to be made. The Judge further noted that the parties had chosen English law to govern the LoCs which did not recognise a doctrine of unconscionability.

Santander sought permission to appeal and was granted it by the Court of Appeal on all grounds save one. This was, namely, that the attempt to bring the principle of unconscionability into English law was denied and, as a result, this issue was not reviewed by the Court of Appeal.

"A bank which gives a performance guarantee must honour that performance guarantee according to its terms."

NIDCO v Santander: the Appeal

The six grounds on which Santander sought to appeal the first instance judgment were as follows:

1. The judge applied an incorrect test of serious arguability when he should have asked himself whether the bank had a real prospect of establishing its defence.

2. The bank did have a real prospect of establishing that NIDCO did not believe in the validity of its claim because a claim for unliquidated damage for premature abandonment of the construction contract was not in law a claim that money was "due and owing".

3. The factual evidence relied on by the bank demonstrated that NIDCO had no genuine belief that money was due and owing from OAS.

4. On any view the claim under the retention letters of credit could only be in respect of the certified retention; at the time of the demand the certified retention was only US$31m and it was therefore wrong to claim an amount of US$34m in respect of the retention security.

5. It was wrong to give summary judgment without offering the bank an opportunity to cross-examine NIDCO's witnesses.

6. The judge's refusal to order a stay in light of the Brazilian injunction was wrong in principle.[8]

What was the correct test to be applied?

Lord Justice Longmore confirmed that the correct test to apply was that there must be a *"real prospect"* of establishing *"that the only realistic inference is that [the claimant] could not honestly have believed in the validity of the demands"*.[9] The Judge at first instance had applied too high a test by using the phrase *"seriously arguable"* rather than the wording of the summary judgment provisions within the Civil Procedure Rules (CPR 24), *"no real prospect of success"*, i.e. some chance of success. The prospect must be real and not false, fanciful or imaginary.

"Letters of Credit are part of the lifeblood of commerce and must be honoured in the absence of fraud on the part of the beneficiary"

That did not, however, in the end make any difference (or as Lord Justice Longmore put it, succeeding on that ground was *"so far as it goes"*) as the test was not satisfied in any event, as confirmed by the remainder of the judgment.

"Due and Owing" and the Fraud Exception

The remainder of Santander's arguments were decisively dismissed. A stay was also refused.

In relation to the question as to whether monies could be said to be *"due and owing"*, the Court of Appeal rejected the attempt to argue that this would have to be crystallised by agreement or an award following a termination before a call could be made.

For regular users of FIDIC contracts, it is worth noting that the Judge would have held (if required to do so) that it was clearly intended that the calls on the securities could be made on termination of the contract. Sums *"due and owing"* would include sums to which a party was entitled on *"any alleged contractual termination"*. Otherwise, the purpose of the securities would be voided, given the date for expiry of the securities may have passed by the time any arbitral award was issued. Indeed, had there been any other finding the security provisions within the FIDIC contracts would have required an extensive review.

As to the allegation that there was no evidence presented that NIDCO had turned its mind to whether the monies were *"due and owing"* and that this recklessness could be interpreted as tantamount to fraud, this was given short shrift:

"No doubt lawyers can have a debate as to whether a current entitlement to claim damages for repudiation entitles one to say that the amount of such damages is due and owing.... But it borders on the absurd to say that the only realistic inference from the fact that businessman did not have (or may not have had) that debate is that they could not have believed in the validity of their demands."

Parallels to the Petrosaudi case

The similarities of the *NIDCO v Santander* case to the Petrosaudi Court of Appeal case are perhaps strongest in relation to the Court of Appeal's analysis of what was passing through the mind of the party calling the security when they signed the demand.

In the Petrosaudi case, their General Counsel (a Mr Buckland – solicitor) had signed the demands made pursuant to the various letters of credit. He had certified that PDVSA (controlled in Venezuela and known for its late payments) was *"obligated to [POS]... to pay the amount demanded under the Drilling Contract"*.

He was essentially found to be fraudulent because *"on the view that he took of the legal position"*, he thought the monies under the underlying contract were due. The Judge at first instance had held that any underlying liability arising from the invoices could not yet be enforced and PDVSA had no present obligation to pay. He went on to consider that Mr Buckland did not honestly hold the belief that the monies were due and that, accordingly, he was fraudulent in signing the demand.

Lord Justice Clarke (who also heard the NIDCO appeal), noted in his Court of Appeal judgment that *"whilst there is only one true construction of an instrument such as the certificate, different legal minds may obviously take different views on such a question"*.[10]

In the Petrosaudi appeal, the Court of Appeal agreed that the monies could be called in any event but they also expressed *"some disquiet"*[11] at the finding that Mr Buckland was fraudulent when he had simply had a different view as to whether certain invoices were payable.

The argument raised by Santander, and the respondents in *Petrosaudi*, was arguably a way of extending the fraud exception to the autonomy principle. If the party resisting a call had a different contractual interpretation to the underlying contract as to whether amounts were due, then the conclusion could be made that a call was *"fraudulent"* either as a result of recklessness or as a result of reaching the "wrong" conclusion as to whether an amount was due.

This is, in the author's view, clearly wrong and inconsistent with the whole *"pay now argue later"* philosophy behind on-demand performance securities. Indeed, if the Court of Appeal hadn't reached the conclusions it did, it would no doubt have led to far more disputes and attempts to avoid calls on such securities in the future.

Conclusion

The *NIDCO v BNP Paribas*, *NIDCO v Santander* and *Petrosaudi* judgments all uphold the autonomy principle under English law. As Lord Justice Longmore emphasises:

"Letters of Credit are part of the lifeblood of commerce and must be honoured in the absence of fraud on the part of the beneficiary. The whole point of them is that beneficiaries should be paid without regard to the merits of any underlying dispute between the beneficiary and its contractor."

Attempts to argue that the doctrine of unconscionability should be extended to English law and/or to open up the fraud exception to consider whether someone's contractual interpretation may be right or wrong have been firmly dismissed. For those beneficiaries seeking to enforce payment the test is clear – there must be a *"real prospect"* of establishing *"that the only realistic inference is that [the claimant] could not honestly have believed in the validity of the demands"*.

Lord Denning can rest easy, as indeed can FIDIC.

"The whole point of Letters of Credit is that beneficiaries should be paid without regard to the merits of any underlying dispute between the beneficiary and its contractor."

Responsibility for concurrent delay

Claims revolving around concurrent delay are a frequently encountered problem in construction contracts. As **Jeremy Glover** explains, the problem of concurrency typically arises when the Contractor is in delay, but the Employer also appears to be delaying the Contract. The question then arises as to whether the Contractor is entitled to receive an extension of time in any event? There are many different answers depending on what the Contract says and which law applies.

What is concurrent delay?

The definition of concurrency that tends to find most favour is the one put forward by John Marrin QC:

"A period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency."[1]

The position in England and Wales

In England and Wales, Mr Justice Akenhead, in the case of *Walter Lily v MacKay & Others,*[2] gave a clear answer to this question outlined at the start of this article:

"In any event, I am clearly of the view that, where there is an extension of time clause such as that agreed upon in this case and where delay is caused by two or more effective causes, one of which entitles the Contractor to an extension of time as being a Relevant Event, the Contractor is entitled to a full extension of time. Part of the logic of this is that many of the Relevant Events would otherwise amount to acts of prevention and that it would be wrong in principle to construe cl. 25 on the basis that the Contractor should be denied a full extension of time in those circumstances. More importantly however, there is a straight contractual interpretation of cl. 25 which points very strongly in favour of the view that, provided that the Relevant Events can be shown to have delayed the Works, the Contractor is entitled to an extension of time for the whole period of delay caused by the Relevant Events in question."

As far as Mr Justice Akenhead was concerned, there was nothing in the wording of the contract which expressly suggested that there was any sort of proviso to the effect that an extension should be reduced if the causation criterion was established. The fact that the Architect had to award a 'fair and reasonable' extension did not imply that there should be some apportionment in the case of concurrent delays. The key test was primarily a causation one.

"There was no rule of law that prevented the parties from agreeing that concurrent delay be dealt with in any particular way."

One further justification for the English approach is that as the contract in question in the *MacKay* case expressly provided for an extension of time for certain relevant events, it must have been contemplated that there could be more than one effective cause of delay and also expressly agreed that a contractor is entitled to an extension of time for an effective cause of delay.

The position in Scotland

One reason for Mr Justice Akenhead's comments was to make clear that he did not accept the position which had been adopted by the Scottish courts where the preferred approach is known as the "apportionment" approach. This followed the case of *City Inn Ltd v Shepherd Construction Ltd*. At first instance, Lord Drummond Young said that:[3]

"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."

In other words, this would require consideration of the period of delay and the causative significance of each event on the works as a whole. On appeal[4], Lord Osbourne took a slightly different approach concluding that if a dominant cause can be identified as the cause of a particular delay in completion of the works, effect will be given to that by leaving out of account any causes which are not material. However, where a situation exists in which two causes are operative, one being a relevant event and the other some event for which the Contractor is to be taken to be responsible, and neither of which could be described as the dominant cause, the claim for extension of time will not necessarily fail. In such a situation, it will be open to the decision-maker, approaching the issue in a fair and reasonable way, to apportion the delay in the completion of the works occasioned thereby as between the relevant event and the other event.

As will be clear, Mr Justice Akenhead did not agree, noting in the *Mackay* case that:

1. For an authoritative discussion on concurrent delay, see John Marrin QC, "Concurrent Delay Revisited", SCL Paper 179, February 2013, available at http://www.scl.org.uk. l
2. [2012] EWHC 1173 (TCC).
3. [2007] CSOH 190.
4. [2010] CSIH 68.
5. See Article on pages 21-23 comparing and contrasting the new NEC4 and FIDIC forms.
6. [2017] EWHC 2414 (TCC).
7. [2007] BLR 195
8. (No.4) [2011] EWHC 1935 (TCC)
9. See the Supreme Court decisions of *Arnold v Britton* [2015] UKSC 36 and *Wood v Capita Insurance Services Ltd* [2017] UKSC24.
10. [2017] EWCA Civ 65.

"It therefore follows that, although of persuasive weight, the City Inn case is inapplicable within this jurisdiction."

Concurrency under the civil law codes

Civil law codes tend not to make express provision for concepts such as concurrency. In the absence of any specific requirement set out in the contract, it is quite possible, bearing in mind the general requirements of good faith and fairness, that the civil law approach might tend to favour apportionment. To take the UAE civil code:

- As a starting point, Article 246(1) requires that a contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith.
- Article 290 states that: *"it shall be permissible for the judge to reduce the level by which an act has to be made good or to order that it need not be made good if the person suffering harm participated by his own act in bringing about or aggravating the damage."*

The UAE Civil Code therefore does seem to recognise the concept of apportionment and taken together these three provisions do seem to suggest that a Tribunal under UAE law might be able to adopt an apportionment approach when there is concurrent Employer and Contractor delay.

FIDIC and concurrent delay

In the 1999 FIDIC form there is no mention of concurrent delay. However, as we have noted elsewhere in this year's Review,[5] the 2016 pre-release version of the FIDIC Yellow Book included at sub-clause 8.5 the following new provision:

"If a delay caused by a matter which is the Employer's responsibility is concurrent with a delay caused by a matter which is the Contractor's responsibility, the Contractor's entitlement to EOT shall be assessed in accordance with the rules and procedures stated in the Particular Conditions (if not stated, as appropriate taking due regard of all relevant circumstances)."

We noted there that this rather neutral comment will of course have the effect of raising the issue of concurrency as a matter that needs to be dealt with by the parties when they negotiate and finalise the contract. That is, of course, if they had not already planned to do so. It is often the course that contracts are already amended to suggest that it is the Contractor who bears the risk of delays when there is a concurrent delay by the Employer. A dispute about one such clause was heard in the early autumn of 2017 in the TCC in England.

A recent English decision: North Midland Building Ltd v Cyden Homes Ltd[6]

The Claimant Contractor and the Defendant, the Employer, had agreed certain bespoke amendments to the JCT Design and Build Contract 2005, one of which concerned the way in which extensions of time would be dealt with in certain circumstances. Clause 2.25.1.3(b) as amended read as follows:

"2.25.

1. any of the events which are stated to be a cause of delay is a Relevant Event; and

2. completion of the Works or of any Section has been or is likely to be delayed thereby beyond the relevant Completion Date,

3. and provided that

(a) the Contractor has made reasonable and proper efforts to mitigate such delay; and

(b) any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account

then, save where these Conditions expressly provide otherwise, the Employer shall give an extension of time by fixing such later date as the Completion Date for the Works or Section as he then estimates to be fair and reasonable."

Sub-clause (3) was the part added by the parties to the standard clause. The clause as amended added into the extension of time machinery the proviso that, in assessing an extension of time, "any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account".

The works were delayed and North Midland applied for an extension of time for a variety of reasons. As part of their reply, Cyden maintained that if there were two delaying events occurring at the same time and causing concurrent delay to completion of the works, with one event which otherwise entitled the Claimant to an extension of time, and the other being "another delay for which the Contractor is responsible", then the Contractor would not be entitled to an extension of time in respect of those two delaying events. North Midland disagreed.

North Midland placed reliance upon the doctrine of prevention. Mr Justice Fraser explained that:

"Essentially the prevention principle is something that arises where something occurs, for which it is said the employer is responsible, that prevents the contractor from complying with his obligations, usually the obligation to complete the works by the completion date."

The Judge further noted that in *Multiplex Construction (UK) Ltd v Honeywell Control Systems Ltd*[7], Mr Justice Jackson (as he then was) had considered the relationship between the prevention principle and time at large, setting out that:

(i) Actions by the Employer which are perfectly legitimate under a construction contract may still be characterised as prevention, if those actions cause delay beyond the contractual completion date.

(ii) Acts of prevention by an Employer do not set time at large, if the contract provides for extension of time in respect of those events.

(iii) Insofar as the extension of time clause is ambiguous, it should be construed in favour of the Contractor.

North Midland said that as a consequence of the first two propositions time was at large. Mr Justice Fraser explained that:

"the concept of 'time at large' does not mean that the contractor has an indefinite time to complete the works. If the completion date in the contract, and the mechanism for having that extended by means of awarding so many weeks to an originally agreed completion date, are inoperable or for some other reason no longer applicable, in general terms the contractor's obligation becomes one to complete the works within a reasonable time. That is what the shorthand expression 'time at large' is usually understood to mean."

North Midland said that dealing with concurrent delay in the way that the Employer had dealt with it in response to the application for an extension of time was unfair and not in accordance with the terms of the contract. An extension of time ought to be granted without taking account of concurrent delays for which the Claimant is responsible, and disallowing those latter periods. However, the Judge made it clear that he did not consider that the prevention principle arose at all.

Indeed, there was a "final nail in the coffin". Clause 2.26.5 defined Relevant Events as the following:

"any impediment, prevention or default, whether by act or omission....."

This sub-clause therefore specifically classified acts of prevention as Relevant Events. This clause also had words added to it by specific amendment by the parties. In those circumstances, the answer to the question as to how extensions of time were agreed to be dealt with in terms of acts of prevention was clear. Such acts of prevention were, as Relevant Events. Time could not be said to be at large.

In fact, Mr Justice Fraser was "crystal clear" that the parties had agreed that if the Contractor was responsible for a delaying event which caused delay at the same time as, or during, that caused by a Relevant Event, then the delay caused by the Relevant Event "shall not be taken into account" when assessing the extension of time. That did not raise any issues of construction whatsoever. The parties were free to agree whatever they liked in terms of how the risk of concurrent delay should be allocated.

The Judge further confirmed that there was no rule of law that prevented the parties from agreeing that concurrent delay be dealt with in any particular way.

The agreement between the parties was a clear agreement dealing with the proper approach to consideration of the appropriate extension of time in situations of concurrent delay, when one cause would otherwise entitle the Contractor to such an extension (absent the concurrent event) but the other cause would not. As agreed here, in that situation, North Midland was not entitled to an extension of time in that situation.

At the end of his judgment, Mr Justice Fraser referred to a discussion about whether, where concurrent delay exists, the prevention principle is engaged at all, referring for example to the words of Mr Justice Coulson (as he then was) in the case of *Jerram Falkus Construction Ltd v Fenice Investments Inc*[8]:

"Accordingly, I conclude that, for the prevention principle to apply, the contractor must be able to demonstrate that the employer's acts or omissions have prevented the contractor from achieving an earlier completion date and that, if that earlier completion date would not have been achieved anyway, because of concurrent delays caused by the contractor's own default, the prevention principle will not apply."

It was suggested that these words should not be followed. Mr Justice Fraser disagreed and advised parties where disputes occurred about this point to proceed on the basis that the prevention principle is not engaged where there is concurrent delay.

> *"The Judge made it clear that he did not consider that the prevention principle arose at all."*

Conclusions

Mr Justice Fraser has made it clear that the clause in question, which allocated the risk of concurrent delays to the contractor was both valid and enforceable. Although the usual position in England and Wales is that a contractor is entitled to an extension of time where two causes of delay to completion operate concurrently, one of which is the contractor's risk and one of which is the employer's risk, this judgment confirms that contracting parties are free to allocate risk as they choose. It is becoming increasingly common for parties to construction projects to introduce provisions which allocate the risk of concurrent delay to the party carrying out the works. This judgment confirms that the TCC will, in principle, uphold any such arrangement.

As will be clear from this year's *Review*, in the UK there have been a number of recent decisions at the highest level[9] which reaffirm the importance of the words agreed in the contract. In the 2017 case of *Carillion Construction Ltd v Woods Bagot Europe Ltd*[10] in the Court of Appeal, Lord Justice Jackson stated that:

"Recent case law establishes that only in exceptional circumstances can considerations of commercial common sense drive the court to depart from the natural meaning of contractual provisions. See Arnold at [19] and [20]. In Grove the Court of Appeal applied those principles to a construction contract, which operated harshly against the interests of a contractor. The court declined to depart from the natural meaning of the contractual provisions."

This decision is an example of a court doing just that.

Notices

Under most formal contracts it is necessary for the Contractor to give notice of various matters as part of the process of seeking extensions of time and/or loss and expense. Depending on its terms, the notice provision will be treated either as a condition precedent or merely as a warranty, breach of which will typically sound in only nominal damages. Increasingly notices clauses are expressed as conditions precedent. In other words, a failure to comply with the requirements of the clause will result in a party being prevented from making what might otherwise be a perfectly valid claim.

The FIDIC 1999 form, sub-clause 20.1 expressly makes it clear that:

"If the contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the contractor shall not be entitled to additional payment, and the employer shall be discharged from all liability in connection with the claim."

Core clause 61.3 of both the new NEC4 forms provides that:

"If the Contractor does not notify a compensation event within eight weeks of becoming aware that the event has happened, the Prices, the Completion Date or a Key Date are not changed unless the event arises from the Project Manager or the Supervisor giving an instruction or notification, issuing a certificate or changing an earlier decision."

The attitude of the UK courts to time bars

Generally, in the UK, the courts will take the view that timescales in construction contracts are directory rather than mandatory[1], unless, that is, the contract clause in question clearly states that the party with a claim will lose the right to bring that claim if it fails to comply with the required timescale. In the case of *Bremer Handelgesellschaft mbH v Vanden Avenne Izegem nv*[2], the House of Lords held that a notice provision should be construed as a condition precedent, and so would be binding if:

(i) it states the precise time within which the notice is to be served; and

(ii) it makes plain by express language that unless the notice is served within that time the party making the claim will lose its rights under the clause.

Here, under the FIDIC 1999 form, sub-clause 20.1 expressly makes it clear that:

"If the contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the contractor shall not be entitled to additional payment, and the employer shall be discharged from all liability in connection with the claim."

Further, the English courts have confirmed their approval for conditions precedent, provided they fulfil the conditions laid out in the *Bremer* case. For example, in the case of *Multiplex Construction v Honeywell Control Systems*[3], Mr Justice Jackson (as he then was) held that:

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

At the same time, the courts have also recognised that care should be exercised when considering the potentially harsh effects of notice requirements. In the case of *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar*[4], a case involving the FIDIC 1999 form, Mr Justice Akenhead said that he could see:

"no reason why this clause should be construed strictly against the Contractor and can see reason why it should be construed reasonably broadly, given its serious effect on what could otherwise be good claims for instance for breach of contract by the Employer".

"The contractual terms are clear and commercial certainty is an overarching consideration."

Changes to the FIDIC time bar

Indeed, FIDIC, in the Second Edition of the Rainbow suite[5], are introducing a new sub-clause, 20.3 "Waiver of Time-limits", which provides the DAB with the power to waive a refusal of an Engineer to consider a claim because it is said to be time barred. The DAB can take the following into account:

- whether the other Party would be prejudiced by acceptance of the late submission;
- whether the other Party had prior knowledge of the event in question or basis of claim; and
- the extent to which, if at all, the Engineer may already have proceeded to make a determination, or more likely sought to negotiate an agreement.

That said, FIDIC are retaining the 28-day time bar which will apply to both Contractor and Employer claims. For FIDIC, notice provisions are intended to provide certainty to both parties as well as to preserve the contractual arrangement if the works are delayed or additional costs are incurred.

1. Temloc v Errill Properties (1987) 39 BLR 30, CA per Croom LJ.
2. [1978] 2 Lloyd's Rep. 113.
3. [2007] EWHC 447 (TCC).
4. [2014] EWHC 1028 (TCC). The case was considered by the Court of Appeal in 2015, but the appellate court made no comment on this part of Mr Justice Akenhead's decision, [2015] EWCA Civ 712.
5. This is being released in December 2017. The comments here are based on the 2016 Pre-Release Yellow Book.
6. [2017] NIQB 20.
7. [2009] ScotCS CSOH 146.

The position in 2017

It should be noted that Mr Justice Akenhead, in the *Obrascon* case, was not saying that clause 20.1 was not a condition precedent, but rather that care should be taken when alleging that proper notice had not been given on time.

The importance of following the notice provisions to be found in any contract was reinforced in the 2017 case of *Glen Water Ltd v Northern Ireland Water Ltd*[6]. Although this was not a FIDIC contract, there was a condition precedent notice clause requiring claims for compensation to be submitted by Glen Water within 21 days of the occurrence of the compensation event that had caused or was likely to cause delay and additional cost.

The project in question was a PFI project agreement for the upgrade of sludge treatment services in Northern Ireland. The agreement provided for an initial construction phase followed by a 25-year operation and maintenance period. During the construction phase, Northern Ireland Water was required, acting as a prudent operator, to maintain its existing sludge treatment assets.

During the construction phase Glen Water issued several compensation event notifications including in relation to the new build cooling water system. Glen Water also notified concerns about Northern Ireland Water's maintenance of the existing assets. In a letter dated 20 October 2009 Glen Water alleged that Northern Ireland Water was not maintaining the existing assets. The letter went on to reject Northern Ireland Water's criticism of the new cooling water system design and assert that a compensation event had occurred.

At a meeting on 14 December 2009 Glen Water mentioned a claim for £3—9m in relation to Northern Ireland Water's maintenance of an incinerator within the existing assets. An internal Northern Ireland Water document dated 15 December 2009 referred to the possibility of a claim arising out of Northern Ireland Water's failure to maintain the existing assets.

Glen Water subsequently commenced proceedings, claiming some £4.4m in compensation for defects in the pressure steam system. The question of whether or not effective notice of a compensation event had been given was addressed as a preliminary issue.

Glen Water argued that its letter of 20 October 2009 and the discussions at a meeting held on 14 December 2009 were sufficient to satisfy the clause in question when looked at in proper context with all of the background taken into account, in particular that in advance of 20 October 2009, Glen Water had frequently expressed concern about Northern Ireland Water's maintenance of the existing assets, the subject of the claim. In reply, Northern Ireland Water said that on an objective construction the letter was concerned with the cooling water claim, something different.

Here, Keegan J noted that:

"I do have some sympathy for the plaintiff's position because the failure to notify prevents a claim being made. That may seem harsh when commercial parties anticipated that a claim might come to pass. I should say that Mr Brannigan did leave no stone unturned in arguing this case. However, I have to decide the case within the parameters of commercial and contract law. The contractual terms are clear and commercial certainty is an overarching consideration. The evidence as to the commercial context and surrounding circumstances has not remedied the defect in the letter. It seems to me likely that the notification requirement was overlooked amid a mass of claims and in the midst of an ongoing process of discussions."

As notice had not been given within the time limits laid down by the contract, the claim was barred. The Judge was clear that any "notification should be clear and unambiguous". Meeting minutes did not constitute a proper notification of claim. Whilst the parties had had discussions regarding the potential claim event, the onus was still on the Contractor to have followed the contract and notify its claim formally. It was also an issue of some importance that the letter Glen Water was trying to rely upon, in contrast to the other compensation event notifications, was not clearly marked as such. The fact that internally, Northern Ireland Water had considered the possibility of a claim arising was irrelevant. The fact that Northern Ireland Water had apparently anticipated (and possibly obstructed a claim by ignoring Glen Water's requests to inspect the existing assets) was again not sufficient to override a failure to give proper notice.

"It seems to me likely that the notification requirement was overlooked amid a mass of claims."

Conclusions

Whilst, as the words of Mr Justice Akenhead in the *Obrascon* case suggest, courts may have some sympathy for the potentially harsh effects of time bar clauses, that sympathy will only go so far. Keegan J thought it significant that in adjudication proceedings brought in 2014, Glen Water had not based a claim for the same compensation upon the letter of 20 October 2009 or the meeting on 14 December 2009. They had not approached the claim in a consistent way.

It is possible that the changed approach was made because of the fact that the claims had reached the courts. However, in reaching her decision, Keegan J referred favourably to the Scottish case of *Education 4 Ayrshire Ltd v South Ayrshire Council*[7] where Lord Glennie was wholly unsympathetic to the suggestion that allowance should be made for the fact that notices given in compliance with conditions precedent might have been drafted by businessmen rather than lawyers, noting that:

"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 [of a Public Private Partnership or PPP Contract] that would not readily be understood by a businessman unversed in the law."

Under clause 20.3 of the new FIDIC form, Glen Water would have been able to argue that Northern Ireland Water had prior knowledge of the event in question and understood the basis of the claim being made. Therefore it could not be said that they were prejudiced by acceptance of the late submission. However, under the contract in question, those arguments were not open to them. Here the contract was clear and whilst the parties had had discussions regarding a potential claim event, that, under the strict words of this particular contract, did not relieve the contractor of the obligation to formally notify the claim.

Recent developments in the UAE: arbitration

With our office in Dubai flourishing, we have been keeping a careful eye on the latest developments in arbitration in the UAE region.

New Construction Court for the DIFC

Since their establishment in 2004, the Dubai International Financial Centre ("DIFC") Courts have provided a judicial framework for resolving civil and commercial disputes and claims arising out of the DIFC and its operations. In March 2017, the DIFC Courts issued a consultation into the proposed establishment of a specialist technology and construction division (TCD) in the UAE. On 15 August 2017, it was announced that the TCD will be introduced in October of this year.

The draft rule 56 provided as part of the March 2017 consultation stated that a claim may be brought as a TCD claim if it involves issues or questions which are technically complex. It gave a number of examples including:

- building, engineering or other construction disputes;
- claims by and against engineers, architects and/or surveyors relating to the services they provide;
- claims arising out of fires; and
- challenges to decisions of arbitrators in construction and engineering disputes.

The law and procedure of the DIFC Courts are based on the common law tradition and there are obvious parallels with the Technology and Construction Court ("TCC") in England and Wales. In common with the TCC, the draft TCD Rules also provide for early case management conferences to set out procedures and timetables to resolve the issues in dispute as efficiently as possible. Proceedings in the DIFC Courts are usually in English and another feature of the DIFC Courts is the publication of judgments on the court website. This will mean that, as cases are heard, the TCD will establish its own body of construction and engineering case law. Whilst this will take time to develop, it should prove to be of considerable value to all those involved in construction disputes. Understanding how the TCD is likely to resolve a matter should promote dispute resolution and avoidance.

This introduction of a dedicated technology and construction court potentially provides a significant new forum for the resolution of disputes in the Middle East. We say "potentially" because parties will only be attracted to the TCD if the judges who hear the cases have the necessary specialist knowledge and experience themselves. One reason for choosing arbitration is the ability to have a say over the identity and skill set of those appointed to resolve the dispute in question. Further, there will need to be a sufficient number of specialist judges to ensure that the TCD is able to operate with due speed and efficiency. Whilst to some extent this is a question of supply and demand, the track record of the DIFC Courts suggests that both these issues will be successfully addressed. The DIFC appears to have understood this. The new division will be headed by Justice Sir Richard Field, who joined the DIFC Courts in 2015, following his tenure as Judge in Charge of the Commercial Court in London. Parties anywhere in the world will be able to make use of the division's services if both parties to the dispute agree in writing.

"A new arbitration law is on the horizon"

Arbitration remains the preferred choice for the resolution of construction disputes in the MENA region. It will be interesting to see whether parties adopt the TCD in their contracts as the forum for the resolution of any disputes. It may be a slow process. The draft rules provide for the transfer of cases within the DIFC Courts, so the first cases may be ones from the existing court lists. Alternatively, it may be that — at least to begin with — the TCD finds itself dealing with challenges to decisions of arbitrators in construction and engineering disputes. This may all help the TCD to establish a reputation which encourages parties to look to the TCD as an alternative dispute resolution forum.

This is certainly something we will be keeping a careful eye on.

ICC and the ADGM

On 13 September 2017, the Abu Dhabi Global Market (ADGM) organised a conference in Abu Dhabi to introduce the new ICC representative office in the UAE which will service the Middle East and North Africa region. The ICC office aims to be open by early 2018 in the new arbitration hearing centre at the ADGM.

This is a significant development which has been welcomed as enhancing the status of the UAE as the preferred venue for arbitrations seated in the Middle East. According to the ICC, 56 parties from the UAE were involved in cases filed with the ICC Court in 2016, which put the UAE among the top 20 most frequent users of ICC arbitration by nationality[1].

1. https://iccwbo.org/media-wall/news-speeches/icc-court-establish-mena-representative-office-uae/ [Accessed 12 Sept.]

The office will be able to accept registrations of new cases under the ICC Rules, which to begin with will be administered by one of the ICC Court Secretariat's existing case management teams. However, that is intended to change and at the conference Sami Houerbi, a director of the ICC, confirmed that the UAE office was not going to be simply a "satellite to Paris".

The ADGM is the Abu Dhabi equivalent of the DIFC in Dubai and was launched in 2014. Like the DIFC, the ADGM is a separate jurisdiction with its own laws. The ADGM has three independent authorities —the Registration Authority, the Financial Services Regulatory Authority and ADGM Courts — which provide an independent judicial system. Unlike the DIFC Courts, English common law is directly applicable in the ADGM Courts, although the ADGM has not adopted the English Arbitration Act 1996, instead applying the ADGM Arbitration Regulations 2015. This means that in contrast to the DIFC Courts, the ADGM already has its own body of construction case law through existing TCC judgments.

An arbitration law for the UAE?

We also learnt one or two interesting pieces of information at the ADGM/ICC conference. First, it was confirmed that a new Federal Arbitration Law was very close to the statute book, and may well be introduced in the early months of 2018. The law is understood to be based on the UNCITRAL Model Law but understandably will be adapted for use in the UAE.

"The new ICC office in the UAE is not simply going to be a satellite of Paris"

This is another important development for the UAE, and is one which has been under discussion for a very long time. Currently, arbitrations seated in the UAE are governed by a small number of articles, 203 to 218, to be found within the UAE Federal Civil Procedures Code. It is not yet known what the new law will include, although it was suggested at the ADGM/ICC conference that there would no longer be a need to ratify arbitration decisions before bringing enforcement proceedings, which should assist in making the enforcement process more efficient.

Arbitrators and experts in the UAE

It was also suggested at the ADGM/ICC conference that changes might be introduced to Article 257 before the end of the year. At the end of October 2016, Article 257 of the UAE Federal Penal Code No. 3 of 1987 was amended by Federal Decree Law No. 7 of 2016. The UAE Federal Penal Code applies in the DIFC and ADGM just as it does elsewhere throughout the UAE. The amended article reads as follows:

"Anyone who issues a decision, expresses an opinion, submits a report, presents a case or proves an incident in favour of or against a person, in contravention of the requirements of the duty of neutrality and integrity, while acting in his capacity as an arbitrator, expert, translator or fact finder appointed by an administrative or judicial authority or selected by the parties, shall be punished by temporary imprisonment.

The aforesaid categories of persons shall be barred assuming once again the responsibilities with which they were tasked in the first instance, and shall be subject to the provisions of Article 255 of this Law."

The essential change to Article 257 was to extend provisions that have been in existence for many years in relation to court-appointed experts and translators, and to party-appointed experts and arbitrators. Everyone accepts, and more importantly expects, that arbitrators and experts will act fairly and without bias. Arbitrators are typically subject to requirements of independence and impartiality. For example, under the DIAC Rules, Article 9.1 provides that:

"All arbitrators conducting an arbitration under these Rules shall be and remain impartial and independent of the parties; and shall not act as advocates for any party in the arbitration."

Under Article 9.8, arbitrators have a continuing duty to disclose to the DIAC, other members of the Tribunal and the parties any circumstances that may arise during the course of the arbitration that are likely, in the eyes of the parties, to give rise to justifiable doubts as to their independence or impartiality.

Considerable concern was expressed at the impact of this amendment to Article 257. The obvious reason for this is that the new provisions might possibly be misused in order to disrupt arbitration proceedings, and certainly it is easy to see how the new legislation could be used to put what would be illegitimate pressure on experts and arbitrators. There is no doubt that arbitrators and experts are concerned at the prospect of threats or actual vexatious criminal complaints being made if they are sitting in the UAE.

At Fenwick Elliott, we have experienced one expert resigning from their role in an ongoing arbitration, as a consequence of the change. We are aware of other experts and also arbitrators who have resigned from ongoing disputes. We have also noticed when contacting potential arbitrators and experts that some have indicated that they are currently not prepared to accept appointments where the arbitration is based in the UAE. Suggestions have been made that the seat of the arbitration should be moved away from the UAE.

As a consequence, the amendments to Article 257 were seen as a serious blow to the UAE's reputation as a major centre of international arbitration, and a number of arbitrators and experts have resigned and/or indicated that they are not prepared to act in the UAE. It is not yet known what the forthcoming changes to the amended Article 257 might be, it may simply be a form of moratorium, but any change or amendment is likely to be welcomed by the international arbitration community.

We will continue to monitor the position.

The first reported UK BIM case: *Trant v Mott MacDonald*

It seemed as if there might never be a reported case on BIM: perhaps because of the apparent transparency and/or collaboration inherent in BIM? In any event, here it is. We now have the first reported UK BIM case, the BIM highlight of 2017: *Trant Engineering Limited v Mott MacDonald Limited*[1]

"Trant argued that without restoring access to the relevant database they would be forced to start the project over again."

Trant v Mott MacDonald

In this case, the Ministry of Defence employed Trant in May 2016 to provide a new £55m power generation facility at the Mount Pleasant Complex in the Falkland Islands, the Mid-Atlantic Power Project. During the tender period for this project, Trant had engaged Mott MacDonald to provide design consultancy services, including preliminary design, detailed design, design coordination, preparation and implementation of BIM and procurement support, principle designer responsibilities and the development of the DREAM assessment (an environment assessment throughout the design stage).

Mrs Justice O'Farrell described BIM in this way:

"The BIM system is building information modelling. It comprises a software system which is intended to assist the design, preparation and integration of differing designs and different disciplines for the purposes of adequate and efficient planning and management of the design and construction process."

Mott MacDonald intended to implement the use of an engineering project software programme called ProjectWise so as to enable the design teams to manage, share and distribute design data on a single platform.

In July 2016, after Trant had notified Mott MacDonald that they had been given the green light to go ahead with the project, Mott MacDonald emailed to Trant a proposed contract and schedules regarding its scope of services and terms of payment. Trant did not respond to Mott MacDonald's proposed contract, nor did it sign and return the contract.

The relationship between Trant and Mott MacDonald eventually broke down. In April 2016 Mott MacDonald issued an invoice claiming the sum of £475,000. Trant did not pay that invoice and it did not issue a pay less notice. Trant did pay Mott MacDonald £500,000 on account in early 2017. In May 2017 Mott MacDonald issued a further invoice claiming £1,626,000. Trant did not pay that sum and in June 2017 Mott MacDonald denied Trant access to the servers hosting the ProjectWise design data by revoking the passwords that had been issued to Trant in March 2017.

The dispute between the parties concerned what services Mott MacDonald was to provide, the value of those services and what sums of money Mott MacDonald was entitled to receive. In addition, the parties disputed whether a contract existed and whether the terms of any such contract entitled Trant to access the design data Mott MacDonald had prepared which was stored on ProjectWise.

Ultimately Trant applied to the Technology and Construction Court for an interim injunction that Mott MacDonald should provide access to the design data on ProjectWise. Trant also sought an order entitling itself or other third parties in connection with the project to use that design data.

Trant argued that a contract did exist and that the terms of that contract included the obligation for the BIM preparation and implementation. The proposed contract also included an intellectual property provision which granted Trant a licence to use Mott MacDonald's intellectual property in connection with the project. Whilst it was agreed that Trant had not responded to Mott MacDonald's proposed contract in July 2016, Trant considered that it had accepted those terms and conditions by performance in making payments to Mott MacDonald.

Furthermore, Trant argued that Mott MacDonald carried out its services in accordance with the schedules attached to that proposed contract.

Mott MacDonald argued that a contract did not exist. Mott MacDonald made the point that there was no express acceptance of the contract and that the fees payable, contract terms and scope of its services had not been finalised or agreed.

On the documents before it, the Court was not able to determine whether or not a contract existed between the parties – that was an issue to be decided at a full trial. The Court, however, was satisfied that there was a serious case to be tried, that damages would not be an adequate remedy and that there was a high degree of assurance that Trant was entitled to the design data that Mott MacDonald had already carried out and that was sitting in the public database area of ProjectWise. The Court noted that even if there were no contract, Mott MacDonald had already accepted payment on account in respect of the work that it had carried out.

The Court also had to consider the question of the balance of convenience and which course of action was likely to carry the least risk of injustice if it turned out to be wrong.

Trant argued that without restoring access to the relevant database on ProjectWise, the project could not be progressed: Trant

1. [2017] EWHC 2061 (TCC).
2. https://www.thenbs.com/knowledge/what-is-the-common-data-environment-cde

would be forced to start the project over again, losing a year of progress. Trant also argued that there would be little harm to Mott MacDonald in providing access to the design data that it had already provided, particularly in circumstances where Trant was prepared to pay compensation, whether by way of outstanding fees or damages that might subsequently be ordered.

Mrs Justice O'Farrell agreed and considered that the balance of convenience lay firmly in granting the injunction. She therefore ordered Mott MacDonald to make available the design data that had already been procured and completed to date. This would allow Trant to progress the project. Access was permitted only to the public folders which were intended for use by Trant.

The Court also ordered Trant to make payment into Court of £475,000, pending resolution of the dispute. It was of the view that it was fair and reasonable that Trant should put up the money in respect of a sum that was invoiced and in respect of which it had failed to issue a payment notice.

Common Data Environment (CDE)

As the NBS states, the common data environment (CDE) is *"a central repository where construction project information is housed. The contents of the CDE are not limited to assets created in a 'BIM environment' and it will therefore include documentation, graphical model and non-graphical assets…"*[2] All parties have access to the CDE and the coordinator of the CDE provides codes or passwords to the platform, allowing access for those parties entitled to it.

PAS 1192-2 states:

"[the] advantages of adopting such a CDE include:-

- *ownership of information remains with the originator, although it is shared and reused, only the originator shall change it;*
- *shared information reduces the time and cost in producing co-ordinated information;*
- *any number of documents can be generated from different combinations of model files."*

The coordinator of the CDE therefore plays a critical role in terms of hosting and allowing access to the data for the entire project.

As *Trant v Mott MacDonald* reminds us, careful consideration should be given to the identity of the CDE coordinator and the terms on which each participant has access to the data. Depending on the project, taking the approach that the employer should safeguard the progress of the project and control the CDE may well not be the most efficient way of working. Indeed it may not even be possible given the employer's resources and capabilities. In order to avoid bringing the project to a halt when disputes arise, parties may want to put in place, where possible, procedures for alternative access to backup copies or otherwise.

> *"In order to avoid bringing the project to a halt when disputes arise, parties may want to put in place, where possible, procedures for alternative access to backup copies or otherwise."*

Conclusion

The highlight of 2016 was the UK government's implementation and requirement for BIM Level 2 on all of its projects. Whilst the jury is out on the extent that the government's aim has been achieved, there is no doubt that it provided impetus for the increased use and take-up of BIM.

Now in 2017 we see the first BIM issue reaching the courts. Whilst *Trant v Mott MacDonald* is a reminder of the importance of considering which party is best placed to host the common data environment and any issues which this might bring, it also highlights the importance of agreeing fundamental obligations (such as scope of services) at the outset of a project. Contracts such as the new NEC4, released on 22 June 2017, are starting to address certain fundamental BIM issues: liability, use of the model, ownership, information requirements, etc. Parties need to embrace dealing with these issues in their appointment at the outset.

Consideration and agreement of all consultant appointments/obligations in advance of any work being carried out, including the detailed terms, conditions and scope of services regarding BIM, is likely to assist in minimising disputes. In *Trant v Mott MacDonald*, denying access to the CDE was a by-product of a wider dispute regarding scope of services and payment.

Design obligations: fitness for purpose

As **Karen Gidwani** explains, this year brought the conclusion to the long-running case of *MT Højgaard A/S v. E.ON Climate and Renewables UK Robin Rigg and another* ("*MTH v. E.ON*")[1]. Fenwick Elliott acted for MTH.

This was a case concerning the principles of contract interpretation in the context of a fitness for purpose clause. It was finally decided by the Supreme Court in E.ON's favour. This article focusses in more detail on some of the arguments made by MTH and the treatment of those arguments by the Supreme Court.

A key issue to consider with this case is whether there is a trend now by the courts to take a more literalist approach to the interpretation of contracts. This is a trend that has been denied recently by the Supreme Court in *Wood v. Capita Insurance Services Ltd*[2], but in some of the cases that have emerged since *Arnold v. Britton*[3] (decided after the Court of Appeal decision in *MTH v. E.ON*) the court does appear to be more willing to look at the letter of the contract, placing less weight on intention and surrounding circumstances.[4]

1. [2017] UKSC 59
2. [2017 UKSC 24
3. [2015] AC 1619; see for example *Balfour Beatty Regional Construction Ltd v. Grove Developments Ltd* [2016] EWCA Civ 990
4. Principles of construction that emerge from the line of authority starting with ICS v. West Bromwich Building Society [1998] 1 WLR 896 and culminating in Rainy Sky v. Kookmin Bank [2011] 1 WLR 2100.
5. Robert Clay and Nicholas Dennys, QC (eds), *Hudson's Building and Engineering Contracts*, 13th edn, Sweet & Maxwell, 2016, para 3-095(5).
6. See *Re Sigma Corp* [2010] 1 All ER 571 per Lord Collins
7. Lord Sumption, "A Question of Taste: The Supreme Court and the Interpretation of Contracts", Harris Society Annual Lecture, Keble College, Oxford, 8 May 2017.

The background

In 2006, E.ON engaged MTH to design, construct and install 62 foundations for the offshore wind farms at Robin Rigg, in the Solway Firth.

The foundations were designed and constructed as monopiles, with a transition piece that sat over the top of the monopile. The transition piece linked the monopile with the turbine tower. The transition piece was joined to the monopile by a grouted connection. The annulus between the monopile and the transition piece was filled with grout. The load from the transition piece was passed to the monopile not through adhesion of the grout as you might expect but instead by friction.

This type of grouted connection had a long history of usage in the oil and gas industry on jacket structures. However, the monopiles contemplated for offshore wind farms were much larger in diameter than the jacket structures used in oil and gas projects.

Det Norske Veritas ("DNV") is a long-standing maritime organisation based in Norway which, amongst other things, publishes codes and standards for use on offshore projects. These are adopted for use in projects throughout the international shipbuilding and energy industries as codes which provide an acceptable level of safety for owners, investors and contractors. In 2004, DNV issued its first international standard aimed solely at the construction of offshore wind farms, DNV-OS-J101 ("J101"). J101 contained a section on the design and construction of grouted connections and set out a parametric equation to be used to ensure adequate load-bearing capacity of the grouted connection for the relevant construction.

The conditions of MTH's contract with E.ON were loosely based on a FIDIC contract. The conditions included general obligations on the contractor at clause 8.1, and in particular:

"8.1 The Contractor shall, in accordance with this Agreement, design, manufacture, test deliver and install and complete the Works:

. . .

(x) so that each item of Plant and the Works as a whole shall be free from defective workmanship and materials and fit for its purpose as determined in accordance with the Specification using Good Industry Practice."

The contract documents were numerous and diffuse, but it was agreed between the parties that the Technical Requirements, which formed part of the contract, were the Specification. The Technical Requirements ("TR") consisted of over 300 pages and comprised 14 sections, including section 1 (General Description of Works and Scope of Supply) and section 3 (Design Basis).

TR 1.6 set out the Key Functional Requirements of the works including that the works should be designed for a minimum site-specific design life of 20 years without major retrofits or refurbishments. TR 1.6 also stated that works were to be designed and installed in accordance with international codes and standards, and that where the design differed from such standards then the adopted design basis had to be at least the equivalent of the requirements of the designated standard.

TR 3 contained a number of references to a design life of 20 years. TR 3.1 stated that:

"the requirements contained in this section and the environmental conditions given are the MINIMUM requirements of E.ON to be taken into account in the design. It shall be the responsibility of MTH to identify any areas where the works need to be designed to any additional or more rigorous requirements or parameters."

TR 3.2.3 stated that J101 and its normative references applied and that MTH's design was to be in accordance with international and national rules with a stated hierarchy; and J101 was at the top of that hierarchy.

TR 3.2.5 stated that the design and construction of the grouted connections were to be carried out using J101.

The key section of the TR for the purposes of the ligation was the second paragraph of TR 3.2.2.2 (referred to in the Supreme Court as TR 3.2.2.2(ii)). TR 3.2.2.2 stated:

"The detailed design of the foundation structures stall be according to the method of design by direct simulation of the combined load effect of simultaneous load processes (ref: DNV-OS-J101). Such a method is referred to throughout this document as an 'integrated analysis'. The design shall be optimised using an integrated foundation, transition piece, and tower model with combined wind and wave loading . . .

The design of the foundations shall ensure a lifetime of 20 years in every aspect without planned replacement. The choice of structure, materials, corrosion *protection system operation and inspection programme shall be made accordingly."*

By February 2009, MTH had installed all the foundations at Robin Rigg. The foundations were ultimately certified by DNV as compliant with J101.

In September 2009, DNV notified the offshore wind industry that it had discovered an error in J101 which meant that the relevant parametric equation for the design of grouted connections overestimated the axial capacity of the connection. This overestimation was eventually quantified as being by an order of magnitude and part of the problem had been the transfer of knowledge from small diameter piles in oil and gas to large diameter piles used in offshore wind farms. As a result the transition pieces could slip down over the monopiles, leading to instability and eventually failure of the structures. The problem in the equation was the use of the value δ, which imported an incorrect figure for the design calculations.

In June 2010 E.ON notified MTH that it considered the issue with the grouted connections to be a defect that was MTH's responsibility and requested MTH to rectify the defect at its own cost. MTH denied responsibility, saying that the failure of the grouted connections was due to an error in J101, which was not a matter that MTH was responsible for under the contract.

The dispute was heard by the High Court in 2013. E.ON argued that under the contract (in particular reading clause 8.1(x) and TR 3.2.2.2(ii) together) MTH had provided an absolute warranty that the foundations would be fit for the purpose of safely transmitting loads for a 20- year lifetime and that there had been a breach of this warranty. In the alternative, E.ON argued that MTH had been negligent in its design of the grouted connections, and as a result was responsible for the cost of the necessary rectification works.

MTH argued that it was not negligent in its design and that there was no absolute warranty. Fundamental to MTH's position was how the references to J101 and the concept of design life should be considered in construing the contract (a more detailed discussion of which is below).

In a judgment issued in April 2014, the High Court found that MTH had not been negligent in undertaking its design but that on a proper construction of the contract, including clause 8.1 and the TR, there was an absolute warranty that the foundations would have a 20-year lifetime.

MTH appealed the warranty finding to the Court of Appeal. E.ON cross-appealed on certain aspects of the negligence case.

The appeal was heard in February 2015 and the Court of Appeal issued its judgment in April 2015. The Court of Appeal unanimously allowed MTH's appeal and found that on a proper construction of the contract, TR 3.2.2.2(ii) was *"too slender a thread upon which to hang a finding that MTH gave a warranty of 20 years life for the foundations"*. With regard to E.ON's cross-appeal, the Court of Appeal found that MTH had breached the contract in one regard but that this had had no causative effect with regard to the failure of the grouted connections. E.ON was awarded £10 nominal damages.

E.ON appealed the warranty finding to the Supreme Court.

> *"if the Supreme Court has sounded a retreat, it has, I must admit, sounded it in rather muffled tones. It has not actually admitted that earlier decisions went too far..."*

The nature of the absolute warranty

As a matter of jurisprudence, a warranty of the type argued by E.ON cannot be seen to be repugnant in English law. This is because of (a) the overarching principle of freedom of contract; and (b) the body of case law on (i) implied terms (whether in the common law or statute) for suitability of materials, goods and workmanship and fitness for purpose; and (ii) express terms with regard to suitability.

In making its argument on the absolute warranty, E.ON relied in each court on the line of authority that considers express terms for suitability in construction contracts, in particular two Canadian cases: *Steel Company of Canada Ltd v Willand Management Ltd* (1966) ("the Canada Steel case") and *Greater Vancouver Water District v North American Pipe & Steel Ltd* (2012).

In the *Canada Steel* case, a roofing contractor was asked by the employer's representatives for advice on the best method of constructing a particular steel sheet roof. The contractor discussed, amongst other things, a substance called Curadex which was subsequently specified. The contractor used Curadex and gave a five-year warranty that all the work specified would remain weathertight and that all material and workmanship employed were "first class and without defect". The Curadex failed, even though it was properly applied. The Supreme Court of Canada held that, notwithstanding the final selection of Curadex by the Employer, "first class and without defect" referred to the purpose and intended use of the work and therefore the contractor was responsible for the failure of the Curadex.

In the *Greater Vancouver* case, a supplier of materials contracted with an employer to supply pipes for a construction project. The employer specified the type of pipe and how it was to be protectively coated. The supply agreement stated that the contractor warranted that the goods would conform to all applicable specifications and, unless otherwise specified, would be fit for the purpose for which they were to be used. The contractor further warranted that the goods would be free from all defects arising at any time from faulty design in any part of the goods. The pipe was manufactured according to the employer's specification but suffered serious defects due to the coating specified. The supplier was found to be liable as a result of the warranties that had been given. The Court of Appeal of British Columbia held that there was no inconsistency between the obligation to comply with a specification and the obligation arising from a suitability warranty (the "dual obligation" as it was phrased in the *MTH v E.ON* judgments); the warranty was simply an allocation of risk between the parties which could be dealt with at the time of contract negotiation.

This line of authority has led the editors of *Hudson*'s to summarise the position as follows:[5]

"When a Contractor expressly undertakes to carry out work which will perform a certain function in conformity with plans and specifications and it turns out the work so constructed will not perform the function, the express obligation to construct work capable of carrying out the duty in question overrides the obligation to comply with plans and specifications."

What made MTH v E.ON different?

On the face of it, one could surmise that the facts of *MTH v E.ON* simply fit into the *Canada Steel* line of authority. However, if that were true then it is unlikely that the case would have been fought all the way to the Supreme Court.

This was a case that involved express terms. The question was therefore always a matter of construction: did the parties intend to agree the warranty in question or not? This is a question to be judged using the established principles of contract interpretation. This means an objective interpretation, reading the contract as a whole.

In the recent case of *Capita v Wood*, Lord Hodge summarised the law on contractual interpretation as follows:

"10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. . . .

11. . . . Interpretation is, as Lord Clarke stated in Rainy Sky (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (Rainy Sky para 26, citing Mance LJ in Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2) [2001] 2 All ER (Comm) 299 paras 13 and 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: Arnold (paras 20 and 77). Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: Arnold para 77 citing In re Sigma Finance Corpn [2010] 1 All ER 571, para 10 per Lord Mance. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement . . ."

In addressing both text and context, in *MTH v E.ON* there were some compelling points to consider:

- How the obligation was phrased. The warranty referred to fitness for purpose in accordance with the Specification. This took you to the TR, a document which was over 300 pages long, in 14 parts, and from there purpose was to be extracted.

- The purpose that E.ON identified in the TR was a 20 year lifetime. However, the TR contained, mainly, references to a 20 year *design* life.

- The TR also stated that the design must be carried out in accordance with J101.

- It is important to understand design life in the context of an international standard and, in particular, J101. It is a stochastic concept, whole life is not guaranteed. Therefore, MTH argued, the references to design life were references to probable life, not an actual lifetime of 20 years. In this regard TR 3.2.2.2(ii) stood out as only one of a couple of references to actual life rather than design life.

- E.ON's argument essentially rested on one paragraph; this was *"an over-literal interpretation of one provision without regard to the whole"*.[6]

- MTH also argued that the whole life obligation that E.ON sought to impose was inconsistent with the defects liability regime (which limited liability for defects to two years following takeover), the provision in the contract for a conclusive final certificate and the exclusive remedies clause contained in the contract.

E.ON's primary argument was that by clause 8.1(x) the foundations were to be fit for purpose, that such purpose was to be determined by reference to the TR and that TR 3.2.2.2(ii) in particular effectively identified the purpose for which the foundations were required, namely to support the superstructure throughout a lifetime of 20 years.

Part of understanding MTH's case was to understand J101 and how it worked. Relying on the references to "minimum" requirements, E.ON's case was that MTH could and should have done something more ("the extra mile" as it was termed in the Court of Appeal) such that the problem with the grouted connections would be avoided. In the Supreme Court, E.ON argued that such further steps could have included, for example, applying a longer design life, more onerous load factors, a more conservative corrosion allowance or changing the fatigue strength of the grout.

However, MTH argued that this would make no difference when designing using J101. The consequence of a design that is compliant with J101 is one which has a satisfactory nominal annual probability of failure throughout its design life. There is no basis within J101 to change that nominal annual probability of failure. Had MTH tried to apply a longer design life for example, this would have made no difference to the nominal annual probability of failure. Accordingly the design life was never guaranteed.

"it is a disservice to commercial parties to override intention and surrounding circumstances to adhere to words which neither party may have realised the effect of at the time of drafting."

MTH also emphasised the nature of J101 as an international standard. Its objective was to provide internationally accepted levels of safety, to be a contractual reference document and provide a basis for certification and verification, giving confidence to investors, owners and insurance companies in any given project and allowing optimisation of the structural design.

MTH argued that if E.ON was correct in its analysis then the warranty argued for amounted to a warranty of the adequacy of J101. Objectively the parties cannot have intended MTH to take on this risk without express words. This could be tested by looking at extreme weather conditions. The design in J101 is based on the occurrence of certain weather events (in this case a 1 in 50 years storm). If E.ON was correct then the result was that in the event of such a storm in year 17 which caused damage to the foundations, MTH would be responsible for repair.

The Supreme Court decision

The parties went before the Supreme Court in June 2017 and the judgment was issued in August 2017. The judgment was written by Lord Neuberger with whom all the other judges agreed.

Lord Neuberger disagreed with the Court of Appeal and considered that TR 3.2.2.2(ii) was sufficient to impose responsibility for the grouted connections onto MTH.

Before considering the question of liability in detail, Lord Neuberger addressed the argument as to the inconsistency of such a warranty with the defects and liability provisions in the contract. He stated that there was "no answer" to MTH's analysis of the effect of these clauses. Significantly, however, he went on to say that, notwithstanding the tension between these clauses, a warranty that the foundations would last for 20 years was "not so problematical" that it would undermine the conclusion that TR 3.2.2.2(ii) was such a warranty.

Lord Neuberger then went on to consider and comment on a point not raised by either party in their submissions, but raised in oral argument by the panel at the hearing. Lord Neuberger considered there to be a "powerful case" to say that rather than warranting that the foundations had a lifetime of 20 years, TR 3.2.2.2(ii) amounted to an agreement that the design of the foundations was such that they would have a lifetime of 20 years. This would obviate any tension, in Lord Neuberger's view, with the defects and liability clauses.

Lord Neuberger went on to reject MTH's arguments in respect of inconsistency between the warranty and the use of J101 and to find that the situation was akin to the *Canada Steel* line of authority. Lord Neuberger rejected the analysis of the Court of Appeal that TR 3.2.2.2(ii) was too slender a thread on which to hang the warranty.

In coming to this conclusion, Lord Neuberger considered the nature of J101 and accepted that it was stochastic and that, on that basis, the parties knew this and would allocate the risk of the failure between them. In his view, TR 3.2.2.2(ii) allocated this risk to MTH.

Lord Neuberger also found that under the contract, J101 was a minimum standard and therefore MTH was obliged to consider design approaches that differed from the standard and could in fact have adopted a different value for δ.

If one returns to the principles of contract interpretation neatly summarised by Lord Hodge in *Wood v Capita*, the theory is such that if you consider both context (J101 etc.) and text (TR 3.2.2.2(ii)), there was strength in MTH's arguments (as accepted by the Court of Appeal). Notwithstanding, the Supreme Court ruled in favour of the text and in doing so there are some oddities in its reasoning. For example, the consideration of a warranty of the design itself (not an argument raised by either party) is not clear and seems to have been used to validate the finding that the warranty prevailed despite the other contract terms on defects and liability. Further, Lord Neuberger went so far as to say that MTH could have used a different figure for δ but this ignores the fact that in practice it is difficult to see how MTH would have been allowed to deviate from J101 in this way.

"a trend is emerging of a more literal approach to contract interpretation"

One may question whether theory and practice are now diverging and that a trend is emerging of a more literal approach to contract interpretation, even if this has not been expressly stated by the court. This is also reflected, it is submitted, in a paper published by Lord Sumption (one of the judges on the panel in the *MTH v E.ON* case) in May 2017.[7] In that paper he stated:

"One would think that the language that the parties have agreed provided the one sure foundation for a hypothetical reconstruction of their intentions. However, rather more than thirty years ago, the House of Lords embarked upon an ambitious attempt to free the construction of contracts from the shackles of language and replace them with some broader notion of intention. These attempts have for the most part been associated with the towering figure of Lord Hoffmann. More recently, however the Supreme Court has begun to withdraw from the more advanced positions seized during the Hoffmann offensive, to what I see as a more defensible position."

Lord Sumption went on to acknowledge that:

"if the Supreme Court has sounded a retreat, it has, I must admit, sounded it in rather muffled tones. It has not actually admitted that earlier decisions went too far..."

Concluding Thoughts

It is rare for a unanimous Court of Appeal to be overturned. In essence, the obligation imposed on MTH was an obligation that was encapsulated in two or three paragraphs in a lengthy and nuanced contract document, despite inconsistencies with other parts of the contract. Those words were given primacy by the Supreme Court. In his paper, Lord Sumption argues that a loose approach to the construction of commercial documents may have done a disservice to commercial parties by depriving them of the only effective means of making their intentions known. Each case must turn on its facts, but it is equally a disservice to commercial parties to override intention and surrounding circumstances to adhere to words which neither party may have realised the effect of at the time of drafting.

The SCL Delay and Disruption Protocol: a second edition

The Society of Construction Law's (SCL) Delay and Disruption Protocol was first published in 2002. The intention was to provide a scheme whereby delay could be better controlled and managed during the construction process. The SCL has always said that, overall, the Protocol aims to set out and be consistent with good practice (rather than best practice). Following the publication of an intermediary update, known as Rider 1, on 1 July 2015, in February 2017 the Second Edition of the Protocol was released.[1]

"Contracting parties should reach a clear agreement on the type of records to be kept and allocate the necessary resources to meet that agreement."

In updating the Protocol, there were eight specific terms of reference:

(i) whether the expressed preference should remain for time-impact analysis as a programming methodology where the effects of delay events are known;

(ii) the menu and descriptions of delay methodologies for after the event analysis;

(iii) whether the Protocol should identify case law (UK and international) that has referenced the Protocol;

(iv) record keeping;

(v) global claims and concurrent delay;

(vi) approach to consideration of claims (prolongation/disruption – time and money) during currency of project;

(vii) model clauses; and

(viii) disruption.

The Second Edition helpfully builds on the guidance provided in the First Edition and Rider 1. We set out below one or two of the key elements.

Legal status of the Protocol

The Protocol has no force of law (unless it is adopted into a contract, which is a very rare occurrence). However, it has been used as a benchmark for how to approach delay analysis. This is more the case in Australia than the UK. HHJ Toulmin CMG QC in the case of *Mirant Asia-Pacific Construction (Hong Kong) Ltd v Ove Arup and Partners International Ltd & Anr*[2] noted that:

"The first problem with this method is that it is not an accepted method of delay analysis for construction programming practitioners...It is not mentioned in the Protocol as a recognised method of delay analysis."

In 2017, in the Queensland case of *Santos Ltd v Fluor Australia Pty Ltd*[3], the extent of the disruption was calculated using the measured mile approach which Flanagan J noted by reference to the brand new Second Edition of the Protocol as an accepted method of calculating lost productivity.

Forms of delay analysis

The Second Edition of the Protocol makes it clear that prompt, indeed contemporary, evaluation is to be preferred. There is a new Core Principle 4 which notes as follows:

"4 Do not 'wait and see' regarding impact of delay events (contemporary analysis)

The parties should attempt as far as possible to deal with the time impacts of Employer Risk Events as the work proceeds (both in terms of EOT and compensation). Applications for an EOT should be made and dealt with as close in time as possible to the delay event that gives rise to the application..."

If this is not possible, the Protocol also considers the most appropriate form of delay analysis after the event. Here, the original Protocol recommended that one particular form of delay analysis, namely the time-impact form of delay analysis methodology, be used wherever the circumstances permitted, *"both for prospective and (where the necessary information is available) retrospective delay analysis"*. This was not universally supported and was one of the main reasons for the review of the existing Protocol. One particular issue with the time-impact analysis can be its reliance upon theoretical modelling and not the actual sequence of events. At the same time, the original Protocol made no mention of the *"windows"* form of delay analysis which has certainly become one of the most used forms of delay analysis, arguably because it is considered to be one of the most reliable.

This omission has now been rectified and under the Second Edition of the Protocol, no one form of delay analysis is preferred, where that analysis is carried out some time after the delay event or its effect. Instead, the Second Edition of the Protocol sets out the factors that need to be taken into account in selecting the most appropriate form of delay analysis as well as providing a helpful explanation of many of the delay analysis methodologies currently in common use. It begins with the prudent comment that:

"Irrespective of which method of delay analysis is deployed, there is an overriding objective of ensuring that the conclusions derived from that analysis are sound from a common sense perspective."

The Protocol then lists a number of criteria which should help determine the choice of the appropriate method of delay analysis. These include: the Contract terms, the circumstances of the project, the nature of the relevant or causative events, the claim or dispute, the value of the project, the time available and the available project records, as well as the need to ensure that a proportionate approach is taken. There is an emphasis on what actually happened and a recognition that a theoretical delay analysis which is divorced from the facts and common sense can be unhelpful in ascertaining whether in fact the relevant delay event caused critical delay to the

1. For further details, please go to the SCL website: https://www.scl.org.uk/resources/delay-disruption-protocol
2. [2007] EWHC 918 (TCC)
3. [2017] QSC 153. Thereby following similar judicial acceptance of the Protocol as a in the cases of *620 Collins Street Pty Ltd v Abigroup Contractors Pty Ltd (No 1) [2006] VSC 490* and *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7) [2012] SASC 49*
4. The example often given, and indeed given in the Protocol, is the commencement date, where, for example, the Employer fails to give access to the site, but the Contractor has no resources mobilised to carry out any work.

completion date and the amount of that delay. The key to establishing the critical path to completion is often the practical analysis of the relevant facts including production and/or resource data, not what the software says.

Concurrent delay

The 2016 pre-release version of the FIDIC Yellow Book included at sub-clause 8.5 the following new provision:

"If a delay caused by a matter which is the Employer's responsibility is concurrent with a delay caused by a matter which is the Contractor's responsibility, the Contractor's entitlement to EOT shall be assessed in accordance with the rules and procedures stated in the Particular Conditions (if not stated, as appropriate taking due regard of all relevant circumstances)."

The SCL say that the approach to concurrent delay in the original Protocol has been amended in the Second Edition to reflect recent case law. The Second Edition defines concurrent delay in this way:

"True concurrent delay is the occurrence of two or more delay events at the same time, one an Employer Risk Event, the other a Contractor Risk Event, and the effects of which are felt at the same time. For concurrent delay to exist, each of the Employer Risk Event and the Contractor Risk Event must be an effective cause of Delay to Completion (i.e. the delays must both affect the critical path). Where Contractor Delay to Completion occurs or has an effect concurrently with Employer Delay to Completion, the Contractor's concurrent delay should not reduce any EOT due."

Where concurrent delay occurs, then any Contractor Delay should not reduce the amount of an extension of time that may be due to the Contractor as a result of the Employer Delay. The Second Edition of the Protocol recognises that true concurrency is rare[4], and this definition is clearly based on the English approach where concurrency is said to arise only where there are events that are equally causative of critical delay. In other words, if one of the events was the dominant cause of delay, then the other would not be truly concurrent because it would not be an effective cause of delay.

When discussing contemporary delay analysis, the Second Edition of the Protocol also notes that, where Employer Risk Events and Contractor Risk Events occur sequentially but have concurrent effects, the delay analysis should determine whether there is concurrent delay and, if so, whether an extension of time is due for the period of that concurrency.

The Second Edition of the Protocol gives the following example. A Contractor Risk Event will result in five weeks' Contractor Delay to Completion, delaying the contract completion date from 21 January to 25 February. Independently and a few weeks later, a variation is instructed on behalf of the Employer which, in the absence of the preceding Contractor Delay to Completion, would result in Employer Delay to Completion from 1 February to 14 February. The Protocol takes the position that the Employer Delay will not result in the works being completed later than would otherwise have been the case because the works were already going to be delayed by a greater period because of the Contractor Delay to Completion. The only effective cause of the Delay to Completion is the Contractor Risk Event.

The approach to notices

We have previously discussed in *IQ* the importance of complying with project notice procedures and time bars. This is, unsurprisingly, endorsed by Rider 1 which stresses that:

"The parties and the CA should comply with the contractual procedural requirements relating to notices, particulars, substantiation and assessment in relation to delay events..."

This will become ever more important under the new FIDIC Forms which have an increased emphasis on time limits for notices and the provision of further particulars.

Global claims

The Second Edition says this of global claims:

"The not uncommon practice of contractors making composite or global claims without attempting to substantiate cause and effect is discouraged by the Protocol, despite an apparent trend for the courts to take a more lenient approach when considering global claims."

Again, the reference to courts really means "English Courts". The Second Edition continues that Contractors should be aware that there is a risk that a global claim will fail entirely if any material part of the global loss can be shown to have been caused by a factor or factors for which the Employer bears no responsibility. The Contractor must try to provide adequate records to enable the Engineer or other adjudicator to establish a causal link between the Employer's Risk Event and any resultant costs or delay.

Records

This further confirms the importance of maintaining records. The new FIDIC Form will impose a greater burden on all parties. Both the Employer and Contractor must keep such contemporary records as may be necessary to substantiate a Claim. Sub-clause 20.2 notes that:

"'contemporary records' means records that are prepared or generated at the same time, or immediately after, the event or circumstance giving rise to the Claim."

Appendix B of the Protocol lists record types relevant to delay and disruption. Further, Core Principle 1 of the Second Edition notes that:

"Contracting parties should reach a clear agreement on the type of records to be kept and allocate the necessary resources to meet that agreement."

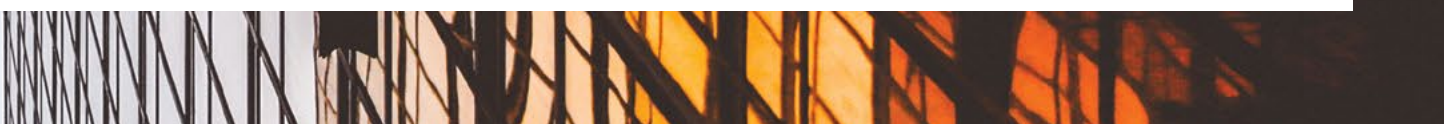
Under the new FIDIC Form, the Engineer may monitor the record keeping and/or instruct the Contractor to keep additional contemporary records. Here the Protocol provides guidelines on the keeping of records and advises that in order to avoid disputes, where practicable, records should be signed by representatives of the Employer and Contractor. The Protocol recognises that there is a cost here (the benefit being that better records mean, in theory, fewer disputes) and specifically notes that:

"Good record keeping requires an investment of time and cost, and the commitment of staff resources by all project participants. It is therefore recommended that, prior to preparing the tender documents, the Employer considers its requirements of the Contractor in relation to record keeping and includes these within the tender documents."

Whether that becomes a standard feature, remains to be seen.

Conclusion

As noted above, the Second Edition of the Protocol has no legal effect (and so is not binding on any Tribunal) unless it is specifically incorporated into a contract. It has also primarily been prepared from a common law perspective. Of course, its fundamental starting point, namely *"that transparency of information and methodology is central to both dispute prevention and dispute resolution"*, is universal. Where, however, the Protocol continues to have value and an increasing influence is by providing guidance as to good (and even best) practice.



Case law update

Our usual case round-up comes from two different sources. As always we highlight here some of the more important cases which may not be covered in detail elsewhere in the *Review*. First, there is the *Construction Industry Law Letter* (CILL), edited by Fenwick Elliott's Karen Gidwani. CILL is published by Informa Professional. For further information on subscribing to the *Construction Industry Law Letter,* please contact Kate Clifton by telephone on +44 (0)20 7017 7974 or by email: kate.clifton@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. If you would like to receive a copy every month, please contact Jeremy Glover or sign up online http://www.fenwickelliott.com/research-insight/newsletters/dispatch. We begin by setting out some of the most important adjudication cases as taken from *Dispatch*.

Adjudication: cases from *Dispatch*

Follow-on adjudications and severance

Amey Wye Valley v The County of Herefordshire District Council

Amey entered into a contract, called a Service Delivery Agreement ("SDA"), for repair and maintenance works to the highways and roads in Herefordshire. Amey agreed to provide a range of services to Herefordshire District Council ("HDC"), broadly comprising highway maintenance and other construction and related works. The period for these services was to be ten years, ending on 31 August 2013. The SDA expressly incorporated Option A of the ECC (2nd edition 1995), together with Contract Data, as adjusted by the items listed in Schedule 5 ("the NEC Conditions").

During 2005, the parties fell into a dispute concerning how to calculate the price adjustment for inflation under the SDA. That dispute was resolved in a letter dated 21 July 2005. Part of that agreement related to the way in which the price increase mechanism was to apply over the life of the contract. This became known as "VOP3".

This case concerned two adjudications, and the relevant adjustment for inflation purposes of sums paid to one party by the other, for works to the highways and roads of Herefordshire over a ten-year period between 2003 and 2013. The first adjudication was conducted in 2013; the second in 2015. Under the NEC form, if a party does not serve a notice of dissatisfaction within a set time period, the adjudication decision becomes final and binding. Neither Amey nor HDC challenged the first decision. The first adjudicator was asked to decide (amongst other things) what VOP3 actually meant; the second adjudication was concerned with putting money figures to the first decision.

The financial consequences of the second decision were that Amey was ordered to repay to HDC some £9.5 million, being the sum by which HDC were said to have overpaid Amey for works during the contract period.

It was agreed that the second adjudicator had made an error in the spreadsheet he used to arrive at the final figure for repayment contained in his decision. However, there was no agreement about the effect of that error. Amey said it was £2.5 million, HDC £1.9 million. Mr Justice Fraser was clear that no criticism could be levelled at the second adjudicator. Adjudicators work under very considerable time pressure:

"Errors of fine detail are part of the process effectively accepted by Parliament as a consequence of the process of adjudication. The 'right' answer is secondary to the parties having a rapid answer."

That was especially the case here, where both parties made admitted errors themselves in the material and calculations that they submitted. The Judge also noted that the second adjudicator correctly found that the findings in the first adjudication were binding on the parties and that he was required to consider the parties' respective positions in relation to the issues between them in the context that those findings were binding.

Amey's position was that the second adjudicator did not follow those findings and so acted without jurisdiction. In doing so, Amey to some degree raised the "same dispute" issue, namely the principle that an adjudicator's decision will not be enforceable to the extent that they purport to decide again that which has already been decided. That was not what had happened here.

Further, the Judge made it clear that the court would not embark upon a detailed analysis of how any adjudicator has made detailed calculations or findings of fact leading to their ultimate decision. Such an exercise is not the function of the court on enforcement proceedings. Here, the way in which the adjudicator performed his calculations was not immediately determinative of whether he had jurisdiction to perform those calculations. Providing that the adjudicator was resolving the dispute referred to him, and not re-deciding something that was not before him, then he had jurisdiction to determine that dispute, whether he made mistakes in doing so or otherwise.

The first adjudicator decided to what extent, and how, VOP3 was to be considered (including whether it was to be binding); the second adjudicator decided the financial consequences of that. His decision was enforceable. In coming to a decision, it is necessary for the court to consider the terms, scope and extent of the dispute previously referred, and the terms, scope and extent of the earlier decision, not the accuracy of an adjudicator's arithmetic.

As to severance, Amey said that the decision should not be enforced in the full amount because part of the amount of repayment calculated involved an error in one part of the spreadsheet. Mr Justice Fraser said that such an approach would be contrary to the law regarding enforcement of adjudication decisions. It would amount to a correction of an error on the face of the decision to arrive at a different outcome. A decision on a single dispute is either valid and enforceable, or invalid and unenforceable. This was a single dispute, namely what was the financial effect of the inflation adjustment necessary as a result of VOP3. The error made in one part of the calculation cannot be severed. This would, in the Judge's view, amount to a correction of a single mistake of fact. The Judge concluded:

"An error in the arithmetic does not render the decision unenforceable."

Costs
WES Futures Ltd v Allen Wilson Construction Ltd

There were a series of disputes (including adjudication) between the parties. In February 2016, WES made a Part 36 offer, which included the statement that if:

"... this offer is accepted at a point which is more than 21 days from the date of this offer, you will be liable for all our client's legal costs incurred in this case".

As Mr Justice Coulson said, "out of the blue", on 4 November 2016, that offer was accepted. Both sides expressly agreed that as a result there was a binding compromise between the parties. However, there was a dispute as to whether that agreement included the cost of two adjudications in 2015 and 2016. The Judge noted that the approach to disputes under Part 36 was confirmed by the decision in *Dutton & Others v Minards & Others* [2015] EWCA (Civ) 984, where LJ Lewison said that:

"If an offer is expressed to be a part 36 offer it should be interpreted if possible to make it effective as what it purports to be, rather than ineffective".

The key to the dispute here was whether the wording of the Part 36 offer, which included the "costs of the proceedings", included not only the cost of the court proceedings but the costs of the adjudications as well.

Mr Coulson was very clear that it did not. As a starting point, the Judge did not think it would make any difference if the offer was not a Part 36 offer. The offer referred to "all [Futures'] legal costs incurred in this case" but that, in the view of the Judge, meant the imminent court proceedings. The offer letter made no reference to the costs of adjudication proceedings, either as costs incurred in the past or to be incurred in the future - something which the Judge considered to be "unsurprising" because the offer envisaged that there would be court proceedings instead.

The Judge also referred to two wider principles which supported this point of view. The first was that in "an ordinary case", a party seeking to recover a sum awarded by an adjudicator is not entitled to (and cannot seek) the legal costs it incurred in the adjudication itself. That is because, pursuant to the Housing Grants Act, as amended, costs incurred in adjudications are not recoverable:

"... if a successful party cannot recover its costs in the adjudication itself, it cannot recover them in enforcement proceedings either".

Second, adjudication is similar to mediation. The Judge referred to the case of *Lobster Group Ltd v Heidelberg Graphic Equipment Ltd* (*Dispatch* Issue 94), where it was held that the costs of a pre-action mediation could not subsequently be recovered as costs of the proceedings because the parties had agreed that they would each bear their own costs of that mediation. That was "effectively achieving", by an agreement to mediate what the 1996 Act requires for adjudication. The costs are the subject of a different regime and are not recoverable.

Whilst the phrase "costs of proceedings" includes "recoverable pre-action costs" this will not normally include the costs of separate, stand-alone ADR proceedings. Here, the Judge included adjudication within the definition of ADR noting that similar principles should therefore apply to the costs of adjudication as they do in mediation: both parties bear their own costs. Accordingly, Futures were not entitled to recover from Wilson the costs of the adjudications.

Claims consultants' costs
Octoesse LLP v Trak Special Projects Ltd

Following the successful enforcement of an adjudicator's decision, Trak asked for its costs to be summarily assessed. These costs included the costs incurred by a firm of construction claims consultants. The costs covered consideration of the claim and evidence; preparation of the defence and a witness statement; instructions to counsel; liaison with the court; and attendance at court. Trak said that they were acting as a litigant in person who through CPR Part 46.5 can recover costs *"which would have been allowed if the work had been done or the disbursements had been made by a legal representative on the litigant in person's behalf".*

Octoesse said that following the case of *Agassi v Robinson* [2005] EWCA Civ 1507, the consultants' costs were not recoverable. They were neither work done by the litigant-inperson nor disbursements which would have been allowed if made by a legal representative. Mrs Justice Jefford disagreed noting that where a litigant-in-person seeks to recover the costs of a consultant's assistance, the relevant question is whether, in the particular instance, the consultant's costs are recoverable as a disbursement. That question is answered by asking whether those costs would have been recoverable as a disbursement if it had been made by a solicitor. Costs would be recoverable as a disbursement by solicitors if the work was such as would not normally be done by solicitors.

The Judge further observed that there were distinct features of adjudication and adjudication enforcement proceedings which can and should be taken into account in considering what disbursements would be recoverable if made by solicitors and which would, in consequence, also be recoverable by a litigant in person. These were as follows:

(i) In the adjudication process itself, parties are often represented by consultants. If solicitors are instructed on the enforcement proceedings, particularly where they have not acted in the adjudication, it would, therefore, be common practice, and in many cases necessary, for them to seek the assistance of the consultants involved in the adjudication;

(ii) Given the accelerated timetable used by the TCC in adjudication enforcement cases, it may be necessary for solicitors, for example when drafting witness evidence, to seek the assistance of those who represented the parties in the adjudication.

The Judge also noted that there had been a number of cases where the costs of claims consultants had been recovered when they provided services in connection with an adjudication enforcement, including *NAP Anglia Ltd v Sun-Land Development Co. Ltd* [2012] EWHC 51, where Mr Justice Edwards-Stuart said:

"In my experience it is not that common for solicitors to be instructed for the first time in a dispute following the conclusion of an adjudication and solely for the purpose of taking proceedings to enforce the adjudicator's decision. Accordingly, this is a factor which must be borne in mind when considering the reasonableness of the costs in question. I do not accept the submission...that such an arrangement inevitably involves duplication...On the contrary, I regard it as fairly self-evident that it would be more economical, in terms of both time and money, for NAP''s solicitors to take advantage of HCC''s already acquired knowledge of the documents and the issues in the adjudication, rather than read themselves into the documents from scratch. HCC will (or should) have had the facts at their fingertips and been familiar with the documentation produced in the adjudication, as well as being broadly aware of what other documents might be in the possession of NAP.

24. Nevertheless, I do not consider that the court can adopt a blanket approach to the assessment of the costs claimed in respect of HCC: they need to be looked at on an item by item basis. It is of course obvious that NAP should not be able to recover costs incurred by HCC unless those costs were directly attributable to the conduct of this application and are not greater in amount and [sic] the costs that would have been incurred by the solicitors if they had done the relevant work themselves.

Mrs Justice Jefford concluded that costs incurred by claims consultants assisting a litigant in person will usually be recoverable on adjudication enforcement proceedings, assuming that those consultants acted in the adjudication. They would be familiar with the factual background and the conduct of the adjudication. The Judge dealt with the costs claimed as follows:

" (i) I do not consider that the costs of liaising with the Court and preparing the schedule of costs (a total of £300) are recoverable as this is very much work which solicitors normally do and where they would have no need to rely on claims consultants.

(ii) I reduce the time spent instructing and liaising with counsel by 50%, giving a sum of £225. I do so recognising that, if solicitors were instructed, they might well seek the assistance of claims consultants in liaising with counsel but it is unlikely they would wholly rely on them.

(iii) Further, the estimated attendance at Court was 4 hours plus 2 hours travelling at the full hourly rate. The hearing lasted 2.5 hours and I would not normally expect a full hourly rate to be claimed for travelling. I reduce this amount to £525."

The right to deduct LADs
Octoesse LLP v Trak Special Projects Ltd

This case revolved around the meaning of clauses 2.22 and 2.23 of the standard form JCT Intermediate Building Contract (IC 2011). Clause 2.22 provides as follows:

"If the Contractor fails to complete the Works or a Section by the relevant Completion Date, the Architect/Contract Administrator shall issue a certificate to that effect. If an extension of time is made after the issue of such a certificate, the extension shall cancel that certificate and the Architect/Contract Administrator shall where necessary issue a further certificate."

On 3 October 2014, the CA issued a certificate of non-completion. The Works were certified as practically complete on 13 February 2015. On 3 July 2015 Trak submitted a claim for an 18-week extension of time. By letter dated 9 November 2015, the CA granted Trak an extension of time of 9.5 weeks. No further certificate of non-completion was issued. Octoesse gave notice of their intention to deduct and did deduct liquidated damages from the sum stated to be due in the final certificate.

In the adjudication, and in Part 8 proceedings before the TCC, Trak argued that Octoesse was not entitled to make that deduction. Under clause 2.23.1, it was an express condition of Octoesse's entitlement to give notice under clause 2.23.2, and to deduct liquidated damages, that the CA had issued a certificate under clause 2.22. That condition had not been met. The effect of clause 2.22 was that the certificate of non-completion issued on 3 October 2014 had been cancelled when a further extension of time had been made in November 2015. As no further certificate had been issued, the LADs could not be validly deducted. The adjudicator and Mrs Justice Jefford agreed.

Octoesse argued that the purpose of clause 2.22 was to put the Contractor on notice that the Employer may levy liquidated damages. The argument emphasised the words "where necessary" in clause 2.22. Octoesse argued that it was not necessary here for the CA to issue a further notice of non-completion because practical completion had already been achieved before an extension of time was made. Trak was already fully aware of its potential liability for liquidated damages. However, the Judge felt that this failed to give effect to the mandatory obligations imposed by the use of the word "shall" in clause 2.22. Awarding an extension of time had the effect of cancelling any certificate already issued and so the CA would have to issue a further certificate, where necessary, regardless of whether practical completion had been granted or not.

As for clause 2.23, if an Employer has given notice of his intention to deduct liquidated damages, but an extension of time is then made and a further certificate of non-completion issued, then the Employer does not need to give notice of his intention again. There is a clear distinction between an Employer's notice under clause 2.23.1.2 and a certificate of non-completion. Here, in light of the extension of time given in November 2015, the certificate of non-completion was cancelled; no further certificate was issued and, in the absence of such a certificate, the condition in clause 2.23.1.1 was not fulfilled. Therefore Octoesse was not entitled to deduct liquidated damages.

Pay Less Notices
Surrey and Sussex Healthcare NHS Trust v Logan Construction (South East) Ltd

Here the Trust sought a declaration about the validity or otherwise of an alleged Interim Payment and Pay Less Notice. An adjudicator had decided that, as the Interim Payment Notice was valid but the Pay Less Notice was not, the Trust was liable to pay Logan just over £1.1 million.

Practical completion was certified on 25 August 2015. Although Logan made no applications for interim payment, Interim Certificates were issued every two months as required by the Contract. The Certificate of Making Good Defects was issued on 24 August 2016 triggering the 28-day period for the issue of the Final Certificate, which had to be issued by 21 September 2016. A final account meeting was arranged to take place on 21 September 2016. Shortly before midnight on 20 September 2016 Logan sent an email attaching a Payment Notice. The Trust treated the document as being Logan's position on the final account valuation for the forthcoming meeting. During the meeting, the final account valuation was discussed at high level. At no time was there any discussion about the issuing of an Interim Certificate or that the document issued the night before was intended to be an Interim Payment Notice. No agreement was reached.

The Final Certificate was issued. The covering email noted that the Payment Notice was "out of date and void", but that "in any event, the details stated in the Final Certificate are the same as would have been stated in any final Interim Certificate which may have been issued". A proposal was made that there should be a standstill agreement whilst the parties attempted to settle their differences through mediation.

If Logan's Interim Payment Notice was validly issued on 20 September 2016, it was common ground that the expiry date for service of a Pay Less Notice was 24 September 2016. On 28 September 2016, Logan noted that no Pay Less Notice had been issued. On 19 October 2016, Logan issued a Notice of Adjudication claiming payment of the sum set out in the Interim Payment Notice.

The Trust said that the court should construe the purported Interim Payment Notice against the factual background. The parties were trying to resolve the final account and, save for what was apparent on the face of the document itself, there was no reference to or prior discussion about Logan seeking an interim payment. The email was sent by Logan without drawing attention to the interim payment regime. Instead Logan diverted the Trust's attention towards the final account meeting. Logan waited until expiry of the time for service of a Pay Less Notice before making its position clear. A contractor had to be open and transparent about its intentions. The notice must be unambiguous. Here the true intention had been buried away.

Logan said that the Interim Payment Notice was clear on its face. It identified itself as an Interim Payment Notice and made particular reference to clause 4.10. The Notice made reference to Valuation No. 24 because it was the 24th payment cycle. Whilst the covering email which enclosed the Notice was not as clear as it might have been, there was sufficient clarity from the Interim Payment Notice itself.

All that had happened here was that the Contract Administrator had taken his eye off the ball, and not having read the Contract properly, was not aware that Logan was entitled to issue an Interim Payment Notice when it did. The factual background relied on by the Trust was wholly irrelevant to the question of the validity of the notice. All that mattered was whether Logan had issued a notice which was in substance, form and intent an Interim Payment Notice. If so, then it qualified as such.

Deputy Judge Nissen QC said that there was a "high threshold" to be met by any contractor who seeks to take advantage of the provisions whereby a sum automatically becomes payable if a timely employer's notice is not served. Therefore, it was relevant to consider the background matters. Here it was relevant that the present dispute would never have arisen had a timely Interim Certificate been issued. It was no answer to say by way of mitigation that the parties were operating the final account process and that this overtook the interim payment regime. The Contract provided for and permitted the continued receipt of interim payments until the issue of the Final Certificate. The attachment to the email was an Interim Payment Notice in substance, form and intent. Viewed on its face, the Interim Payment Notice was both clear and free from ambiguity. The document said, in terms, that it was an Interim Payment Notice. The Trust was therefore provided with reasonable notice as to its content.

The Judge then considered whether the Trust's email attaching the Final Certificate could be considered to be a valid Pay Less Notice. The valuation of Logan's work was set out in some detail in the Final Certificate and accompanying breakdown. This was the only sum to which Logan was entitled, whether by way of final account or interim payment. Thus broadly, the email and attachments were responsive to the Interim Payment Notice.

Looked at another way, the documents provided an adequate agenda for an adjudication about the true value of the Works on an interim basis for the purposes of Valuation No. 24. There was a detailed breakdown of the Trust's position. There was nothing more that Logan needed to know. The Judge saw no difficulty with the notion of serving a contingent Pay Less Notice. Here the Contract Administrator was simply saying that, if he was wrong about the invalidity of the Interim Payment Notice, the Final Certificate reflected everything he wanted to say in response to it. The Trust had therefore provided a valid Pay Less Notice.

Payment Notices
Trilogy Services Scotland v Windsor Residential

This is a Scottish payment case. In November 2014, Windsor entered into a fixed price "construction contract" (as defined by the HGCRA), the terms of which were set out on one sheet of A4 paper. The Scheme therefore applied. The contract provided for payment by four separate instalments. There was no dispute that Trilogy completed the works required of them in relation to the first three instalments and that they were paid for those works. A dispute arose over whether Trilogy had completed the fourth. Trilogy said they had and in July 2015 made an application for payment.

No s. 110A(3) notice was given by Windsor specifying the sum that they considered to be due; the work to which the payment related; or the basis upon which that sum was calculated. This failure meant that it was open to Trilogy, to give Windsor such a notice. That notice could be given at any time after the date on which the payer ought to have given notice. On 9 October 2015, demands were sent by Trilogy's solicitors to Windsor. The letter was accompanied by a copy of the outstanding invoice dated 16 July 2015. It was asserted that payment was due and that previous demands for payment had been ignored. The letter ended with a threat to raise proceedings for recovery in the absence of payment. No payment was made and proceedings were commenced. The issue for the court was whether the solicitor's letter could constitute a notice under s. 110A(3) of the HGCRA. A notice complies with s. 110A(3) if it specifies the sum that the payee considers to be, or to have been, due at the payment due date in respect of the payment; and the basis upon which that sum is calculated. The solicitor's letter complied with all this.

However, Windsor argued that a party serving such a notice had to make it clear that it was applying for payment. A considerable degree of clarity was needed that an application was a notice under HGCRA before it could legally be one. In short, it could not have been the intention of the author of the letters that they be notices under the HGCRA.

Here the Sheriff Appeal Court considered that Trilogy were not required to demonstrate that it was their intention to give notice under the HGCRA. The court was referred to the English decision of *Henia Investments Inc v Beck Interiors Ltd* (Issue 183) where Mr Justice Akenhead said that it must be clear that, in substance, form and intent, what was being given was a compliant notice. The Scottish court noted that it was not surprising that the claims in the *Henia* case failed. Henia had sought to take advantage of "what could be described as a lack of clarity in their own documentation." That was not the position here.

Trilogy's position was that they had completed the works necessary to entitle them to the fourth instalment and accordingly they had made an application for payment of that amount under the contract. No notice was given and the solicitor's letter complied in form and substance with the requirements of the HGCRA. It probably assisted Trilogy's case that the letter had appended to it a copy of the original application. There could be no doubt about their intentions. They wanted to be paid.

Put another way, what would Windsor have thought on receiving the letter? That Trilogy wanted to be paid the sums requested in its application for payment sent some three months previously. The Sheriff Appeal Court, looking more at the substance of the documents than their form, duly held that the solicitor's letter was not a letter written as a notice which was said to be in accordance with s. 110A(3) of the HGCRA, but its content meant that it was a valid notice under s. 110A(3) of the HGCRA.

The sting in the tail for Trilogy was that this dispute, over payment of £14,000, had taken some 18 months to reach a conclusion, not least because the apparent lack of clarity in Trilogy's notices, had given Windsor something to argue about.

Service of notices
Kersfield Developments (Bridge Road) Ltd v Bray and Slaughter Ltd

This was an adjudication enforcement case. Amongst other issues, Kersfield said that Bray was not entitled to the £1.1 million awarded by the adjudicator because Kersfield had issued a valid pay less notice. This issue raised an important point about the service of any payment notice.

Kersfield's pay less notice was served by email and post. The email was sent, on time, at 9.50 p.m., on Friday 12 August 2016. A letter was sent on the same day. Clause 1.78.3A of the contract said that a notice may be sent electronically provided a copy was also sent on the same day to the addressee by pre-paid first class post. So Kersfield complied with that. However the contract also said that any notice so served would take effect on the next business day, here 15 August 2016.

The pay less notice was due by 14 August 2016. Mrs Justice O'Farrell noted that the contract allowed the parties the convenience of service by email whilst at the same time providing certainty as to the date on which such notice takes effect. That was *"reasonable and sensible"*. The pay less notice was therefore late.

Preserving the right to make a jurisdiction challenge
Dawnus Construction Holdings Ltd v Marsh Life Ltd

Marsh had engaged Dawnus to design and build a hotel plus retail and restaurant units in Poole. The project fell into delay and the contract was terminated. A number of disputes arose and there had been four adjudications. This adjudication enforcement case concerned the fourth, a referral by Marsh seeking a valuation of the account upon termination. Although it was Marsh who had made the adjudication referral, the Adjudicator held in favour of Dawnus. The total amount said by the Adjudicator to be due to Dawnus came to just under £1.5 million (inclusive of VAT and interest).

Marsh said there had been a breach of natural justice in that the Adjudicator had failed to consider and deal with various defences that they had put forward. However, as a starting point, HHJ McKenna had to consider whether Marsh, by inviting the Adjudicator to correct errors in the Decision under the slip rule, was accepting the validity of the Decision. By doing this without a general reservation of rights, Dawnus said that Marsh was electing to forego any opportunity it might otherwise have had to challenge the Decision.

Following the issue of the Decision, both parties had written to the Adjudicator raising a number of slips, Dawnus raising mathematical errors but Marsh raised more substantive issues, namely alleged breaches of natural justice going to whether or not the Adjudicator had considered the arguments raised by Marsh during the adjudication. Marsh said that the failure by the Adjudicator to have considered the arguments, must have been a slip. The Adjudicator revised the quantum of his Decision but rejected the more substantial points raised.

HHJ McKenna explained that the doctrine of election prevents a party from "approbating and reprobating" or "blowing hot and cold" in relation to an adjudicator's award. Here Marsh could have, but did not, expressly reserve its right to pursue a claim of breach of the rules of natural justice when inviting the Adjudicator to make corrections under the slip rule. By not doing this, when inviting the Adjudicator to exercise his powers under the slip rule, Marsh had waived or elected to abandon its right to challenge enforcement of the Decision since it had thereby elected to treat the Decision as valid:

"Assuming that good grounds exist on which a decision may be subject to objection, in the absence of an express reservation of rights, either the whole of the relevant decision must be accepted or the whole of it must be contested."

Marsh was therefore precluded from challenging the Decision in the enforcement proceedings. However, in case he was wrong, the Judge did go on to review the natural justice challenge. Before doing so, HHJ McKenna reminded the parties that for a breach of natural justice to be a bar to enforcement, the breach must be plain, significant and causative of prejudice.

Here, the Judge accepted that the Adjudicator may have misunderstood the nature of certain of Marsh's arguments. However, the Judge then reviewed in general terms what it was the Adjudicator had been asked to do. Here, the Adjudicator was specifically asked to determine the issue of loss and expense and that was what he did. Marsh had argued that contractually there was no entitlement to loss and expense and the Adjudicator had rejected that argument. In doing so, the Adjudicator accepted Dawnus' contractual arguments about which were the relevant events that should be taken into account. He had therefore addressed the question that had been put to him. The Judge concluded that Dawnus:

"may not like that conclusion but to my mind it is stuck with it."

Other cases: *Construction Industry Law Letter*

Expert opinion evidence – disclosure of instructions

Allen Tod Architecture Ltd (in liquidation) v Capita Property and Infrastructure Ltd

Technology and Construction Court;
Before His Honour Judge David Grant;
judgment delivered 26 August 2016

The facts

In 2005, Allen Tod Architecture Ltd ('the Claimant') were engaged as architect to provide a one-stop construction management to Barnsley MBC in respect of a project to renovate Barnsley town hall. The Claimant retained Capita Property and Infrastructure Ltd ('the Defendant) to provide it with structural engineering advice and other services.

The project hit very serious problems in mid-2007, when weaknesses in the walls and foundations were encountered. This led to delay. Barnsley issued arbitration proceedings, claiming professional negligence on the part of the Claimant.

In December 2013, the Claimant issued court proceedings against the Defendant. In September 2014, the Claimant instructed an expert ('Expert A'). Between 2014 and mid-2015 the Claimant tried to obtain a written report from Expert A but such a report was not forthcoming. In July 2015 Expert A produced a summary of his views by email, which he described as his "preliminary report". A CMC was held on 3 September 2015 at which a detailed order was made including that the parties had permission to call expert evidence. No experts were named in the directions order.

In October 2015, Barnsley and the Claimant settled the arbitration proceedings and the Claimant subsequently amended its claim against the Defendant, to include the monies that it had paid to Barnsley.

The Claimant continued to encounter problems with Expert A. In February 2016 Expert A produced a draft report and the Claimant became concerned that, whilst Expert A was supportive of the Claimant's case, he was unable to manage the task of producing a report and expressing his views with the clarity required to assist the court. Further difficulties ensued with obtaining assistance from Expert A for a mediation which took place on 12 April 2016, although after much pressing Expert A did provide views on matters raised by counsel, in support of the Claimant's position. Following this, the Claimant decided to instruct a new expert, Prof Roberts.

The pre-trial review took place on 29 July 2016, with the trial listed to commence on 4 October 2016. At the pre-trial review, the Defendant made an application for specific disclosure of, inter alia, any report, document and/or correspondence in which the substance of Expert A's expert opinion was set out, whether in draft or final form. In particular, the Defendant requested (i) notes attached to an email sent from Expert A to the Claimant's solicitors dated 19 December 2014; (ii) the preliminary report issued by Expert A in July 2015; and (iii) any document within which Expert A provided his views prior to the mediation which occurred on 12 April 2016.

The Claimant resisted disclosure on the grounds that (i) each of the documents sought was privileged; (ii) in the circumstances of the case, the Claimant had now disclosed sufficient material to provide a proper basis for the court to the permit the claimant to call Prof Roberts and that it was not necessary and/or proportionate to order the Claimant to disclose any further material; and (iii) on the evidence, this was not a case where the claimant had been "expert shopping".

Issues and findings

Should the Claimant disclose the preliminary report and opinions of Expert A as sought by the Defendant?

Yes. Privilege did not apply to these documents. It was appropriate for the Claimant to disclose the material sought. Whilst this was a case of either no expert shopping or expert shopping only to a faint degree, the court could still order disclosure.

Commentary

Paragraph 32 of this judgment is a useful summary of the position in relation to disclosure of reports and opinions produced by a first expert in circumstances where a party wishes to instruct a second, replacement, expert. The general principle, however, is that very little will be exempt from disclosure even in cases where there has not been any obvious "expert shopping", in the sense of deliberately trying to find an expert who will give a certain opinion.

Contract interpretation – limitations on liability

McGee Group Ltd v Galliford Try Building Ltd

Technology and Construction Court;
Before Mr Justice Coulson;
judgment delivered 26 January 2017

The facts

In about February 2013, Galliford Try Building Ltd ('GT') entered into a sub-contract ('the Sub-contract') with McGee Group Ltd ('McGee') for McGee to undertake the design and construction of earthworks, substructures, drainage, reinforced concrete superstructures and post tensioned slabs and beams at the Resort's World project in Birmingham. GT was the main contractor.

The sub-contract sum was £148,973,300 and the sub-contract period was 53 weeks with an original sub-contract completion date of 6 February 2014, which date was subsequently extended to 5 March 2014. The completion date for the main contract works was 16 January 2015, although there was also a series of access target dates from July 2014 to October 2014 against which liquidated damages could be levied.

Clauses 2.21 and 2.21A of the Subcontract stated that if the sub-contractor failed to complete the sub-contract works within the relevant period or periods for completion or such that the contractor was unable to achieve the access target dates then, subject to the requisite notice being given, the sub-contractor was to pay or allow to the contractor the amount of any direct loss or expense incurred by the contractor as a result of that failure. Clause 2.21B stated that the sub-contractor's liability for direct loss and/or expense and/or damages should not exceed 10% of the value of the sub-contract order.

Clause 4.21.1 of the Sub-contract provided that if the regular progress of the main contract works or any part of them was materially affected by any act, omission or default of the sub-contractor then the contractor was to notify the sub-contractor of the details of the effect on regular progress, the likely loss, damage, expense or cost as reasonably requested by the sub-contractor and the sum reasonably estimated by the contractor of such loss, damage, expense or cost. Clause 4.21.2 went on to state that any such sum reasonably estimated by the contractor as due in respect of any loss, damage, expense or cost may be deducted from monies due to the sub-contractor or be recoverable as a debt.

The sub-contract works commenced in or around February 2013. The parties agreed a supplemental agreement on September 2013 recognising that certain delays had occurred. The formal sub-contract order was eventually dated 17 December 2013 and incorporated the standard form JCT Design and Build Sub-Contract Agreement (2011 edition) as amended by the parties.

On 17 June 2014, GT sent McGee four letters setting out cross-claims for delay and disruption, amounting to over £2 million. Thereafter until December 2014, GT notified McGee of deductions from sums otherwise due to McGee under the sub-contract. The claims were referred to as being for reimbursement of costs, loss and expense and cost associated with McGee's failing to regularly and diligently progress their works. Each time, GT cross-referred to the letters of 17 June 2014 and each time the figure deducted for the claims was £1,489,733, being 10% of the sub-contract sum.

In January 2015, GT changed the description of the claims slightly and increased the amount of deduction beyond the 10% cap.

In January 2016, GT notified McGee of the date of practical completion of the sub-contract works as being 4 November 2015.

On 11 October 2016, GT sent McGee a statement of calculation of the final sub-contract sum. This included a document entitled "Galliford Try Summary Statement of Entitlement to Loss and Expense and Interest" ('GT's Loss and Expense Claim'). GT's Loss and Expense Claim sought to distinguish between claims made under clauses 2.21 and 2.21A of the Sub-contract and claims under clause 4.21 of the Sub-contract. Under the first head of claim, GT claimed £1,026,628.76, therefore within the cap. Under the second head of claim, GT claimed £2,291,495.53 and argued that the cap did not apply to this claim.

Issues and findings

Did Clause 2.21B cap all claims in respect of loss and expense including claims under clause 4.21?

Yes. Any other interpretation of the contract would be uncommercial and render the cap otiose.

Commentary

In the face of a heavily amended standard form, GT tried to argue that the two separate clauses dealing with loss and expense should be treated differently, enabling GT to make claims over and above the liability cap stated in the Sub-contract. This argument was roundly rejected by the Judge who considered that it would be uncommercial to adopt such an interpretation and, further, that it would render the liability cap otiose.

s.68(2)(g) Arbitration Act 1996 - Application to set aside award - serious irregularity - fraud *Celtic Bioenergy Ltd v Knowles Ltd*

Technology and Construction Court;
Before Mrs Justice Jefford;
judgment delivered 16 March 2017

The facts

Celtic Bioenergy Ltd ('CBL') was engaged by Devon County Council ('DCC') in respect of a project for the design and construction of a composting facility. Disputes arose between CBL and DCC including claims for loss and expense and the deduction of liquidated damages. Some of the disputes were dealt with in adjudication and arbitration proceedings were also commenced between CBL and DCC.

CBL engaged Knowles under a series of agreements to provide advice and representation in the adjudications and arbitration against DCC. On 19 November 2010, CBL and Knowles entered into a Deed of Assignment, pursuant to which CBL assigned to Knowles its rights against DCC. The Deed at the same time reserved to CBL, as assignor, the right to enforce payment or claim damages.

An award was subsequently issued by an adjudicator in adjudication no.8, resulting in sums becoming due to CBL from DCC.

On 7 February 2014, Knowles issued invoices to DCC in respect of the sums awarded in the adjudication. DCC did not pay the sums awarded.

In the meantime, disputes arose between CBL and Knowles as to Knowles' entitlement to payment for the services it had provided in adjudication nos. 6 to 8 and the quality of the services provided. One of the agreements for services contained an arbitration clause and arbitration was commenced between CBL and Knowles. The agreements between CBL and Knowles provided for payment disputes to be resolved by litigation and all other disputes to be resolved by arbitration.

In respect of the arbitration between CBL and Knowles, an arbitrator was appointed but then resigned. A second arbitrator, Mr Vaughan, was appointed in January 2015. CBL and Knowles agreed that there should be a split hearing. The initial hearing would consider (i) whether Knowles' fees for adjudications nos. 6, 7 and 8 were fixed or capped; and (ii) when and under what terms those fees became payable. A further hearing would consider Knowles' entitlement to payment and CBL's claim to be entitled to set-off damages for breach. The arbitrator was not asked to consider the actual amount due to Knowles.

CBL also commenced arbitration proceedings against DCC. A settlement of those proceedings was agreed in principle. The stumbling block to full settlement was DCC's concern about Knowles' claims against it. This led to CBL and DCC agreeing a form of a further Deed of Waiver ('the Second Deed of Waiver'). The Second Deed of Waiver was sent to Knowles by CBL's solicitors on 5 June 2015 with a request that Knowles execute the Deed. Knowles did not respond to this letter.

The arbitration between CBL and Knowles proceeded and on 22 August 2015, Mr Vaughan issued a Partial Award, finding that (i) any fees that would be due to Knowles for their services in respect of adjudication nos. 6, 7 and 8 would be fixed or capped at certain amounts; and (ii) the fees would be payable from the proceeds of adjudication no.8, 14 days after receipt of those sums or if the proceeds were insufficient on the publishing of an award or settlement in the arbitration between CBL and DCC.

In October 2015, Mr Vaughan issued a costs award determining that Knowles was liable for the costs of the initial issues. In February 2016 permission to appeal was refused.

On 1 March 2016, Knowles attempted to refer a claim against CBL for payment of fees in the sum of £2 million to the LCIA for arbitration. CBL resisted this saying that under Knowles' appointment, payment disputes were to be dealt with by litigation.

Between 16 March 2016 and 4 April 2016, Knowles entered into correspondence with DCC, which CBL was unaware of. Knowles claimed from DCC the sums awarded in adjudication no.8 together with further sums that had been paid recently to CBL, and expressly relied upon rights it stated it had under the Deed of Assignment in doing so. Knowles' claim was disputed by DCC.

On 18 March 2016, in parallel, in the arbitration with CBL, Knowles asked Mr Vaughan to make declarations on the fees payable and as to whether the circumstances for payment had been met.

During this time, Knowles had not paid any sums to CBL in respect of the costs award.

On 21 March 2016, CBL obtained permission from the Court to enforce the costs award and on 24 March 2016, CBL made a further application to Mr Vaughan for interim relief in the form of a further payment on account of costs.

On 1 April 2016, Knowles made a second attempt to request an LCIA arbitration in respect of payment, framing the dispute as one for breach of contract and alleging that CBL had acted in such a way as to prevent Knowles recovering its fees.

On 11 April 2016, Knowles issued a claim form without notice seeking permission to enforce what it said was an award made on 22 August 2015 of certain sums. These were the amounts Mr Vaughan had found to be the fixed or capped amounts. Knowles provided a statement in support from a Mr Rainsberry to the effect that the arbitrator had decided that Knowles was entitled to the sums set out, that they were payable on settlement of the arbitration between DCC and CBVL and that the arbitrator had made a finding that a settlement had been reached. The Court made the order sought on an ex parte basis. CBL applied to have the order set aside.

On 13 May 2016, Mr Vaughan issued an award giving CBL provisional relief and ordering Knowles to pay CBL £200,000 on account of costs. This was a sum in excess of the amount that Knowles was claiming to enforce against CBL and on that basis, Knowles agreed to concede its application for enforcement. CBL insisted that the consent order record that the Partial Award did not contain any decisions entitling Knowles to be paid the sums claimed.

Knowles then made an application to Mr Vaughan pursuant to ss.39 and/or 47 of the Arbitration Act 1996 , requesting two declarations. Firstly, that Knowles had complied with paragraph 3 of the ad hoc agreement as it had withdrawn its invoices served on DCC. Secondly, that Knowles had complied with paragraph 4 by providing an indemnity in favour of DCC indemnifying DCC against Knowles pursuing the sums owed by DCC to CBL under the Deed of Assignment. Mr Rainsberry provided a statement in support of this application, relying on the issue of the credit notes in respect of the invoices and the First Deed of Waiver in respect of the indemnity. No mention was made of the correspondence between Knowles and DCC in March/April 2016, which was contrary to the position now argued in the arbitration.

On 6 September 2016, Mr Vaughan issued his award, finding that Knowles had complied with paragraphs 3 and 4 of the ad hoc Agreement. The arbitrator accepted the evidence provided by Knowles. Following issue of this award, CBL wrote to DCC on 22 September 2016 asking whether DCC would now pay the monies due from adjudication no.8 into a stakeholder account. DCC replied on 11 October 2016 stating that it appeared that Knowles was not willing to enter into any agreement and provided CBL with copies of letters that Knowles had written in March 2016

CBL applied to have the September 2016 Award set aside and/or remitted to the arbitrator for a new decision. CBL argued that the failure by Knowles to tell the arbitrator about the correspondence with DCC that took place in March/April 2016, which it argued demonstrated a breach of the relevant paragraphs of the ad hoc Agreement, was completely misleading and amounted to fraud. CBL's primary case was that Knowles had misled the arbitrator deliberately; alternatively that Knowles did so recklessly. Knowles argued that the letters that it had sent to DCC were simply to get DCC to show that it relied on the First Deed of Waiver, and that the letters did not demonstrate that it had been in breach of the relevant paragraphs of the ad hoc Agreement.

Issues and findings

Was the September 2016 Award obtained by fraud?

Yes. The award had been obtained by deliberate fraud and should be remitted to the arbitrator for his consideration in possession of the full facts.

Commentary

This is apparently the first case in a construction context where an arbitrator's award has successfully been challenged under s.68(2)(g) of the 1996 Act, namely that the award has been obtained by fraud.

The Judge found that, on the facts of this case, the evidence to demonstrate deliberate conduct amounting to fraud was compelling. Notwithstanding, the Judge also considered, obiter, CBL's alternative argument that fraud could be demonstrated if the conduct had been undertaken "recklessly". Although neither party had been able to identify authority to the effect that recklessness as to the truth of a statement could amount to fraud within the meaning of s.68(2)(g) of the 1996 Act, there was considerable force in the submission that fraud in the civil context could be equated with or could require no more than the tort of deceit. The elements of the tort of deceit are (i) a representation which is (ii) false and (iiii) dishonestly made and (iv) intended to be relied upon and is in fact relied upon. Relying on dicta in The Kriti Palm [2006], the Judge came to the conclusion that there may be cases in which recklessness as to whether a statement was true or false might amount to fraud within the meaning of s.68(2)(g) if there is some other element of unconscionable conduct.

Contract interpretation – limitations on liability
Wood v Capita Insurance Services Ltd

Supreme Court;
Before Lord Neuberger, Lord Mance, Lord Clarke, Lord Sumption and Lord Hodge;
judgment delivered 29 March 2017

The facts

By way of a Sale and Purchase Agreement dated 13 April 2010 ('the SPA'), Mr Wood agreed to sell to Capita, the entire issued share capital of a company, Sureterm Direct Ltd ('the Company'). Mr Wood was a director of the Company owning 94% of its share capital. Jointly selling the Company with Mr Wood were two other directors of the Company, Mr Knightley and Mr Collinge who owned 1% and 5% of the share capital respectively. Following the sale, Mr Wood remained a managing director of the Company until the end of 2010.

In about August 2008, the Company began to sell motor insurance through online sites such as Confused.com. The sales were not completed online: potential customers obtained a quotation from the Company on the online site and the Company then contacted the potential customer directly to confirm their risk details before selling them the appropriate insurance policy.

Shortly after April 2010, employees of the Company raised concerns about these sales processes, which had resulted in some customers paying substantially more than they had been quoted online. It was alleged that the Company had presented customers with higher quotations without informing them why the quotations had increased. This allowed the Company to increase its own arrangement fees when neither the underwriting premium nor the risk profile had changed significantly. The Company carried out a review of its sales which revealed that in many cases customers had been mis-sold insurance.

Capita and the Company were obliged to inform the Financial Services Authority ('FSA') of the findings, which was done on 16 December 2011. The FSA conducted a risk assessment visit to the Company in November 2012 and Capita and the Company agreed with the FSA to conduct a remediation scheme to pay compensation to customers identified as potentially affected by the mis-selling.

Capita alleged that the Company and Capita's other subsidiaries had suffered losses as a result of the mis-selling or suspected mis-selling in the period prior to the completion of the sale under the SPA. Capita claimed just under £2.5 million in respect of these losses. The extent of mis-selling and losses claimed by Capita was disputed. Under the SPA, each of the sellers provided warranties detailed in clause 7.1 to the buyer on a proportionate basis. Clause 7.11 contained an indemnity as follows:

"The Sellers undertake to pay to the Buyer an amount equal to the amount which would be required to indemnify the Buyer and each member of the Buyer's Group against all actions, proceedings, losses, claims, damages, costs, charges, expenses and liabilities suffered or incurred, and all fines, compensation or remedial action or payments imposed on or required to be made by the Company following and arising out of claims or complaints registered with the FSA…or any other Authority against the Company, the Sellers or any Relevant Person and which related to the period prior to the Completion Date pertaining to any mis-selling or suspected mis-selling of any insurance or insurance related product or service".

At a preliminary issue hearing, the question arose as to whether the indemnity clause required Mr Wood to indemnify Capita even if there had been no claim or complaint by a customer. The trial judge found in favour of Capita. Mr Wood appealed. The Court of Appeal said that Mr Wood could not be liable under clause 7.11 of the SPA as liability would only arise if the matter for which the indemnity was sought follows and arises out of either (i) a claim made against the Company, a Seller or a Relevant Person; or (ii) a complaint registered with the FSA or any other Authority against the Company, a Seller or Relevant Person and, in either case, the claim or complaint (a) relates to the period prior to the Completion Date and (b) pertains to the mis-selling or suspected mis-selling of any insurance or insurance related product.

Capita appealed to the Supreme Court, arguing that the contractual indemnity was not confined to loss arising out of a claim or complaint.

Issues and findings

Was the contractual indemnity confined to a loss arising out of a claim or a complaint to the relevant authorities?

Yes.

Has the decision of Arnold v. Britton [2015] "rowed back" from the guidance on contractual interpretation given by the Supreme Court in Rainy Sky SA v. Kookmin Bank [2011]?

No. The decision in Arnold has not altered the guidance given in *Rainy Sky*.

Commentary

In deciding on the correct way in which to interpret the indemnity in the SPA, the Supreme Court addressed some of the commentary that has been made on the decision in *Arnold v. Britton* and in particular whether that decision has signalled a move away from established principles of contract interpretation.

The opinion of the Supreme Court is that there has been no movement away from the principles set out in *Rainy Sky v. Kookmin Bank* [2011]. In particular, Lord Hodge (with whom all the other Lords agreed) stated that interpretation is, as Lord Clarke stated in *Rainy Sky,* a unitary exercise and that where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, that in striking a balance against the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and also must be alive to the possibility that one side may have agreed to something which in hindsight did not serve his interest.

Lord Hodge went on to say that the unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It is necessary to read the language in dispute and the relevant parts of the contract that provide its context and balance the indications given by each.

In this case, the Supreme Court considered that the contractual provisions, the commercial context and the practical consequences of the rival contractual interpretations of the parties and found that Mr Wood's interpretation to be the most preferable.

Contract interpretation – Practical Completion *GB Building Solutions Ltd (in administration) v SFS Fire Services Ltd*

Technology and Construction Court; Before His Honour Judge Stephen Davies; judgment delivered 25 May 2017

The facts

GB Building Solutions was engaged as design and build main contractor to provide an office building in Manchester City Centre. GB Building Solutions engaged SFS as design and build subcontractor to provide a sprinkler system in the office building. In late December 2009, during the construction works, a flood occurred in the basement of the office building. A dispute arose between the parties as to responsibility for that flood.

The subcontract was based on a JCT Standard Form of Design and Build subcontract, 2005 edition, with amendments ('the Subcontract'). Clause 6.6.1 of the Subcontract provided that the contractor was to take out a Joint Names insurance policy endorsed in terms that, in respect of loss or damage by Specified Perils, either the subcontractor was to be recognised as an insured under the policy or the insurers would waive any right of subrogation which they had against the subcontractor and that this recognition and waiver would continue up to and including the "Terminal Date".

The parties accepted that the "Terminal Date" was the date of practical completion of the subcontract works. The flood was a Specified Peril.

It was common ground between the parties that if the flood occurred before the Terminal Date then GB Building Solutions was unable to maintain a claim against SFS for its losses. If, however, the flood occurred after the Terminal Date then GB Building Solutions was able to advance a claim. The question that therefore arose was whether the flood had occurred before or after the Terminal Date and, accordingly, the meaning of the phrase "Terminal Date". In considering this, the court had to consider two, interrelated, issues.

The first issue was whether the parties had amended the standard form of subcontract so that practical completion was defined as "*the issue of the certificate of practical completion pursuant to the main contract*". It was agreed that if this amendment had occurred then GB Building Solutions could not maintain its claim against SFS as the flood had occurred before the issue of the certificate of practical completion under the main contract.

If it was determined that there was no such amendment, then the second issue fell to be considered. In such circumstances, it was agreed that clause 2.20.1 of the subcontract conditions applied. Clause 2.20.1 provided for SFS to give notice to GB Building Solutions when it considered practical completion to have taken place and, if there was no dissent, then practical completion was deemed to take place on the date of notification. If clause 2.20.1 did apply, then the question arose as to whether valid and effective notification had been given and, if so, upon which date practical completion had occurred.

Issues and findings

Had the parties amended the subcontract conditions such that practical completion was defined by reference to issue of the certificate of practical completion under the main contract?

No. Clause 2.20.1 of the subcontract conditions applied.

Did SFS give valid and effective notice of practical completion pursuant to clause 2.20.1?

Yes. However, the date of practical completion was either 26 October 2009 or 1 December 2009 and therefore the flood occurred after the Terminal Date.

Commentary

The Judge concluded that this was a case where the rival interpretations of the contract by both parties were plausible. The Judge proceeded to undertake the "unitary exercise" and conduct the "iterative process" of contract construction as referred to in the long line of authority on contract interpretation most recently culminating in the case of *Capita v. Wood*. On that basis, when read against the other provisions of the contract and taking into account capitalisation, the Judge preferred the arguments raised by GB Building Solutions and declined to find that practical completion was the date for practical completion under the main contract.

The Judge then went on to consider whether notice of completion had been given under clause 2.20.1 and found, on the particular facts that it had been given, thus resolving this preliminary issue in favour of GB Building Solutions.

Precedent R - abuse of cost budgeting process
Findcharm Ltd v Churchill Group Ltd

Technology and Construction Court;
Before Mr Justice Coulson;
judgment delivered 12 May 2017

The facts

Findcharm operates a restaurant within the Churchill Hotel in Portman Square, London. The Churchill Hotel is owned by the Churchill Group Ltd. In November 2014, there was a gas explosion at the hotel which closed the restaurant for about four months. Findcharm issued proceedings against Churchill for the costs arising from that explosion. The claim is for approximately £820,000 plus interest and the largest single item of claim is the claim for business interruption/loss of profit.

Churchill issued a bare defence in response to the claim made by Findcharm, including not formally admitting the cause of the explosion.

As is expected under the relevant Civil Procedure Rules, the case was subject to costs budgeting, including the exchange of Precedent R which requires each party to comment on the costs budget of the other.

Findcharm's cost budget was £244,676.30. Churchill's cost budget was £79,371.23. Churchill argued in its Precedent R that, accordingly, Findcharm's budget should be less than £90,000.

The costs budgets were reviewed by the Judge at the CMC and he set out some important points of practice relating to costs budgeting.

Issues and findings

How should parties approach the use of Precedent R?

Parties should not seek to exploit the cost budgeting rules in the hope of obtaining a tactical advantage over the other side. It is an abuse of the costs budgeting process to offer unrealistically low figures in a Precedent R in the hope that the Court will be tempted to calculate its own amount of the other party's costs, lower than the amount proposed by that party.

Commentary

The Judge expressed his frustration at the tactics adopted by the Defendant in this case and approved the Claimant's costs budget in full. The Judge made it clear that he wanted this case to be publically available in order that the Precedent R process is carefully and properly adhered to by the parties to civil litigation.

The Fenwick Elliott Blog

Introduction

In February 2017, headed by Andrew Davies, we started the Fenwick Elliott blog. Click on www. https://www.fenwickelliott.com/ blog.

The aim of these blogs is to provide everyone with short updates on topical legal or other issues in the industry, to share our opinions on a wide variety of subjects and to engage with you and share thoughts and ideas on these various matters through the comments facility. Your comments are very welcome.

In August 2017, Andrew Davies wrote about "smash and grab adjudications".

Is the end nigh for "smash and grab" adjudications?

So called "smash and grab" adjudications are very common in the construction industry. They arise when the paying party fails to give either a payment notice or a pay less notice, the two notices introduced in 2009 by the amended Construction Act. If neither of these notices are given, the amount applied for by the payee becomes the "notified sum" which is payable by the final date for payment.

Following the decision in *ISG Construction Limited v. Seevic College* in 2014, the importance of such adjudications increased, as Edwards-Stuart J held that where there had been a "smash and grab" adjudication, no cross adjudication on the true value of the interim payment was possible. Edwards-Stuart J said that a failure to give the required notices meant that the sum applied for was "deemed to be the value of those works".

I have never liked the term "smash and grab", as it implies there is no entitlement to the sum applied for. In my view there is a clear entitlement to payment in these circumstances. Where there are two missed opportunities to give a notice reducing the sum applied for, and where the paying party or their appointed certifier is aware of the consequences of failure to do so, I have little sympathy with the payer's or certifier's failures and I support the payee's entitlement.

It appears that Fraser J agrees with me about the terminology. In *ICI Limited v. Merit Merrell Technology Limited*, a lengthy judgment dealing with a number of issues to which we devoted the entire issue of our August *Dispatch*, Fraser J said that where paying parties or certifiers fail to comply with the amended Construction Act's requirements, the payee becomes entitled to the sum for which he applied. Fraser J said that the term "smash and grab" was best avoided as the "phrase has clearly pejorative overtones".

It was Fraser J's comments in *ICI* on the *ISG* decision which caught my attention and which I want to discuss in this blog.

One of the issues in *ICI*, which arose out of works Merit carried out for ICI at a processing plant in Northumberland, was whether ICI could, following its termination of Merit's employment, recover sums it claimed were overpaid to Merit during the project.

Merit argued, relying on *ISG*, that the sums ICI said were overpaid had been awarded following adjudications on interim payments where no notices had been given and that the value of those works had therefore been deemed accepted by ICI. Fraser J said *ISG* did not go as far as Merit contended. Fraser J looked at ISG and the cases which followed it to support this view.

Fraser J first considered *MJ Harding Contractors v. Paice and Springall* 2015, which concerned serial adjudications and a final account dispute. In *Harding*, the Court of Appeal allowed Mr Paice and Ms Springall to refer a subsequent valuation dispute to adjudication after a previous adjudication which arose from a failure to give a valid pay less notice.

> *"Following ISG the courts have confirmed that the 'smash and grab' adjudication is not the last word on the payee's entitlement to payment; it merely settles the issue of cash flow for that interim payment cycle. "*

Fraser J next looked at *Brown v. Complete Building Solutions* 2016, where the Court of Appeal found in respect of a final certificate that an adjudication on the value of the works was a different dispute from an earlier adjudication concerning what was payable where the required notices were not given.

Fraser J also considered *Kersfield Developments (Bridge Road) Limited v. Bray and Slaughter Limited* 2017 where O'Farrell J in the TCC said the mechanism under the amended Construction Act where the sum applied for became due in the absence of the required notices "simply regulates cash flow" and does not affect the parties' "substantive rights".

Fraser J's summary of the cases following *ISG* was very interesting; he said that they "cast some real doubt on whether [*ISG*] would be decided in the same way now". Fraser J did not say *ISG* was wrong, and pointed out that neither of the Court of Appeal cases he had considered had found *ISG* was wrong. He said that the reasoning in the later cases about the ability to recover overpayments or windfalls was different from the reasoning - and outcome - in *ISG*.

The key differences between *ISG* on the one hand and *Harding and Brown* on the other were that *ISG* related to interim payments whereas *Harding and Brown* related to a final account. This difference is critical because Fraser J said in *ICI* that *ISG* - and any other cases concerning interim entitlement to payment - related only to timing and not the parties' substantive rights.

Fraser J's judgment in *ICI* is not in my view the beginning of the end for "smash and grab" adjudications. In my view they will (and should) continue. What Fraser J helpfully clarified was that following *ISG* the courts have confirmed that the "smash and grab" adjudication is not the last word on the payee's entitlement to payment; it merely settles the issue of cash flow for that interim payment cycle. If there is a windfall as a result of the payer or certifier's failures, that can be corrected in the next interim payment cycle or at the final account stage. Fraser J confirmed that cross adjudications are possible at the final account stage.

What *ICI* also confirms is the importance to payers and certifiers of giving the required notices at the right time, given the impact it can have on a payer's cash flow. This is a drum I have been banging since the original Construction Act introduced us to the delights of withholding notices in 1998.

We hope you will find the blog thought provoking and please feel to engage with us to discuss your thoughts and ideas on what we have written.

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