Fenwick Elliott

Annual Review

2007

The essence of adjudication is speed: ignore any deadlines at your peril

Time to dust off your notes on the JCT Major Projects Form?

International arbitration: the new liberal approach of the Court of Appeal

The construction law specialists

Fenwick Elliott

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

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

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Editor
Jeremy Glover

First word

Simon Tolson

Senior partner

It's my pleasure to introduce this year's Fenwick Elliott Annual Review. As always, it contains a number of articles and features designed to help you stay informed on the most recent legal decisions and to highlight the latest regulatory changes to enable you to avoid costly delays and disputes.

Fenwick Elliott remains committed to working with our clients to resolve their problems and manage their risks, many of which are unique to the construction and engineering industries. The legal arena is always evolving and we continue to keep at the cutting edge of the latest issues and theories as they develop. More than that we are at the forefront of those developments. In the courts, Judge Coulson commented that "resourceful losing parties" are now trying to overturn adjudicators' decisions on the grounds they were late. I am pleased to say that we made sure in the *Cubitt v Fleetglade* case that such a challenge comprehensively failed.

We were also involved in acting for the successful party in what is, for our industry, likely to be the most important decision to come out of the construction of Wembley Stadium. We persuaded the TCC in the *Multiplex v Honeywell* case, which we summarise on page 49, that the Australian case of *Gaymark Investments v Walter Construction* does not represent the law of England and that contract terms requesting a contractor to give prompt notice of delay serve a valuable purpose. Mr Justice Jackson made it clear that the courts will seek to uphold extension of time clauses whenever possible.

Whilst undoubtedly most of the disputes in the construction industry still start and by and large finish in adjudication, there is a resurgence of confidence in TCC litigation. We now regularly experience some of the fastest moving court procedures in the land. Trials measured in weeks, not years, are now common. In one case, I had an action commenced as Part 8 proceedings on 8 February with the trial concluded by 27 February. We have had visited upon us a reformist agenda, which has greatly improved the service offered by the Court. The TCC's reputation has been firmly re-established. Conversely, domestic arbitration has not fared that well. While certain arbitrators invoke procedures to expedite the process and we have the Society of Construction Arbitrators' 100-day scheme, there is not really much evidence of its use on a wider scale.

Dispute avoidance is a key driver and we are continually looking for innovative ways to reduce disputes to a minimum. Our involvement in working with CEDR in the development of project mediation is one such initiative and in the *DGT* decision, which we report on page 41, we persuaded the courts to stay the court proceedings brought by DGT to enable an adjudication to take place. Of course, a key to avoiding disputes is understanding your contract and with this in mind, one of my partners, Jeremy Glover, co-authored a commentary on the New FIDIC Red Book 1999 Edition[†]. Our Review also contains commentaries on those rival contracts, the NEC3 and the JCT Major Projects Form. As I know from chairing a recent conference, the NEC3 remains a controversial character.

Whilst Fenwick Elliott remains the single largest specialist construction firm in the UK, we have seen continued significant growth in instructions from around the globe. We have increasingly been instructed to assist with large-scale energy projects across Europe, the Middle East, Asia and Africa. We are always looking to reflect the needs of our clients at home and abroad and this is why I am delighted to announce the recruitment of Julie Stagg who will be strengthening our projects team. Julie has a wealth of experience on a wide variety of projects from urban regeneration schemes to sports stadia to major office developments. I look forward to introducing her to you.

We are all aware of the significant challenges that lie ahead for the construction sector. London 2012 and the infrastructure spend on projects like Cross Rail, Heathrow East Terminal, and various major urban developments loom large. These are exciting times and we all look forward to working with you over the next 12 months.

Simon Tolson

[†]**Understanding the new FIDIC Red Book: A clause by clause commentary** by Jeremy Glover and Simon Hughes with an introduction by Christopher Thomas QC.

Editor's overview

Jeremy Glover

Editor

Welcome to the eleventh edition of our ever-popular Annual Review. Keen-eyed observers will notice that we have made a few changes to the style and look. However we have retained the breadth and scope of the content including our traditional features such as the summaries of the key cases from the past 12 months, taken from the Dispatch and the Construction Industry Law Letter.

These cases all demonstrate the continuing importance of mediation and other forms of ADR. The revisions to the Pre-Action Protocol for Construction & Engineering Disputes, which came into force at the beginning of April, provide further confirmation of this. Do read our article on page 16 summarising these changes to see the penalties imposed for failing to take heed of the new regime.

We are pleased to have been part of the TCC Mediation Survey. The interim report on the results of that survey, to be found at page 20, provides interesting reading and perhaps slightly unexpected results. Mediation and ADR are increasingly not just limited to the domestic market. For example, the Project Mediation scheme, which we have developed in conjunction with CEDR, provides a new method of managing the risk of disputes from the delivery stage of a project both at home and abroad.

With this in mind, the Review also features an article on page 24 about the "early warning system" to be found in the NEC3 contract. Whilst the NEC3 may be the contract that is favoured by the Olympic Delivery Authority, we also take a detailed look on page 27 at one of its main rivals, the JCT Major Projects Form.

We also examine the different ways in which force majeure is treated under the common law and civil codes in the new FIDIC Red Book 1999 Edition. Indeed this will be one of the topics to be discussed at the forthcoming seminar entitled *"FIDIC Contracts Conference Practical and Legal Considerations on Major International Projects"* which we are jointly running with Keating Chambers on 5 October 2007. If you would like further details, please visit our website – www.fenwickelliott.co.uk.

The Review also takes a look at the latest government legislation, both proposed and actual. The reforms of the CDM Regulations, which came into force in April, are designed to reduce the administrative burden on all parties. However, they also significantly increase the responsibilities on employers. Perhaps more surprisingly, the Corporate Manslaughter and Corporate Homicide Bill finally received parliamentary approval in July. On page 10, we summarise what you need to know.

Equally surprisingly, some three years after our Review first mentioned the possiblity, the government has finally revealed its intentions for the reform of the Housing Grants Act. However, it has not said when these proposals might become law. Meanwhile adjudication remains a fast changing area of law and Fenwick Elliott, as we describe on page 7, has been closely involved in the latest legal challenges involving the implications of late decisions.

Finally, who would have thought that a case involving Russian charterparty contracts would tackle the question of what the words "arising out of a contract" would mean? Understandably the headlines focused on the Court of Appeal's recognition that it was time for the courts to take a more liberal approach in international arbitration cases to the construction of jurisdiction and arbitration clauses. However, within the judgment, as our summary on page 34 reveals, can be found clarification which is equally applicable to construction contracts.

We hope you enjoy the new look Annual Review. I'd welcome your comments on any of the articles. Just email me at jglover@fenwickelliott.co.uk.

Jeremy Glover
September 2007

Adjudication

Reforms of the HGCRA finally announced

It was in our 2004 Review that we first mentioned the possibility of reform of the Housing Grants Construction & Regeneration Act 1996 ("HGCRA"). Several consultations later and the Government's plan to improve construction payment practices has been launched. Although the launch is by way of a further consultation process, given the short period of time allowed for responses, until 17 September 2007, it seems likely that these changes will be implemented fairly soon. We say no more than that because the Government has made it clear that legislation to implement the proposals emerging from this consultation will be introduced only as soon as Parliamentary time allows.

The Government proposals seek to introduce greater clarity and transparency into the statutory payment framework and to encourage parties to resolve disputes by adjudication. The key changes are as follows:

(i) Adjudication:

- The legislation will apply to oral and partly oral contracts and not just contracts evidenced in writing;
- The use of agreements that interim payment decisions will be conclusive is to be prevented; and
- Costs are to be fairly allocated.

(ii) Payment

- The duplication of payment notices is unnecessary and is to be brought to an end;
- The need to serve a section 110(2) payment notice is to be clarified;
- The content of payment and withholding notices is to be made clearer and must include details of any set-off or abatement;
- The prohibition of pay-when-certified clauses.

(iii) Suspension

- The statutory right to suspend performance is to be improved by allowing the suspending party to claim the costs and delay which result from any valid suspension.

The Government proposals seek to introduce greater clarity and transparency into the statutory payment framework and to encourage parties to resolve disputes by adjudication.

Contracts in writing

This is perhaps the most radical change. It is also the most surprising as it was not something that had been highlighted in previous consultation papers. This was even though there had been many who wanted changes to the legislation following the Court of Appeal decision in *RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland Ltd)* [2002] EWCA Civ 270 where the majority had held that section 107 of the HGCRA meant that all the essential terms of the contract needed to be in writing or evidenced in writing. However, the call for change had to be balanced against the recognition concisely expressed by HHJ Bowsher QC in *Grovedeck Ltd v Capital Demolition Ltd* [2000] EWHC 139 (TCC) that:

"Disputes as to the terms, express and implied, of oral construction agreements are surprisingly common and are not readily susceptible of resolution by a summary procedure such as adjudication."

The difficulties caused by the RJT case can be seen in the recent decision of HHJ Wilcox who decided that the letter of intent in the case of *Bennett (Electrical) Services Ltd v Inviron Ltd* [2007] EWHC 49 (TCC) failed to comply with the requirements of section 107. However, he also commented on the difference of opinion of the Court of Appeal in the RJT case, noting that:

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

The driving force behind this change is that the "evidenced in writing" requirement was found to be acting as a barrier to the referral of disputes.

The Government's response is to follow the Australian and New Zealand approach and extend the HGCRA to contracts that are agreed wholly in writing, only partly in writing, entirely orally or varied by oral agreement. In other words, this removes the restriction of the application of the HGCRA to contracts in writing. However, if a contract does not set out provisions relating to a contractual adjudication scheme in writing, then as a default, the Scheme provisions will apply.

The driving force behind this change is that the "evidenced in writing" requirement was found to be acting as a barrier to the referral of disputes. The consultation paper noted that research by TeCSA has found that of 154 recent enforcement cases, 15% related to whether the construction contract was evidenced in writing or not. Given the Government's aim to extend the ambit of adjudication, the proposed extension of section 107 is a natural one. It will be interesting to see whether, the next time TeCSA carry out a similar survey, a large percentage of the disputes will revolve around what constituted the contract between the parties.

Interim payment

The next change is that any agreement that a decision will be conclusive as to the amount of an interim payment will be deemed to be ineffective. Research had shown that some 15% of contracts provided for conclusive decisions in relation to interim payments. As this was felt to be a means of avoiding the referral of interim payment disputes, in accordance with the Government aims, such agreements had to go.

Costs

Here, the Government is proposing to include new statutory provisions so that the following agreements are only valid if made in writing and after the appointment of the adjudicator:

- Agreements that one party should pay the whole or part of the costs of the adjudication; and
- Agreements that the adjudicator may make a decision that a party should pay the whole or part of the costs of the adjudication.

This is designed to prevent contractual provisions requiring the referring party to pay the costs of adjudication, a clear disincentive to commencing the adjudication process. Where a valid agreement has been made as described above, the adjudicator will be able to award only a reasonable amount in respect of costs reasonably incurred by the parties and, in respect of his fees, such reasonable amount as relates to the work undertaken and expenses incurred. Notwithstanding this, the parties shall remain jointly and severally liable for the adjudicator's reasonable fees and expenses. Interestingly, a combined DTi/CIC survey of adjudicators suggested that adjudicator's average fees and expenses are approximately £5,000 per referral. As these provisions will be enshrined in statute, the Government intends to remove all provisions about costs Part I of the Scheme, namely paragraphs 11 and 25, which entitle an adjudicator to his fees if his appointment is revoked or when he ultimately decides the dispute.

Payment

The problem with the section 110(2) notice, which sets out payments made or proposed to be made, was that under most contracts, the information in the notice tended to repeat the information already contained in the certificate. The Government is therefore proposing that in order to prevent this unnecessary duplication, a notice

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or certificate from a third party can act as a section 110(2) payment notice. That said, it is also intended to amend section 110 to make it clear that a payment notice is always required if a payment would have become due under the contract. This will be the case even where there is no obligation to make any payment because the work has not been carried out or it has been set off or is subject to abatement. Payment notices are seen by the Government as an important tool in communicating details of payments which are made or are proposed to be made.

Further, the Government intends to introduce clarity as to the content of the payment and withholding notices under sections 110 and 111. The proposal is that the payer must set out in a payment notice the amount (if any) that he is paying or proposes to pay. Where there is more than one ground, the payer will be required to set out each ground and the amount attributable to that ground. Although this might not seem new, you will be required to include details of any set-off or abatement, something which is currently not always thought to be necessary. The Government is intending to achieve transparency about what constitutes the sum due.

Finally, the Government intends to prohibit pay-when-certified clauses. This is to ensure that a certificate covering work under one contract cannot act as a mechanism to determine the timing of payment for work done under another.

Suspension

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

The statutory right to suspend performance is to be improved by allowing the suspending party to claim the costs and delay which result from any valid suspension.

There was nothing to prevent the parties from conferring more extensive rights through the terms of the contract. By way of example, clauses 25.4.17 and 26.2.9 of the JCT With Contractor's Design 98 form entitles the contractor to apply for an extension of time in respect of "*delay arising from a suspension…*" and for "*loss and expense where appropriate...*" However, a party could not insist that this happened.

The Government intends to make the right to suspend performance a more effective remedy. Thus the party need not suspend all its obligations to the party in default and the government will provide a statutory right of compensation for any reasonable losses caused by the suspension. These costs may include damage to materials while clearing the site, storage charges, management costs and the cost of retaining labour and plant. The aim is to make the right of suspension more accessible and effective.

A Coda

The Government has also considered the recent House of Lords case of *Melville Dundas v Wimpey.*[1] From a policy perspective, the Government considers that section 111 should not apply in cases of insolvency. Thus, the Government agrees with the House of Lords. However, section 111 should apply in all other cases. In other words, the Melville Dundas case should be construed narrowly on its own facts.

Of course there remain two unknowns. Will all these proposed changes actually be implemented and if so, when? That remains to be seen. Full details of the proposed changes can be found on the government website at www.berr.gov.uk.

[1] See page 43 below for further details.

Adjudication

The importance of time limits in adjudication

On 23 April 2007, due to continuing demand,we held the 13th in our series of ever-popular Adjudication Update Seminars. Our keynote speaker was Mr Justice Ramsey who provided an invaluable view of adjudication from a TCC Judge's perspective. Our other guest speaker was Matt Molloy of MCMS who gave an insight into the role of the adjudicator. Matt had been the adjudicator in the case of Cubitt Building Interiors Ltd v Fleetglade Ltd where Dr Julian Critchlow had acted on behalf of the successful party. Not entirely coincidentally, Julian was another of our speakers. This is an extract of what he had to say:

With challenges based on jurisdiction and natural justice difficult ... to establish ... the resourceful losing party ... has had to look elsewhere for a reason to argue that the adjudicator's decision should not be enforced. In recent times ... it has become common for the losing party to allege that the adjudicator has failed to comply with the strict timetable required by the 1996 Act, and that, in consequence, his decision is a nullity.[1]

The issues I want to cover are, first, the importance of time limits in adjudication, and what happens when they are not met; and, secondly, what time limits tell us about the legal relationship between the adjudicator and the parties.

I am actually going to start with a point of principle, namely that provided they do not make an arrangement that runs counter to the Housing Grants Act, the parties can agree whatever adjudication rules they want. It is a principle that has sometimes been overlooked. But it was expressly affirmed in *Cubitt* where Judge Coulson said:

"Ms McCredie contended that the juridical nature of this adjudication was contractual, and not statutory. She said that the 1996 Act required that every construction contract had to contain adjudication provisions which complied with Section 108. If they did not, then the statutory scheme for construction contracts would be implied. If they did, then what mattered were the express terms of those contractual adjudication provisions. The 1996 Act only mattered if the contractual provisions were not compliant ... I agree with those submissions. It seems to me that if the contractual adjudication provisions comply with the Act, then they must be at the forefront of the court's consideration of the parties' respective rights and liabilities. I would respectfully venture the opinion that, in some of the reported cases, the focus has been too much on the 1996 Act (and section 108 in particular) and not enough on the relevant terms of the parties' contract."

I will start by having a look at the facts in *Cubitt*. There were two main issues which were decided at the same time. To make things as clear as possible I will deal with them separately. Cubitt was Fleetglade's Main Contractor. Disputes arose, but before they had been sorted out, the Contract Administrator issued the Final Certificate. The Contract contained the familiar provision that the Final Certificate would become conclusive of work done, money payable and extensions of time unless proceedings were commenced within 28 days of its issue. Neither party accepted the accuracy of the Final Certificate so, to make sure they did not lose their rights, both parties started proceedings – in Cubitt's case by adjudication.

At this point it's necessary to go into some detail because the precise timing of what happened next had a big impact on the final result that nobody really expected at the time. Cubitt issued an Adjudication Notice and then, the following day, sent an application to the RICS for an adjudicator to be appointed. However, the RICS did not make a nomination of an adjudicator until after 5p.m. on the seventh day after service of the Adjudication Notice. At about 5.35p.m. the Adjudicator confirmed he would act.

This gave Cubitt a problem. The JCT Adjudication Rules applied. They say that if an adjudicator is appointed within seven days of the Adjudication Notice then the Referral, which sets out the claim in full, must also be served within seven days. If the appointment is made after seven days, it just needs to be served "forthwith". That is, on its face, stricter than the 1996 Act which only says that there must be a timetable that has "the object" of referring the dispute to the adjudicator within seven days of the Notice. The 1996 Act wording suggests to me that provided the Rules intend there to be a referral within seven days, there will not be a serious problem if that limit is not complied with strictly.

[1] Judge Coulson QC in *AC Yule & Son Ltd v Speedwell Roofing & Cladding Ltd* [2007] EWHC 1360. See case summary on page 39 below for further details.

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The difficulty Cubitt faced was that it was now already after business hours on the seventh day and there were 12 lever arch files of material. We offered to serve the main referral document at once by fax or email and send the supporting documents the next day. This offer was refused. So we served the whole lot the next day – the eighth day after service of the Notice. Fleetglade said that the Referral was late so the Adjudicator did not have jurisdiction. We disagreed, but, in any event, had no option but to push on because the Final Certificate had by this time become conclusive except for proceedings that had already been issued. We could not just start a fresh adjudication. But we did not want the jurisdiction issue hanging over our heads while the adjudication proceeded. So, we started proceedings in court for a declaration that the Referral had been properly served and that the Adjudicator did have jurisdiction.

The court is moving away from the idea that decisions must be upheld wherever possible and is substituting a new priority – to ensure that adjudications are decided as quickly as possible by adhering to a strict timetable.

By the time the declaration case came to court, Cubitt had already got a reasonably favourable decision from the Adjudicator so we combined the declaration with an enforcement application. We made a number of points about the late service issue. First, we said that we had served the original Notice after 4p.m. and, in accordance with the Civil Procedure Rules, it should be deemed to have been served the next day. That would mean that the Referral had been served within seven days. The Judge disagreed. Cubitt had wanted to serve the Notice on the day it was actually sent and he could see no reason to use the analogy of CPR to deem service the following day.

The next point was that when the JCT Rules said that the Referral was to be served within seven days, it was only directing what ought to happen – it was not mandatory. Failure to comply would not make the Referral invalid. After all, except where time is expressly made of the essence, missing a time limit in building contracts is not usually fatal. We did not get anywhere with that, either. Judge Coulson said that compliance with the timetable is essential to ensure that the adjudication runs "like clockwork". The most important feature of adjudication was speed. We then said that the Adjudicator had not actually been appointed within seven days because the RICS had only notified of the appointment after 5p.m. on the seventh day and the Adjudicator only contacted us after 5.30p.m. – after normal business hours. Therefore Cubitt did not have to serve the Referral within seven days of the Notice, but only "forthwith" after the appointment. We lost on this one as well. Again, Judge Coulson said that a day for these purposes was an actual day, not a business day.

However, having demolished all our arguments, Judge Coulson went ahead to find in our favour! Although he decided that the provisions for service of the Referral had to be adhered to strictly, he said that here late service did not make the Referral a nullity. First, he said that the rules had to be operated in a "sensible and commercial way". The rules did not say what was to happen if the Adjudicator were appointed so late that it was not practicable to serve the Referral on the same day. A sensible interpretation of the Rules was that if that happened the Referral must simply be served as soon as possible. Service on the eighth day would be good enough. Any different conclusion would be absurd. It would mean that if the Adjudicator were appointed at 11.55pm on the seventh day, the Referring Party would have to serve the Referral in just five minutes. The Judge was also persuaded by the fact that it would be unfair to penalise Cubitt for the RICS's delay in making the appointment. He said:

"In my view, that delay was unacceptable. Bodies like the RICS have generated considerable revenue from their nominating function, and some of their members derive the majority of their income from their practice as adjudicators. In such circumstances, the parties are entitled to expect the nominating body to act promptly to nominate an adjudicator. In this case I consider that the RICS failed to act promptly."

He went on to say that it would be wrong to penalise Cubitt for the RICS's delay, given that we had, within an hour of being notified of the appointment, offered to fax Fleetglade a copy of the Referral. So what Judge Coulson was doing was making it very clear that adjudication timetables have to be adhered to strictly. However, in the very special circumstances of this case he was going to let Cubitt slip under the wire in the interests of justice and fairness and hold that the Referral was properly served.

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However, in the course of the adjudication another problem had arisen. The time for making a decision had been extended well beyond the initial 28 days up to 24 November 2006. Just before the decision was due, the Adjudicator told the parties that he had completed his decision subject only to final proofing and an arithmetical check. However, he pointed out that his terms allowed him to hold a lien over his decision until he was paid. The parties responded that adjudicators are not entitled to exercise liens and a little after noon the next day, a Saturday, he released the Decision.

The Decision was published 12 hours or so late, and Fleetglade resisted enforcement saying that the delay made it invalid. Judge Coulson agreed that the timetable for making the Decision had to be adhered to strictly. He also confirmed that an adjudicator is not entitled to exercise a lien over a decision, even if his terms of acting say that he can.[2] However, Judge Coulson said that the making of the Decision and the sending of it to the parties were two separate acts. In this case, on the evidence, the Adjudicator had made his Decision on time – that is, by 24 November, and he had then communicated it forthwith, i.e. about 12 hours later on the next day. So the Decision was valid. That said, the Judge made it absolutely plain that where the Rules talked about sending out a Decision "forthwith", that meant within just a few hours. If the Decision here had been sent any later it would have been invalid. Again, the court made it clear that there must be strict compliance with adjudication timetables. If not, the Decision will be invalid. Cubitt only succeeded on the unusual facts of the case.

Although an adjudicator cannot be sued in negligence provided he acts in good faith, if he acts outside his jurisdiction, for example by giving a late decision, he effectively ceases to be an adjudicator and so may be liable in damages.

Judge Coulson also suggested that if the Decision had been late the Adjudicator could have been in trouble personally. Although an adjudicator cannot be sued in negligence provided he acts in good faith, if he acts outside his jurisdiction, for example by giving a late decision, he effectively ceases to be an adjudicator and so may be liable in damages. If the Decision had been invalid here, because the Final Certificate had become conclusive, those losses could have been huge.

Now, it is useful to compare *Cubitt* with a case with broadly similar facts heard just a month later, *Epping Electrical Company Ltd v Briggs and Forrester (Plumbing Services) Ltd.* Here where an adjudicator held on to his Decision for two days, it was held that when he did release it, it was invalid. That was so even though the relevant CIC Adjudication Rules said that adjudicators' decisions would generally be valid even if made late. Judge Havery decided that in this respect the CIC Rules ran contrary to the 1996 Act, and were invalid. The Rules could not save a Decision that had been made out of time.

Conclusion

So these cases are very important. Up to now the courts have tended to do their best to ensure that adjudicators' decisions are upheld and not defeated by technicalities. These cases show that in matters of timetabling they will take a much tougher approach. This means that it is essential when involved in adjudications, in whatever capacity, to ensure that time limits are adhered to strictly.

We have looked at some interesting black letter law, but where does that leave us on the point of principle raised at the beginning: that is, that the parties can make whatever arrangements they like provided they do not conflict with the HGCRA? It seems to me arguable that the *Cubitt* and *Epping* Decisions do not actually apply that principle at all. For example, in the Epping case, the parties, by adopting the CIC Rules, had decided that a late decision would usually still be valid. It might be thought that this, again, merely amounted to an agreement that had the effect of extending the time for making the Decision. Therefore, the Decision should be valid when delivered.

So why has the court not upheld what the parties seem to have agreed freely? It seems to come down to policy. The court is moving away from the idea that decisions must be upheld wherever possible and is substituting a new priority – to ensure that adjudications are decided as quickly as possible by adhering to a strict timetable. If, however, the parties have freely agreed a different policy, it is not obvious to me why the courts should seek to subvert that agreement.

[2] This is a view shared by other TCC Judges. See for example HHJ Thornton QC in the case of *Mott Macdonald v London & Regional Propoerties Ltd* [2007] EWHC 1055

Health & Safety

What does the new corporate manslaughter legislation mean for you?

Our Capital Projects seminars are proving to be as popular as our Adjudication Update Seminars. Our 4th, which will be chaired by Victoria Russell, takes place on 20 November 2007. The seminar features talks by Ken Shuttleworth, Chairman of the CABE design review committee for education, Dave Hampton, the carbon coach and Colin Harding of George & Harding, as well as our usual in-house Fenwick Elliott contributions. For further information please contact Marie Buckley.

Last November, Victoria Russell spoke on the variety of duties and liabilities of construction professionals. A copy of that paper can be found on our website. Meanwhile, Jon Miller, as set out below, summarised the Corporate Manslaughter legislation, which became law in July 2007.

The new legislation will make it easier to convict companies of corporate manslaughter as the emphasis will shift from trying to find an individual with a directing and guilty mind to looking at all of the company's procedures and operations

The impetus for a new law on corporate manslaughter has been the number of rail and other transport disasters. Although fines have been imposed on companies involved in Hatfield (Balfour Beatty £7.5m, Railtrack £3.5m), Paddington (Network Rail £4m, Thames Trains £2m) and the Southall disaster (Great Western Trains £1.5m), these fines did not prevent universal condemnation when companies and the individuals involved avoided manslaughter convictions. The public perception is that the courts have been too lenient.

The present legislation

The current Corporate Manslaughter and Corporate Homicide Act 2007 received the Royal Assent on 26 July 2007. By section 1, the Act will apply to "organisations". An organisation includes a company, government departments and even the police force. Arguably, "organisations" will not apply to partnerships, sole traders and some unincorporated associations. Schools, clubs and parish councils, for example, are unincorporated associations and, as the Bill is currently drafted, they will not be caught by its provisions. The reason for this is that, according to the Home Office, unincorporated associations have a constantly changing membership and it is therefore difficult to taint them with the acts and omissions of their earlier members who were around when the fatality took place.

As expected, there was a considerable amount of lobbying going on as the Bill went through the Committee Stage. The definition of "organisation" was extended to partnerships as civil liberties groups strongly argued that many partnerships have the same degree of permanency as modern companies.

Crown immunity

The Act, for the first time, will also abolish crown immunity as its scope will cover government departments, schools, the police force, etc. Section 11 makes it clear that government departments etc. are not to be treated as servants or agents of the crown. There are some narrow exceptions where a public body has to make strategic decisions when it comes to spending public money (strategic decisions taken by the prison services in respect of detainees, emergency services response times, allocating resources to riots, general policing, etc.), which are not covered by the legislation. Although crown immunity has been lifted, this now is coming in for regular examination. The exception given to some public bodies/decision-making is said to avoid creating a level playing field between the public and private sectors where they perform the same roles.[1] The legislation was criticised because the immunity given to (say) the army would mean that it would not apply, for example, to the deaths of the four young soldiers at the Deepcut Barracks. This was revised by the application of the Act to the armed forces by virtue of section 12.

[1] This is one of the aims of the legislation according to the notes accompanying it at paragraph 18

Health & Safety

Individuals

Sections 11-14 make it clear the new offence of corporate manslaughter will not apply to an individual. The common law offence of manslaughter by gross negligence will be abolished insofar as it applies to organisations. Instead, organisations will be caught by the new corporate manslaughter act. This does not mean that individuals cannot be responsible for manslaughter if they commit manslaughter during the course of their employment – individuals will still be caught by the criminal offence of manslaughter.

The pressure group, Families Against Corporate Killers, has condemned the Act as *"not fit for purpose and will not have any major effect in deterring negligent employers from injuring and killing people as it does not carry the threat of imprisonment for gross negligence"*. The new Act makes the position clear; company directors cannot be imprisoned as a result of the gross negligence of their company.

The key feature of the Act is that there will be no need to find a single director or manager with a "controlling mind". Instead the focus will shift, and the jury will now examine the combined failings of senior management. An organisation will be guilty of the offence of corporate manslaughter :

"if the way in which its activities are managed or organised:-

(a) causes a person's death, and

(b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased."

All commercial organisations should take steps to review their business risks in relation to this new legislation

A "senior manager" is someone who plays a significant role in making decisions about how the whole or substantial part of an organisation manages to organise or actually manages the whole or substantial part of the organisation's activities. Many directors and senior managers will be directing a "whole or substantial part" of an organisation's activities. However, it is doubtful as to whether site-based personnel will be deemed to be directing a "substantial part" of (say) a contractor's business.

Confining the offence to senior management has also attracted considerable criticism.[2] This is because it is only the failures of senior management that will render the company open to prosecution. Failures at other levels of management, no matter how serious, will not be caught. If an investigation found that death was caused by a number of failings at different levels, some at a senior management level and some at junior management level, any subsequent prosecution would only consider the acts or omissions of the senior management. Critics have argued that companies could make themselves "manslaughter proof" and immune from prosecution by delegating the safety responsibilities to below senior management level.

"Gross breach of relevant duty of care"

The organisation must owe the victim a "relevant duty of care." This is defined by the civil law of negligence and in particular:

- A duty owed to employees or any person performing services for the organisation;
- The duty owed as an occupier of premises;
- The duty owed in relation to the supply of goods or services, or of any construction or maintenance operations or any other activity on a commercial basis or even the keeping of any plant vehicle or any other thing.

The law of negligence is constantly developing. In the construction industry, the courts have decided that a local authority building inspector firstly did and then did not owe a duty of care to the property owners when inspecting foundations. The duty owed by builders to subsequent purchasers of property has changed, whilst it is unlikely that the courts will still say that a subcontractor owes a duty of care to an employer.

[2] See for example the Centre for Corporate Accountability commentary on the Coporate Manslaughter and Homicide Bill 2006

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The problem is that the civil law of negligence has to take into account factors which have nothing to do with the principles underpinning criminal law. The criminal law tries to protect citizens who are deprived of their rights to life, limb or property, whereas civil law decides whether one organisation or person should make redress to another. As to deciding whether there was a gross breach of the duty owed, the jury has to look at a wide range of factors, including how serious the breach of the health and safety legislation was, and how much of a risk of death that breach posed. They must also decide the extent to which accepted practice within an organisation would have encouraged the failure to comply with health and safety legislation.

It is difficult to define the standard of care to be expected of all organisations, bearing in mind the different functions a business will carry out compared with say a school or local authority. The law has fallen back on the law of negligence and health and safety legislation but as a result the standard required for conviction is vague. Consequently there are alternative proposals to allow a judge to decide whether a relevant duty was owed and the jury to decide whether the "gross breach" could have been prevented had all reasonable precautions been taken.

Unlimited fines

Although companies cannot be imprisoned, they can be fined. It is expected that juries will look at the whole range of management conduct and working practices, rather than concentrating on individuals' actions. The fine, however, will be set by the judge, not the jury. There will be no limit on the fines and some commentators believe that fines as much as £20m or even higher will result, even though judges do have a tendency to be conservative when imposing financial penalties. Also, with more companies in the dock, it will be easier for victims' families to obtain compensation. However, a prosecution for corporate manslaughter could only be instituted with the consent of the Director of Public Prosecutions. This will mean that individuals will not be able to commence a private prosecution.

There will be no limit on the fines and some commentators believe that fines as much as £20m or even higher will result ... with more companies in the dock, it will be easier for victims' families to obtain compensation.

Health & Safety at Work Act 1974

The fines imposed in the Hatfield, Paddington and Southall incidents were all imposed for a breach of health and safety legislation. According to section 3(1) of the Health and Safety at Work Act 1974:

"It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, the persons not in his employment who may be affected thereby are not thereby exposed to risk to their health and safety."

Failure to comply with this duty is a criminal offence, which is punishable by an unlimited fine. When deciding what is "*reasonably practicable*" the employer must weigh up the risk on one side against the sacrifice to him on the terms "*time, trouble and money*" to avert the risk.[3] One might ask whether the new Act adds anything. It allows for unlimited fines, in similar vein to the Health & Safety at Work Act. However, although a conviction of fine for breach of health and safety legislation attracts public criticism – a conviction for corporate manslaughter will have more impact.

Conclusion

The current Corporate Manslaughter and Corporate Homicide Act has been over 12 years in the making. It will make it easier to convict companies of corporate manslaughter as the emphasis will shift from trying to find an individual with a directing and guilty mind to looking at all a company's procedures and operations. However, the effect of the Act would be the same as breaches of the Health and Safety at Work Act. Companies will face significant fines. Therefore all commercial organisations should take steps now to review their business risks. For example, Design and Build Contractors should review their health and safety arrangements. Of course that review should already have taken place, given the implementation of the new CDM regulations which are described below.

[3] *Edward v National Coal Board* 1949. This is known in modern parlance as risk assessment.

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The new CDM regulations

The new Construction (Design and Management) Regulations 2007 ("CDM Regulations") came into force on 6 April 2007, replacing the existing 1994 Regulations. The Regulations are supplemented by a new Approved Code of Practice, titled "Managing health and safety in construction" (also known as "ACoP"). These new Regulations strengthen the duties on all those involved in the design and construction of projects of every size. In particular, the new regime imposes greater obligations on clients and employers who will no longer be able to assign their duties to agents. A failure to meet the duties can give rise to both criminal and civil liability. [1]

The new Regulations are more comprehensive and aim to place clearer responsibilities on the parties in an attempt to oblige them to co-operate, communicate with each other and share information, reduce bureaucracy and comply with the Regulations. Consequently it is intended that if a duty is breached, it will be easier to apportion blame and bring a prosecution. The HSE[2] have justified the changes for the following reasons:

"Construction remains a disproportionately dangerous industry where improvements in health and safety are urgently needed. The improvements require significant and permanent changes in dutyholder attitudes and behaviour. Since the original CDM Regulations were introduced in 1994, concerns were raised that their complexity and the bureaucratic approach of many duty holders frustrated the Regulations' underlying health and safety objectives. These views were supported by an industry-wide consultation in 2002 which resulted in the decision to revise the Regulations."

The aims of the new Regulations are to:

- *improve the planning and management of projects from the very start;*
- *identify risks early on;*
- *target effort where it can do the most good in terms of health and safety; and*
- *discourage unnecessary bureaucracy.*

The main changes are as follows:

- An enhanced duty on clients, which according to the HSE has been introduced to better reflect the influence that clients have (or perhaps should have) on health and safety standards on site;
- The removal of the facility for the client to transfer their liabilities to an agent;
- The introduction of a new duty holder, the co-ordinator, to replace the existing planning supervisor; and
- Improved guidance for those who must assess the competence of persons and/or organisations before appointing them.

There are two types of project. Those projects likely to take more than 30 days or 500 man-days of construction work are known as notifiable projects. Other projects are non-notifiable. The new Regulations apply in their entirety on notifiable projects.

If your project was current as at April 2007, the client must within 12 months take reasonable steps to ensure that the planning supervisor and principal contractors are competent to act under the new Regulations.

The changes seem wide-ranging. The HSE is of the view that the overall cost effect will be minimal. Their rationale is that the costs of implementing the new Regulations will be off-set by more efficient working practices and a reduction in the time lost due to accidents and the like. Whether this turns out to be optimistic or not remains to be seen.

Employers or clients

Clients are not required to manage the work themselves but to make sure that others have arrangements in place to control the risks associated with construction sites. This duty is not delegable and accordingly, as stated above, the revised obligations impose much wider responsibilities upon employers and clients.

Accordingly, clients and employers must become more actively involved in ensuring a healthy and safe environment on site. Although a client can still appoint an agent to

[1] The same was true under the old Regulations. In April 2007, a number of charges were brought following the death of a scaffolder who died after falling through a fragile roof light. His employer and the main contractor were both fined for breaches of the Health & Safety at Work Act. The project designer and planning supervisor were fined for breaches of the CDM Regulations.

[2] www.hse.gov.uk

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assist it with compliance with the Regulations, liability for any breach of the client responsibilities will remain with the client. In projects where there is more than one client, for example consortiums or joint ventures, clients can elect in writing that only one will be treated as the client for the purposes of the Regulations. If no election is made they will all be treated as a client under the Regulations. Remember that the client has overall responsibility for checking that all parties, including workers who carry out the construction work, are competent to perform their duties.

The client must also ensure that the CDM co-ordinator, designer and contractor receive all information relevant to their tasks so as to eliminate risks to health and safety and also to meet the duties under the Regulations. Previously, the client only had to supply information to the planning supervisor.

Concerns were raised that the complexity of the old Regluations and the bureaucratic approach of many duty holders frustrated their underlying health and safety objectives.

On notifiable projects, the client is required to ensure (i) the appointment of the CDM co-ordinator as soon as is practicable after initial design work has begun and (ii) that the construction phase of the project does not start unless the principal contractor has prepared a compliant construction phase plan and the client is satisfied that the requirements for arrangements to be made for the provision of welfare facilities have been satisfied.

The Regulations do not apply to domestic projects. For example, if you are having work done in your own home, they will not apply to you. However, they will apply to the contractor carrying out the works.

The co-ordinator

The main role of the co-ordinator is to advise and assist the client in complying with their duties under the Regulations. If a project is notifiable then a CDM co-ordinator and a principal contractor must be appointed. In particular, the co-ordinator must:

- Assist the client with the appointment of competent contractors and designers;
- Advise on the adequacy of other duty holders' arrangements for controlling risk arising from the project;
- Co-ordinate the design work, planning and other preparation for construction;
- Liaise with the principal contractor about design changes during construction;
- Notify HSE about the project; and
- Produce or update the health and safety file.

The contractor

The role of the contractor remains essentially the same. The contractor must ensure that suitable arrangements are in place for the management of health, safety and welfare issues. This may include training obligations. The contractor must also consider the extent to which the sub-contractors are also complying with the Regulations and their own health and safety obligations.

Further, the contractor should remember that all members of the project team are under a duty not to appoint anyone, for example a designer, under the Regulations who is not competent. Equally, if you know you are not competent to undertake the necessary role under the Regulations you are under an obligation not to accept the appointment.

The approved code of practice

The ACoP is intended to supplement the new Regulations and provide guidance in plain English. The ACoP has a special legal status. If you follow the provisions set out in the ACoP (and can demonstrate that you followed those provisions) you will be deemed to have complied with the law. In other words, if you are prosecuted for a breach of health and safety law, and you have not followed the ACoP, you will be deemed not to have complied with the CDM Regulations, unless you can prove

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compliance by other means. The ACoP runs to 121 pages and costs just £15. It can be ordered via the HSE website.

Practical impact

Indeed, further information about the new Regulations can be found on the HSE website, www.hse.gov.uk.

It is important that you understand how the Regulations may affect your business. Appointments, contracts and warranties should reflect the changes brought in, both in terminology and scope. Employers and contractors need to make sure that their contracts cover the new Regulations and the duties imposed. Everyone must consider their working practices and procedures. It is not just a case of actually complying with the Regulations, you should carefully record the fact as well.

This is especially the case with standard terms and conditions. For example, the planning supervisor should be referred to as CDM co-ordinator. You should delete provisions that assign responsibilities to an agent. As an example, the JCT have replaced clause 3.25 of the SBC with the following:

"Each Party acknowledges that he is aware of and undertakes to the other that in relation to the Works and site he will duly comply with the CDM Regulations. Without limitation, where the project that comprises or includes the Works is notifiable:

As a result of their enhanced duties under the new Regulations, clients and employers must become more actively involved in ensuring a healthy and safe environment on site.

(i) The Employer shall ensure both that the CDM Co-ordinator carries out all his duties and, where the Contractor is not the Principal Contractor, that the Principal Contractor carries out all his duties under those regulations;

(ii) Where the Contractor is and while he remains the Principal Contractor, he shall ensure that:

(a) The Construction Phase Plan is prepared and received by the Employer before construction work under this Contract is commenced, and that any subsequent amendment to it by the Contractor is notified to the Employer, the CDM Co-ordinator and (where not the CDM Co-ordinator) the Architect/Contract Administrator; and

(b) Welfare facilities complying with Schedule 2 of the CDM Regulations are provided from the commencement of construction work until the end of the construction phase.

(iii) Where the Contractor is not the Principal Contractor, he shall promptly inform the Principal Contractor of the identity of each sub-contractor that he appoints and each sub-subcontractor appointment notified to him;

(iv) Promptly upon the written request of the CDM co-ordinator, the Contractor shall provide, and shall ensure that any sub-contractor, through the Contractor, provides, to the CDM Co-ordinator (or, if the Contractor is not the Principal Contractor, to the Principal Contractor) such information as the CDM Co-ordinator reasonably requires for the preparation of the health and safety file."

However, it should not just be a case of amending contracts, you must ensure that you understand what the new Regulations require of you. The stated aims of the new regulation are to:

- improve the planning and management of projects from the very start;
- identify risks early on;
- target effort where it can do the most good in terms of health and safety; and
- discourage unnecessary bureaucracy.

It remains to be seen the extent to which these aims succeed. However, everyone must be aware that the Government, through its health and safety legislation, intends that health and safety matters are treated as an essential and normal part of every project – not an afterthought. Breaches will no doubt be treated accordingly.

Litigation

The revised Pre-action Protocol for Construction and Engineering Dispute

On 6 April 2007, a revised Pre-Action Protocol for Construction & Engineering Disputes came into force. This new protocol will govern all disputes from that date. Disputes that were already on foot and so the subject of the existing protocol will continue to be governed by that protocol.

The main changes are as follows:

(i) The introduction of a new paragraph 1.5 which specifically provides that costs incurred in the Protocol must be proportionate to the complexity of the case and the amount of money which is at stake. Thus by way of example, parties will not be expected to marshal and disclose all supporting details and evidence that may ultimately be required if the case proceeds to litigation;

(ii) By paragraph 4.3.1, whilst still being obliged to issue the Letter of Response within 28 days of receipt of the Letter of Claim, potential defendants can agree an extension of time up to three months to issue their Letter of Response;

(iii) Paragraph 5.1 sets a deadline for the pre-action meeting which should now normally be held within 28 days of receipt of the Letter of Response;

(iv) Paragraph 5.5(1) notes that parties will be asked to agree to define the relevant issues to be considered by experts and how such expert evidence will be dealt with;

(v) Paragraph 5.4 makes it clear that no party shall be forced to mediate or participate in any other alternative form of dispute resolution; and

(vi) However, all parties should be aware that by paragraph 5.6(v) the court may require a party who attended a pre-action meeting to disclose whether or not they considered or agreed an alternative means of resolving the dispute.

DGT had not complied with the TCC Pre-Action Protocol. Thus, even if there had been no adjudication agreement, the Judge would have ordered a stay.[1]

These amendments are intended to reflect the concerns of those using the Protocol which have arisen in practice since its introduction. It was felt that all too often the Protocol process was being manipulated to prolong the dispute between the parties, rather than to try to resolve that dispute in a constructive manner as envisaged by the Protocol. The changes are designed to help combat this.

The changes to the Protocol followed the interim report of a working party set up by Mr Justice Jackson which was tasked with considering whether any particular changes ought to be made to the Protocol. The working party reviewed the experiences of those operating under the existing Protocol and sought to identify any areas where problems had been encountered. The interim report noted that in general it was felt that the existence of the Protocol had:

"benefited the parties to disputes by providing them with an early opportunity to articulate and evaluate the strengths and weaknesses of the claims and defences."

However, the working party also identified certain areas of concern, in particular in relation to the time and costs of complying with the Protocol. In respect to timing issues, that concern was that potential defendants were seeking long periods to prepare a letter of defence and that whilst a potential claimant might object, there was no real sanction or process to encourage agreement to a lesser period. It was recognised that further delay could be caused by the fact that the organisation of the Pre-Action Protocol meeting often could not commence until after the response to any counterclaim. This would lead the Pre-Action Protocol procedure to taking 12 months or more.

It can be seen that two of the amendments to the Protocol have been introduced to try and deal with this. First, the time within which potential defendants have to

[1]Comments of HHJ Coulson QC in the case of *DGT Steel and Cladding Ltd v Cubbitt Building and Interiors Ltd*. See case summary on page 41 below.

respond to the claim has been reduced from four to three months and now a much earlier deadline has been introduced for the holding of the pre-action meeting.

Another area of concern related to costs. Whilst the revisions do not directly address this issue, clearly by attempting to shorten the Protocol process, costs should be reduced. In addition, the new paragraph 1.5 has made it clear that the concept of proportionality must be considered in relation to the incurring of costs. A particular example given relates to the gathering together and disclosure of documentation, albeit that parties will still be able to make applications for pre-action disclosure in accordance with CPR Part 31.16.

Why is the protocol important?

The Pre-action Protocol for Construction and Engineering Disputes applies to a wide category of disputes, including professional negligence claims against architects, engineers and quantity surveyors. It is of particular importance because a potential claimant must comply with the Protocol before commencing proceedings in the court. Paragraph 1.4 relates to compliance and states that:

"The court will look at the effect of non-compliance on the other party when deciding whether to impose sanctions."

I take the view that it was wholly unnecessary to commence this litigation ... It is clear that alternative dispute resolution could have been and should have been explored.

Non-compliance with the Construction and Engineering Pre-action Protocol was considered in the case of *Paul Thomas Construction Limited v Hyland & Anor.* Here, the defendants had employed the claimant as a building contractor. A dispute arose over the quantification of the final account. The defendants offered to submit to a form of adjudication, but the claimant refused unless the defendants paid the entire costs of that process. The claimant then issued court proceedings, and made unsuccessful applications under CPR Part 24 (summary judgment) and Part 25 (interim payments).

HHJ Wilcox considered whether the claimant was justified in issuing proceedings. He decided they were not, and that they had conducted themselves in an unreasonable manner in breach of the Pre-action Protocol. He further held that the appropriate sanction was for the claimant to pay the defendants' costs on an indemnity basis. The Judge concluded that the claimant had acted in a heavy-handed.manner. He stated:

"Culpability here means wholly unreasonable behaviour. That must be measured against the reasonable conduct of reasonable solicitors at the time and must be informed by the current rules and, in particular, paragraph 1.4 of the pre-action protocol. I take the view that it was wholly unnecessary to commence this litigation . . . It is clear that [alternative dispute resolution] ... could have been and should have been explored ... That may include sensible discussions between the parties not necessarily involving a third party. In my judgment, there is in those terms some culpability in this case. In my judgment, indemnity costs are warranted."

Obviously, until the changes are tested in practice, no one can say whether they will have the desired effect. However, as the *Hyland* case demonstrates, the courts will not look kindly on parties who act unreasonably. Of course the rules must be read with care. Paragraph 5.4 makes it quite clear that a party cannot be forced to mediate. That is quite right. Practically there is little point in wasting resources in preparing for a mediation where one party has no inclination to take a proper part. However, do not forget that refusing to mediate can carry its own penalties and the Protocol notes that the court can enquire at an early stage whether ADR was considered.

Paying the price of failing to comply with the Protocol

The recent case of *Charles Church Developments Ltd v Stent Foundations Ltd & Peter Dann Ltd* [2007] EWHC 855 (TCC), which came before Mr Justice Ramsey, demonstrates what might happen if you do not comply with the Protocol.

The case concerned a development project in London. During the course of the piling, there were a number of incidents. In August 2000 and February 2001, CCD wrote to

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Stent about these, but thereafter Stent heard nothing further from CCD making any formal claim or anything else, until March 2003 when CCD informed Stent that they were investigating claims against Stent and others. CCD asked Stent to provide information and documentation in connection with that investigation. There was some correspondence between those advising Stent and CCD, but this ceased in about September 2004.

Then some 20 months later in June 2006, CCD served a formal claim on Stent. The claim form had been issued in February 2006. No attempts had been made to conduct any Pre-Action Protocol procedure before the issue or service of the proceedings. CCD accepted this and indeed apologised to the court for that conduct. In early 2007, Stent made an application to the court seeking an order that:

(i) CCD shall pay Stent's costs of the claim to the 13 April, 2007, to be subject to detailed assessment if not agreed.

(ii) CCD shall, in any event, bear its own costs of the claim against the first defendant to the 13 April, 2007.

In this case, as in many similar cases, experience has shown that it is likely that the Pre-Action Protocol would have led to a settlement without a need for court proceedings.

Stent, referring to CCD's failure to comply with the Pre-Action Protocol, relied on paragraph 2.3 of the Protocol Practice Direction which provides that:

"If, in the opinion of the court, non-compliance has led to the commencement of proceedings which might otherwise not have been needed to be commenced, or has led to costs being incurred in the proceedings that might otherwise not have been incurred, the orders the court may make include: (1) An order that the party at fault pay the cost of the proceedings, or part of those costs, of the other party or parties."

CCD said two things by way of defence. First that this was a case where there were potential limitation difficulties. In those circumstances, CCD said that their failure was a failure to seek directions under paragraph 6 of the Protocol. Second, CCD said that the question of costs should not be determined now, but at the end of the action, or after settlement, when the position on costs would be clearer, and the court would have more information on which to base its decision.

The Judge noted that CCD had not taken any steps to implement the TCC Pre-Action Protocol nor to alert Stent to the contents of the claim or the fact that proceedings were imminent. Indeed, he questioned whether there was an immediate limitation problem. Rather, in the period from 14 February 2006 to 8 June 2006, when these proceedings were finally served on Stent without advance notice, CCD spent much time and cost in preparing the particulars of claim for service in the proceedings, ignoring the pre-action obligations.

What was the effect of the breach of the Pre-Action Protocol?

A key objective of the Pre-Action Protocol is to enable parties to avoid litigation by agreeing a settlement of a claim before the commencement of proceedings. Judge Ramsey proceeded on the following basis:

"in this case, as in many similar cases, experience has shown that it is likely that the pre-action protocol would have led to a settlement without a need for court proceedings."

CCD said that no order should be made at this stage because the decision as to the consequences of the failure to comply with the Pre-Action Protocol would be easier to make at a later stage when, for instance, the court knew the outcome of a mediation that was due to take place in May 2007. CCD also submitted that Stent's application sought to gain a tactical advantage in relation to one issue – the costs up to the date of the mediation – whereas that could be dealt with in the context of the mediation.

Stent submitted that non-compliance with the Protocol had been established and the court was in as good a position now as it will be in the future to decide the question of

costs. If the mediation were to fail, then the court would not know why it had failed, because such matters would be, and remain, confidential. Stent also said that the mediation was more likely to fail if the question of those costs was not resolved now.

The Judge agreed the failure to comply with the Protocol meant that the parties were entering the mediation with an additional issue: the increased costs that had been incurred in the context of the proceedings, instead of under the Protocol procedure. He thought there were good reasons why that issue should be resolved now. In particular it would remove an extra issue which would allow the parties to mediate in a way that more closely mirrored a mediation at the end of the Protocol procedure.

Stent's costs

The costs position as disclosed at the first case management conference showed that as at October 2006, CCD estimated its costs to date as £800,000 including solicitors' costs and experts. Stent had incurred costs of £90,895 and Peter Dann some £80,000.

In relation to Stent's costs, any order should place them in no worse a position than Stent would have been in, had the Protocol been complied with. The evidence indicated that they would initially have responded using their in-house technical team but that they would have required some outside expert engineering, delay and quantum input. The Judge held that Stent were entitled to recover costs to reflect the increased work carried out because of the exchange of information taking place, not in the lower-cost atmosphere of Pre-Action Protocol procedure, but in the higher-cost atmosphere of court proceedings. In relation to solicitors' costs, this should reflect, to some extent, the use of in-house solicitors, rather than external solicitors.

The Judge held that Stent were entitled to recover costs to reflect the increased work carried out because of the exchange of information taking place, not in the lower-cost atmosphere of Pre-Action Protocol procedure, but in the higher-cost atmosphere of court proceedings.

The Judge was conscious that there were now two possible outcomes to the mediation. If there was a settlement, the additional element of the costs expended in that period will have been spent unnecessarily. If there was no settlement, then Stent would benefit from not having to spend certain elements of cost in the proceedings. However, the Judge held that the costs order should reflect the likelihood that the claim could have been resolved by Protocol process. In all the circumstances, the Judge decided that Stent should be entitled to recover from CCD 50% of its costs incurred from 9 June 2006 (the date the claim was served) until 13 April 2007.

CCD's costs

Here, had the Pre-Action Protocol procedure been followed, then CCD's costs from 14 February 2006 to 13 April 2007 would have been incurred in the lower-cost regime of the Pre-Action Protocol, rather than the higher-cost regime of court proceedings. Such costs would only generally become relevant if, at any stage, a costs order is made in CCD's favour. In principle, in that event, CCD could seek payment of costs of and incidental to the proceedings, which might include the costs of complying with the Pre-Action Protocol. In assessing the position, the Judge held in mind:

"(1) My conclusion that these proceedings would have been likely to be resolved had a pre-action protocol procedure been followed.

(2) The fact that the proceedings from 14 February 2006 to 13 April 2007 should have been carried out in the lower-cost atmosphere of the pre-action protocol process.

(3) The fact that if the proceedings are not settled, the proceedings will continue, and if CCD succeeds, it would otherwise be entitled to its costs in the period from 14 February 2006 to 13 April 2007."

The Judge therefore held that the proper way of dealing with the position on CCD's costs was, as with Stent's cost, to provide that CCD should, in any event, bear 50% of its costs of the proceedings from 14 February 2006 to 13 April 2007. That might well be a significant sum, bearing in mind the £800k CCD said it had incurred by October 2006.

Mediation

TCC mediation survey – mediation in construction disputes: an interim report

The use, and in particular the effectiveness, of mediation in construction disputes is usually based upon anecdotal evidence. In order to address this problem, an evidence-based survey commenced on 1 June 2006. This funded project is being conducted by King's College, London.[1] The research is being conducted not only with the support of the Technology and Construction Court, but also with their assistance. As Nicholas Gould explains, the aim of the research is to:

(i) Reveal in what circumstances mediation is a real alternative to litigation, in other words a value-added alternative that settles the dispute;

(ii) Assist the court to determine whether, and at what stage, it should encourage mediation in future cases; and

(iii) Identify which mediation techniques are particularly successful.

Survey forms are issued to all of the participants of litigation in the TCC, which has concluded after 1 June 2006. The survey is, therefore, almost at its halfway point. This article is merely a summary of the interim report based upon the data collected in the first quarter of the survey period.

The survey

The representatives of each party that has settled, resolved or received a judgment from the TCC after 1 June 2006 have or will receive a survey form. Form 1 applies where a case has settled. Form 2 applies where a judgment has been given. Both surveys enquire whether mediation was used, the form that it took and at what stage in the litigation process the mediation occurred. Specific details about the dispute resolution process are then collected.

Experience of mediation has shown that the vast majority of cases are capable of settlement and are, in fact, settled in this way. In my judgment, that has to be taken as the starting point.[3]

Interim results

During the first six months, a response rate of 25.5% was recorded. An initial analysis of the responses shows that 32% of those disputes that settled were as a result of a mediation. This is more than had been anticipated. Of the remaining 68%, 61% settled by conventional negotiation while 7% settled as a result of some other process.

The nature of the cases dealt with is also interesting. A noticeable proportion of the cases related to defects (28%), design issues (15%) and professional negligence (15%). A survey dealing with similar categories of disputes arising from the Technology and Construction Court some ten years ago revealed that the majority of the issues leading to litigation in the TCC, were those relating to payment, variations, delay and site conditions.[2]

During the past ten years there has been a reduction in the number of cases commencing in the TCC. Some of this in part relates to the introduction of the pre-action protocols, also in part to the increase in mediation, but undoubtedly, due also to the increase in adjudication. Perhaps it is the case that time and money-related issues, often prevalent in construction disputes, are now being dealt with by way of adjudication, and during the pre-action protocol process, while defects, design and negligence are remaining within the court's domain. This might be because those issues are frequently not only more complex, but often multi-party and therefore not easily suited to adjudication.

Respondents were asked to identify at what stage litigation settled or was discontinued. This is particularly interesting as many will often have an anecdotal view as to the time at which disputes settle. Anecdotally, many believe that most

[1] King's College, London gratefully acknowledges the Society of Construction Law, the Technology and Construction Solicitor's Association, Her Majesty's Judges of the Technology and Construction Court and Fenwick Elliott LLP for research funding, ongoing support and guidance. The research is being undertaken on a daily basis by Aaron Hudson-Tyreman. Thanks must also go to Carolyn Bowstead, the TCC Court Manager, for her ongoing assistance.

[2] Gould, N. and Cohen, N. (1998) "ADR: Appropriate Dispute Resolution in the UK Construction Industry" Civil Justice Quarterly, volume 17, April, Sweett & Maxwell.

[3] Mr Justice Ramsey in *P4 Ltd v Unite Integrated Solutions plc.* See opposite page for further details.

Mediation

settlements are reached on the court steps. Clearly, this is not the case. There are a variety of "pinch points" in the litigation process. According to the respondents, those pinch points are:

- During exchange of pleadings (33%);
- During or as a result of disclosure (14%);
- As a result of a payment into court (10%); and
- Shortly before trial (24%).

Of the settlements reached, 81% were reached at one of the above stages. The remaining 19% occurred somewhere between the issuing of the claim form and the issuing of the judgment.

This is now becoming an international trend ... the Construction and Arbitration List in the High Court of Hong Kong is currently operating a pilot scheme for what is described as voluntary mediation.

Of the mediations undertaken, 81% were as a result of the parties' own initiative, just 5% as an indication of the court, and 14% as a result of an order of the court. Barristers (48%) and construction professionals (38%) were the most frequently encountered mediators, with solicitors only represented by 14%. No other professionals were represented. No judges had been appointed as a part of the court settlement process according to the respondents. This analysis is only based on the first quarter of the survey period, so the final results may of course reveal a different picture.

Many of the respondents believed that costs had been saved as a result of mediation. In effect, the financial amounts saved represented the point in the litigation at which the dispute is settled. Some suggested that the cost savings were between £200,000 and £300,000. No doubt, those reflected the disputes that settled early during the pleadings stage, whilst those who suggested that the savings were £25,000 or less perhaps represented those disputes that settled shortly before trial.

Conclusion

Mediation is clearly being used successfully in construction disputes. A limited number of mediators are being used repeatedly by those parties that have commenced or are responding to litigation in the Technology & Construction Court. The mediations that are being undertaken are on the parties' own initiative. However, mediations are not occurring at one particular point in the litigation process, but at several distinct points, namely: pleadings, disclosure, payment in and shortly before trial.

These results are only a snapshot, based upon an analysis of the first quarter of the research period. The research continues and will conclude in the summer of 2008. A more detailed report will be available towards the end of 2008.

Mediation case law update

Judicial decisions continue to stress the importance of mediation. One such example was *P4 Ltd v Unite Integrated Solutions plc* which came before Mr Justice Ramsay in November 2006. This case confirms two things. First, notwithstanding the decision in *Halsey v Milton Keynes NHS Trust* [2004] CILL 2119, the reality is that the courts consider that there are very few disputes which are not suitable for mediation. Indeed, this is now becoming an international trend. For example, the Construction and Arbitration List in the High Court of Hong Kong is currently operating a pilot scheme for what is described as voluntary mediation. However, parties still need a good reason to refuse to mediate to avoid cost penalties. Second, parties who do not take an open approach to the provision of information that may be relevant to the dispute at issue at an early stage, run the risk of being penalised for costs. This obviously makes sense otherwise it would be open to an unsuccessful party to say that it would have settled at an early stage if it had known about a particular piece of information. The Pre-Action Protocol requires an open exchange of information and the message from the courts is that if you refuse to do this, you do so at your own risk as to costs.

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Project mediation: it's like partnering with teeth

Thursday 7 december 2006 saw the launch of the Model Project Mediation Protocol and Agreement which has been prepared by Fenwick Elliott and the Centre for Effective Dispute Resolution (better known as "CEDR"). Simon Tolson and Nicholas Gould explain more.

What is project mediation?

Project Mediation is one of the new methods of managing the risk of disputes during the delivery stage of a project. In short, the project participants contract from the outset to use mediation as the primary means of dispute resolution. Project Mediation attempts to fuse team building, dispute avoidance and dispute resolution in one procedure.

The advantages of Project Mediation include that:

- *The process encourages communication and information flow;*
- *It focuses on dispute prevention;*
- *It shows that parties are taking collaborative working seriously;*
- *It is flexible, cost effective and can be budgeted for in advance;*
- *Imaginative solutions are generated;*
- *The process focuses on the parties' needs rather than contractual rights; and*
- *It is relatively inexpensive, quick and effective.*

The aim of project mediation is to assist in the successful delivery of a project by identifying and addressing problems before they turn into disputes about payment and delay. A project mediation panel is appointed at the outset of the project; it is impartial and normally consists of one lawyer and one commercial expert, who are both trained mediators. The panel assists in organising, and attends, an initial meeting at the start of the project and may conduct one or more workshops at the outset or during the course of the project as necessary, to explain what project mediation is about and how it works. They may also visit the project periodically in order to gain a working knowledge of the project and, more importantly, those who are working on it.

That knowledge allows the panel to resolve differences before they escalate, because the panel provides an immediate forum for the confidential discussion and potential mediation of differences or disputes. Therefore the panel members will not be coming to the project cold each time there is a dispute, but rather will build up their knowledge of the project as it progresses. In addition, the parties have the right to contact the mediators informally and consult with them privately at any time.

The Model Project Mediation Protocol sets out the ground rules, including the powers of the project mediators. It includes, as you would expect, a confidentiality agreement to ensure that all information emanating from the mediation process is not to be used for any other purpose, unless the parties agree otherwise.

In project mediation, the parties to the construction contract recognise that there is a risk that they might have disputes during the course of the work but also recognise that a standing mediation panel could help to avoid those disputes. This is because the parties to the construction contract will get to know the individual mediators, and those mediators will not only have an understanding of the project, but will also know the individuals concerned. There is, therefore, the potential for the project mediation panel to become involved not just in disputes, but also in the avoidance of disputes before the parties become entrenched and turn to adjudication, arbitration or litigation. By anticipating potential differences, managing unexpected risks and seeking to prevent disputes, the mediators help to control project delivery.

There are of course some similarities with the structured ADR procedures such as Dispute Review or Adjudication Boards. However, typically, these are only economically viable because they are used on substantial projects; this is because of the costs associated with establishing and running a three-person board. However, project mediation is viable for projects with a much lower contract sum, and has the potential for very widespread use; it is intended to be cheaper, less formulaic, more flexible and more informal than a Dispute Board.

In terms of cost, it is much cheaper than a Dispute Board. If a dispute arises, a Dispute Board requires detailed statements of case, evidence, experts' reports and a hearing. If a dispute arises on a project with project mediation (and remember that the idea

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behind Project Mediation is that it is there to prevent disputes arising), the parties exchange position statements and supporting documents. There would then usually be a one-day mediation with a high chance of resolving the dispute. The mediators already have valuable knowledge of the project and of the individuals working on the project.

The Model Project Mediation Protocol sets up a mediation framework which is then put in place for the entire life cycle of a project. A key difference with mediation in its traditional sense is that currently ADR is often only explored once a dispute has arisen, positions been taken and relationships soured. Here, the parties agree at inception to manage and resolve any differences that may arise with the assistance of the Project Mediation Panel that follows the project through. This knowledge allows the panel to resolve contractual differences before they escalate, and provides an immediate medium for the confidential, mediated resolution of disputes. With Project Mediation, a dispute can be nipped in the bud and where a dispute is resolved during the course of a project, the Panel will of course still be in place afterwards to help facilitate implementation of the agreement, as well as to help avoid, manage or resolve other disputes.

Project mediation provides a better response to project finance and risk management. Banks and funders are increasingly having to look at operational risk and having effective measures available to deal with conflicts. Project Mediation is one such option.

Some of the advantages of Project Mediation are that:

(i) By its nature mediation is voluntary but quasi contractual;

(ii) The process encourages communication and information flow and enhances collaborative working between the parties;

(iii) It focuses on dispute prevention;

(iv) It shows that parties are taking collaborative working seriously;

(v) It is flexible, cost-effective and can be budgeted for in advance;

(vi) It is without prejudice to the parties' contractual rights and remedies;

(vii) The process focuses on the parties' needs rather than contractual rights;

(viii) Imaginative solutions are generated and become available to the parties; and

(ix) It is relatively inexpensive, quick and effective.

The benefit of project mediation lies with encouragement of collaborative working and the use of an effective early warning system.

Project mediation enables conflict management and dispute resolution to be integrated into the contract as part of a collaborative contracting approach. As project mediation is integrated into the contract, it will be included as part of the contract procurement documentation.

Project Mediation does, of course, build on what has gone on before, but is tailored to the needs of the industry. It is more about dispute avoidance and only then resolution. The mediators are there to assist with problem-solving during the project. Therefore the parties can focus on the project not the fight. Although they cannot make decisions, so the power to deal with issues remains with the parties, the project mediators can inject some reality that might otherwise be overlooked. It's like partnering with teeth.

The benefit of project mediation lies with encouragement of collaborative working and the use of an effective early warning system. The aim of such a process is to encourage parties to look ahead together and eliminate financial and programme risks. It focuses on the people and getting the job done. The project mediators can test whether the participants are really collaborating or just going through the motions.

Further information can be found on our website at www.fenwickelliott.co.uk or that of CEDR at www.cedr.co.uk

Construction contracts – NEC3

NEC3 – Early warning system

The use of the NEC3 contract is becoming more widespread. For example, it is being used to construct the innovative Halley 6 Research Station, which is being constructed on a moving ice shelf in Antarctica. It is also the contract that has been chosen by the Olympic Development Agency ("ODA"), the single body that has been created to ensure the delivery of the 2012 Games and beyond. In particular, the ODA is responsible for the planning, designing and building of the venues, facilities and accommodation, and the development of the infrastructure to support these. The ODA released its draft Procurement Policy for consultation on 11 July 2006. This policy outlines the ODA's requirement that the 2012 Games are delivered on time and budget, in a way that benefits the community and environment, in keeping with the spirit of London's Olympic Bid.

Nicholas Gould gave a talk to the SCL Conference held in Singapore in February 2007 entitled "NEC3: The Construction Contract of the Future?" In an extract from that talk, a full copy of which can be found on our website, Nicholas talks about the NEC3 early warning procedure. The early warning procedure, at core clause 16, provides that:

It could be said that this is a partnering-based approach to the resolution of issues before they form entrenched disputes. Co-operation between the parties at an early stage provides an opportunity for the parties to discuss and resolve the matter in the most efficient manner.

- The contractor is to give the project manager a warning of relevant matters;
- A relevant matter is anything which could increase the total cost or delay the completion date or impair the performance of the finished work;
- The contractor and project manager are then required to attend an early warning meeting if one party so requests. Others might be invited to that meeting; and
- The purpose of the early warning meeting is to work together to discuss how the problem can be avoided or reduced. Discussion will focus on what action is to be taken next, and to identify who is to take that action.

It could be said that this is a partnering-based approach to the resolution of issues before they form entrenched disputes. Co-operation between the parties at an early stage provides an opportunity for the parties to discuss and resolve the matter in the most efficient manner. This is a departure from the usual approach of the contractor serving formal notices. A contractor may receive compensation for addressing issues raised by way of the early warning system. On the other hand, if a contractor fails to give an early warning of an event that subsequently arises, and that he was aware of, then any financial compensation is assessed as if he had given an early warning. If, therefore, a timely early warning would have provided an opportunity for the employer to identify a more efficient manner of resolving the issue, then the contractor will only be paid for that economic method of dealing with the event.

Risk register

The risk register which appears at clasue 16.3 is new. The risk register will initially contain risks identified by the employer and contractor, but the risk register will develop as the project proceeds. It works hand in hand with the early warning process and in conjunction with the proactive project management approach of the contract. There are three main objectives of the risk register:

(i) To identify the risks associated with the project;

(ii) To set out how those risks might be managed; and

(iii) To identify the time and cost associated with managing those risks.

It may be possible to precisely and specifically identify risks that can be added to the register, or in other instances the risk register may simply contain some generic risks. The process of identification allows the parties to consider how those risks might be managed before turning their attention to the time and cost implications. If Option A or B (priced contracts) applies, then the employer will only bear the costs in terms of time and money if a risk is covered by a compensation event. Otherwise, the contractor bears all other risks. The approach is similar for Options C and D (target cost contracts) in that the employer will bear the risk if the event is one listed in clause 80.1. If not, the

Construction contracts – NEC3

employer will in any event initially bear the risk, but the risk will then be shared through the risk share mechanism set out in clause 53.

There is however the further impact of clause 11.2(25) dealing with "Disallowed Cost".[1] If an element of cost is a disallowed cost, then the risk will be the contractor's in any event. Finally, the employer bears almost all of the risk under Options E and F (cost reimbursable contracts). This is unless the risk is covered by the definition in clause 11.2(25) or 11.2(26) again relating to Disallowed Costs. Nonetheless, the important aspect of the risk register is not just the early identification, but also the ability to then appraise and re-appraise as well as proactively manage risks before they occur. The overall effect of a well run risk register is a greater assessment of the overall financial outcome of the project and a greater ability to manage the time for completion.

Compensation events

Core clause 60 deals with compensation events. If a compensation event occurs, which entitles the contractor to time and/or money, then these will be dealt with on an individual basis. If the compensation event arises from a request of the project manager then the contractor is asked to provide a quote, which should also include any revisions to the programme. The project manager can request that the price or programme is revised, but only after he has explained his reasons for the request.

There are three main objectives of the risk register:

(i) To identify the risks associated with the project;

(ii) To set out how those risks might be managed; and

(iii) To identify the time and cost associated with managing those risks.

The general scheme of clause 60 is to define those events which are compensation events. Notice provisions are required at clause 61. The project manager may request a quotation in respect of a compensation event. The contractor should submit its quotation within three weeks of a request by the project manager. The project manager then replies within two weeks, either accepting the quote, instructing a revised quote, notifying the contractor that the proposed instruction will not be given, or notifying the contractor that the project manager will make his own assessment.

Compensation events are assessed under clause 63. A compensation event is assessed by reference to the *"actual Defined Cost of the work already done, the forecast Defined Cost of the work not yet done and the resulting Fee".* Clause 52 deals with Defined Cost, which is the *"Contractor's cost which is not included in the Defined Cost and treated as included in the Fee".* The Defined Cost comprises the rate and percentages that are set out in the contract data less any discounts, but subject to an additional Fee.

A delay to the Completion Date is assessed by reference to the planned completion shown on the accepted programme. The adjustment to the time for completion is, therefore, based upon assumptions, and may include for risks associated with the forecasting of any particular event. There is, however, no change to any adjustment to the time for completion if the assessment turns out to be wrong.[2]

NEC3 has adopted a more strict regime for contractors in respect of compensation events. Core clause 61.3 is set out in terms:

"The Contractor notifies the Project Manager of an event which has happened or which he expects to happen as a compensation event if the Contractor believes that the event is a compensation event and the Project Manager has not notified the event to the Contractor.

If the contractor does not notify a compensation event within eight weeks of becoming aware of the event, he is not entitled to a change in the Price, Completion Date or a Key Date unless the project manager should have notified the event to the Contractor but did not. This clause must also be read in conjunction with clause 60.1(18) which states that a compensation event includes:

"A breach of contract by the Employer which is not one of the other compensation events in this contract."

Clause 61.3, therefore, effectively operates as a bar to the contractor in respect of any time and financial consequences of any breach of contract if the contractor fails to notify.

[1] Under NEC3, Option C "Disallowed Costs" are costs which the project manager decides are not *"justified by the Contractor's accounts and records"*, should not have been paid to a subcontractor or supplier, and were incurred because the contractor did not follow acceptance or procurement procedures or give an early warning.

[2] Clause 65.2 *"The assessment of a Compensation Event is not revised if a forecast upon which it is based is shown by later recorded information to have been wrong."*

Construction contracts – NEC3

The courts have for many years been hostile to such clauses. More recently, there has been an acceptance by the courts that such provisions might well be negotiated in commercial contracts between businessmen.[3] The House of Lords case of *Bremer Handelsgesellschaft MBH v Vanden Avenne Izegem PVBA* provides authority for the proposition that for a notice to amount to a condition precedent it must set out the time for service and make it clear that failure to serve will result in a loss of rights under the contract. This seems relatively straightforward. However, it may not be possible for an employer to rely upon *Bremer* where the employer has caused some delay. An employer may, therefore, be in some difficulty when attempting to rely upon *Bremer* in circumstances where it has caused the loss or a proportion of the loss.

The courts interpret strictly any clause that appears to be a condition precedent. The court will construe the term against the person seeking to rely upon it, and also will require extremely clear words in order to find that any right or remedy has been excluded. However, an alternative approach to the drafting of such provisions was highlighted in the case of *City Inn Ltd v Shepherd Construction Ltd.* City Inn was the employer, and Shepherd was the contractor for a hotel at Temple Way, Bristol. The conditions incorporated the JCT Standard Form of Contract Private Edition With Quantities (1980 edition). The architect granted an extension of time of four weeks. An adjudicator then granted a further extension of five weeks.

City Inn argued that as the contractor failed to comply with clause 13.8.1 they were not entitled to any extension of time. Shepherd claimed that clause 13.8.5 was a penalty clause and was therefore unenforceable. They also argued that the clause only applied if on receipt of an instruction the contractor actually formed the opinion that there would be an adjustment to the contract sum and delay to the completion date.

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.

Lord Justice Clerk, delivering the opinion of the court, held that the contractor was impliedly obliged to have applied his mind to the question and form a view as to the likely consequences of an Architect's Instruction. It was not sufficient for the contractor quite simply not to bother to think about the position. The clause was not a penalty because the contractor had the option, if he wished to avoid liability for the delay, of applying his mind to the clause and then providing the employer with the details required by clause 13.8.1. As the contractor had failed to comply with the clause he had deprived the employer of the opportunity to address the matter, if the employer considered that the cost and/or the delay, potentially caused by the instruction, were not acceptable.

One important distinction between the drafting of the provision in *City Inn* and the NEC3 is that the contractor in *City Inn* did not have to carry out an instruction unless he had submitted certain details to the architect. The NEC3 is a bar to the bringing of a claim simply for a failure to notify the project manager about a compensation event. A specific instruction might not have been given. The contractor might not be prompted to respond in the absence of a specific instruction.

Mr Justice Jackson, in the case of *Multiplex Constructions (UK) Limited v Honeywell Control Systems Limited (No. 2)* [2007] EWHC 447, agreed with the view taken in *City Inn v Shepherd*, that there are good reasons both for the employer requiring a contractor to give prompt notice of delay, and also for creating a sanction by way of condition precedent for any failure to give such notice. He said 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."

Time bars are becoming increasingly common. This judgment confirms that time bars are legally enforceable and that they do not set time at large. Consequently, all parties should always carefully check their contracts when entering into them in order to see whether there are any time bars in the extension of time or loss and expense clauses.

[3] See for example *Photo Production Ltd v Securicor Ltd* [1980] AC 827.

Construction contracts – JCT MPF

JCT Major Projects Form

As Simon Tolson notes, little has been written about the Major Projects Form ("MPF") which has been with the industry the best part of five years. However, the talk on the grapevine is that the Government's honeymoon with the NEC family may be about to change. Perhaps it is time to dust off your prep notes on the MPF?

Guidance note[1]

The JCT warns in its Guidance Notes that this form of contract is not for everyone. It is designed for use by experienced Employers who require limited procedural provisions in the contract form and have their own sophisticated in-house procedures and protocols, and Contractors with whom they regularly work. Also, given the fact that under this new form of contract the Contractor assumes more risks and responsibilities than under traditional JCT standard forms, the JCT is particularly "nervous" that work should only be carried out under the new MPF by experienced, knowledgeable contractors who can carry out proper risk analysis and put in place appropriate risk management systems. This should be recognised if anyone looks "green" in the gene pool. The same applies to subcontractors.[2]

At fewer than 15,000 words, the MPF is a slip of a girl compared with what much of the industry has wrestled with under JCT WCD 98. This comes of more modern drafting but the bulk of it is due to the contract taking a "less is more approach".

The JCT specifically decided to call the "new"[3] form of contract the "Major Project" form in order to try and deter, or dissuade, yellow inexperienced Employers and Contractors from adopting it in lieu of WCD on "run of the mill" design and build projects. It remains to be seen whether this form of contract is taken up exclusively for "Major Projects" or whether, as one rather suspects, it creeps into general usage after a time lag which, by all accounts, is still running. The MPF is still a hard-edged document; it adopts provisions designed to encourage modern and best practice in procurement, but it is nevertheless not a partnering arrangement. There are toughly framed rights and remedies within its various provisions. The MPF is in its infancy, relatively speaking. Thus far it has been used on the Oval to my knowledge, but take-up is beginning slowly but against the competition now of NEC 3.

Risks, responsibilities and contractor freedom

Under the new MPF, the Contractor assumes significantly more responsibility and risk than under traditional JCT forms. The quid pro quo is that the Contractor should have greater freedom as to how and in what way he delivers the Project. The intention is that having defined its "requirements", the Employer should then permit the Contractor to undertake the Project without the Contractor being constrained by or reliant upon the Employer for anything more than access to the Site, the review of Design Documents and payment. There is no requirement or expectation that the Employer will issue any further information, as all design and production information beyond that contained in the Employer's "Requirements" will be produced by the Contractor.

Design responsibilities

The allocation of design responsibility is something that will need to be clearly spelt out in the tender documents. The new contract expressly states that the Contractor "*shall not be responsible for the contents of the Requirements or the adequacy of the design contained within the Requirements*" (as with JCT 05 – DB, ICD, and MWD), but it is not immediately apparent how, or on what basis, the Contractor can seek recompense for additional time and/or costs incurred in overcoming any shortcomings in design contained within the Employer's Requirements. Perhaps it is intended that in circumstances where the Employer's general expectations and requirements are at variance with specific concept or detailed designs contained within the Requirements one falls back on the provisions dealing with discrepancies within the Requirements which entitle the Contractor to choose between discrepant provisions at the Employer's cost. However, what if an element of the design for which the Contractor is wholly responsible is dependent upon an element of design provided in the Requirements, how then does one deal with inadequacies in the Employer's design?

[1] The JCT has also published a 24-page set of Guidance Notes for use with the MPF (which appears to partly contradict the aim of producing a shorter and simpler contract that should be sufficiently self-explanatory).

[2] The JCT Sub-Contract first published in June 2004 reflects the format and approach of the Contract and anticipates that the subcontractor will be similarly experienced in undertaking work.

[3] A June 2003 virgin. The MPF is considerably shorter than any of its contemporary JCT contracts, for example it is 80% smaller than the 1998 With Contractor's Design contract.

Construction contracts – JCT MPF

With three notable exceptions, the Contractor's design warranty is generally one of skill and care, albeit *"the skill and care to be expected of a professional designer appropriately qualified and competent in the discipline to which such design relates and experienced in carrying out work of a similar scope, nature and size to the Project"*. The contract makes it clear that the Contractor does not warrant that the Project, when constructed in accordance with the Contractor's designs, will be suitable for any particular purpose.[4] The exceptions to the skill and care warranty are compliance with:

- the Statutory Requirements;
- any performance specification contained within the Requirements; and
- the guidance on the selection of materials contained within the publication *Good Practice in the Selection of Construction Materials* prepared by Ove Arup & Partners.

Subject to the Contractor not being responsible for the contents, including design of the Employer's Requirements, the Contractor gives an otherwise strict, unqualified assurance that the design of the Project will comply with these three "exceptions." The new design provisions, however, are generally in line with what one frequently sees by way of amendment to WCD. It remains to be seen how indemnity insurers will react to these new standard form proposals.

Curtailment of contractor's entitlement to EOTs

The provisions relating to time, commencement and completion have been simplified and cropped. In particular, the list of events entitling the Contractor to an extension of time has been quite radically curtailed.[5] The Contractor is no longer entitled to time for exceptionally adverse weather, civil commotion, local combination of workmen, strikes, delay on the part of Nominated Subcontractors or Suppliers, difficulties in securing labour, goods or materials, delay on the part of statutory undertakers – (although this may now be covered by the new provision entitling the Contractor to an EOT for interference with the Contractor's regular progress by "others" on the site) and changes in law after the Base Date. A number of the traditional Relevant Events such as failure to give access to the site are now covered by a general catch-all, Employer default provision which entitles the Contractor to an EOT for *"any breach or act of prevention"* on the part of the Employer or his representatives or advisers.

Loss and/or expense

The scope for claiming loss and expense is reduced significantly. Any instruction which is a Change shall not under this form either individually or in conjunction with other Changes give rise to loss and expense. This means Contractors will need to price Changes rather more accurately to ensure sound recovery of loss and expense. Loss and expense is payable by the Employer:

- if there is an act of breach or prevention by the Employer in matters other than those permitted by the Contract or that are not stated as giving rise to a Change;
- where there is interference with the Contractor's regular progress by others; and
- where the Contractor validly exercises its right of suspension.

Practical completion, acceleration and early completion bonuses

For the first time, the new JCT contract contains a definition of Practical Completion. This definition of Practical Completion requires that the Project be complete for "all practical purposes" but makes the point specifically that the Project may for "all practical purposes" be Practically Complete notwithstanding the existence of minor outstanding works which do not affect its use. The definition also envisages that any stipulations considered essential to the issue of whether the Project is to be considered Practically Complete, or not, should be set out in the Requirements. Production and delivery of the health and safety file, as-built information and O&M manuals are all expressed to be conditions precedent to Practical Completion.

[4] Thus, the Employer defines his Requirements and the Contractor carries out work in accordance with them, although he is not responsible for the adequacy of design contained within the Requirements. The Contractor takes on, as in WCD, reasonable skill and care obligations but not fitness for purpose. However, he warrants that his design will use materials selected in accordance with the current version of *Good Practice in the Selection of Construction Materials* prepared by Ove Arup.

[5] To preserve the liquidated damages provision the MPF provides an extensive list of relevant delay events, but this list does not include exceptional weather conditions, industrial disputes, the inability to obtain labour and/or materials, or delays in statutory approvals. These excluded items are therefore at the risk of the Contractor.

The MPF adopts the following principles for making an extension of time:

• The Employer should implement any agreement reached regarding Changes, acceleration or cost savings.

• Regard must be given to any failure by the Contractor of clause 9.3, i.e. using reasonable endeavours to prevent or reduce delay to the works.

• A fair and reasonable adjustment should be given regardless of any concurrent culpable delay.

Construction contracts – JCT MPF

The Contractor can only be instructed to accelerate where he is in agreement and the provisions conferring bonuses for early completion are an option. To give incentive to the Contractor to complete before Practical Completion, the Contract provides for the Contractor to be paid a bonus if completion occurs before the Completion Date. For a bonus to apply, the Appendix needs to have been filled in, otherwise the principle in *Glenlion Construction Ltd v Guinness Trust* holds true. A Contractor under most standard forms is entitled to plan the early completion of the works, but this will not impose unilateral obligations upon the Employer to facilitate that early completion.

Payment

The payment procedures are simple and straightforward. Payment is made 14 days after receipt of the Contractor's VAT invoice. No hedges and traps for the unwary, provided they produce a sensible pricing document. The payment provisions provide options including Interim Valuations (Rule A), Stage Payments (B), and Schedule of Payments (C) which the parties can decide to incorporate. Interim Payments remain the predominant method, and a single payment notice is to be issued, covering any amounts to be withheld. The Form therefore combines the requirements of the Housing Grants Act by the provision of a single notice, thus attempting to avoid arguments as to whether a Withholding Notice has been properly served at the correct time and/or in the correct format.

Probably the most novel changes in the contract (but in common with JCT 05) are those relating to third party rights.

Interim payments will therefore be made monthly, but through the use of the Pricing Document it is possible to adopt a range of options for the payment of the Contract Sum, including interim valuations, stage payments, scheduled payments or any other terms which the parties may wish to agree. Another first for the JCT (and a significant break from tradition) is that the new MPF does not envisage any sort of retention.

Third party rights

Probably the most novel changes in the contract (but in common with JCT 05) are those relating to third party rights. The contract endeavours to do away with the need for collateral rights by utilising the provisions of the Contracts (Rights of Third Parties) Act 1999 and setting out Funders, Purchasers and Tenants rights in a special Third Party Rights Schedule appended to the contract.

The idea is that Funders, Purchasers and Tenants will be able to enforce their rights directly against the Contractor pursuant to the Act without the need for a multitude of collateral warranties. Regrettably, the rights set out in the Third Party Schedule appended to the contract are based upon the rights conferred by the existing JCT collateral warranties in favour of a Funder, Purchaser and/or Tenant, which are something of a notorious "fudge" of conflicting interests and have not really found favour in the market. It remains to be seen whether the new Third Party Rights Schedule finds favour or whether it too will be subject to heavy amendment.

From a funder's perspective, the new Schedule only grants rights for the Funder to call upon the Contractor to procure copyright licences rather than actually conferring licences. Instead of a "spread" of risk between Contractor and others, the Funder must rely solely upon the Contractor's covenant. Another concern for Funders may be that the Schedule only allows the assignment of the Funders' rights to another Funder not a Purchaser or Tenant acquiring an interest in the Project following realisation of the Funder's security in or over the Project.

Purchasers and Tenants will have similar concerns to Funders plus the added concern that their rights are restricted to the recovery of "*the reasonable costs of repair, renewal and/or reinstatement of any part of the Project to the extent that a Purchaser or Tenant incurs such costs and/or a Purchaser or Tenant is or becomes liable either directly or by way of financial contribution for such costs*". Contractors will have a myriad of concerns about the new Schedule including that the Contractor will be the sole covenantor in respect of the Project. Further, the definitions of Purchasers and Tenants are wide and make no distinction between a Tenant of a significant part of the Project, e.g. a

threshold number of floors, and a Tenant of an insignificant part which would not usually justify the grant of a collateral warranty, e.g. a kiosk.

It is not clear how, if at all, the Contractor can enforce the Funder's payment obligation and/or its guarantee of payment by the Funder's appointee following exercise of the Funder's step-in rights under the Schedule; and neither the Contracts (Rights of Third Parties) Act 1999 nor the Schedule deals adequately with the risk of "double jeopardy", namely the risk of being sued more than once in respect of the same loss.

Ground conditions

There is an option here: an Employer that wishes the Contractor to accept responsibility for ground conditions (which are conditions or man-made obstructions in the ground that necessitate amendment to either the Requirements or Proposals) can leave the Form unamended. A sensible compromise. If it is happy to accept that ground conditions give rise to a "change," then it can tick the relevant option in the appendix and operate clause 8.2. Experience tells in real life few Employers will do so. If clause 8.2 applies, any ground conditions which could not have been foreseen by an experienced and competent Contractor at the Base Date will constitute a Change. However, it will only be a Change by reference to the information about the site which the Contractor had received or could reasonably have obtained.

The JCT is particularly "nervous" that work should only be carried out under the new MPF by experienced, knowledge-able contractors who can carry out proper risk analysis and put in place appropriate risk management systems.

The contract therefore specifically addresses the issue of unforeseen ground conditions and gives the parties the option of ground conditions being either the Contractor's risk (which is the default option) or alternatively treating unforeseen ground conditions in similar manner to clause 12 of the ICE conditions.

Making good

The "Rectification Period" is a key stage of the contract. The intention is that at the expiry, quality, financial and commercial matters will have been dealt with. Fat chance, some may say, but that is the intention, hence all the health warnings about entering such a contract and the maturity required of all its players.

At the end of the Rectification Period, the Employer issues a statement to the Contractor. This is similar to a certificate of making good defects and should be done promptly. The statement will either state the Contractor has made good the defects, or in circumstances where the Contractor has been requested to undertake remedial work and has not done so within a reasonable time of the expiry of the Rectification Period, the statement will indicate that the Employer will instruct others to rectify the defects and give an estimated cost of rectifying the defects. Alternatively, the Employer can elect not to have the defects rectified as under JCT contracts pre-98. If the Employer decides not to rectify the defects, the Employer can make an appropriate deduction from the final payment advice. The final payment advice should be issued concurrently with the Rectification Statement and will be final and binding in relation to any financial matters unless they are disputed within 28 days of issue.

Disputes

One final point of interest, as with the JCT 05 family, there is no provision for arbitration in the new contract. Disputes are to be resolved by mediation, adjudication and/or litigation. Adjudication will be conducted in accordance with the Scheme. Accordingly, I believe, and it is a view shared by the British Property Federation, that this form offers the single-point responsibility for design-and-build procurement that is required.

Summary

At fewer than 15,000 words, the MPF is a slip of a girl compared with what much of the industry has wrestled with under JCT WCD 98. This comes of more modern drafting but the bulk of it is due to the contract taking a "less is more approach". As you prepare MPF contracts for signature, you need to ensure that the documents you are adding cover all the central issues of insurance, payment arrangements, tests and inspections.

FIDIC

At the beginning of the year, Sweet & Maxwell published "Understanding the New FIDIC Red Book : A Clause by Clause Commentary". Jeremy Glover was the co-author alongside Simon Hughes from Keating Chambers. Here Jeremy looks at Force Majeure under the Common Law and Civil Codes and compares the FIDIC form and the NEC 3rd Edition.

One of the potential difficulties with international projects is that the contracts entered into are governed by laws which may be unfamiliar to one or other of the contracting parties. For example, there is a difference in the way that force majeure is treated in common and civil law jurisdictions. Whilst most civil codes make provisions for force majeure events, at common law, force majeure is not a term of art and its meaning is far from clear. No force majeure provision will be implied in the absence of specific contractual provisions, and the extent to which the parties deal with unforeseen events will be defined in the contract between them. Thus without a specific clause, there will not necessarily be relief for force majeure events.

No force majeure provision will be implied in the absence of specific contractual provisions,

The aim of the force majeure clause is to exempt a party from performance on the occurrence of a force majeure event. Commercially the clause is there to address risks which cannot necessarily be economically insured and which are outside the control of the parties to the contract. There are, of course, many definitions of that force majeure event. For example, in the case of *Atlantic Paper Stock Ltd v St Anne-Nackawic Pulp and Paper Co*, [1976] 1 SCR 580, Dickson J in the Supreme Court of Canada said that:

"An act of God or force majeure clause … generally operates to discharge a contracting party when a supervening, sometimes supernatural, event, beyond the control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill."

The FIDIC Form

The definition of force majeure provided in the new FIDIC form at clause 19 is widely drawn. Clause 19.1 defines a force majeure event as one:

(a) which is beyond a Party's control,

(b) which such Party could not reasonably have provided against before entering into the Contract,

(c) which, having arisen, such Party could not reasonably have avoided or overcome, and

(d) which is not substantially attributable to the other Party.

Force Majeure may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as conditions (a) to (d) above are satisfied:

(i) war, hostilities (whether war be declared or not), invasion, act of foreign enemies,

(ii) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war,

(iii) riot, commotion, disorder, strike or lockout by persons other than the Contractor's Personnel and other employees of the Contractor and Sub-Contractors,

(iv) munitions of war, explosive materials, ionising radiation or contamination by radioactivity, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radioactivity, and

(v) natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity.

The broad definition of force majeure to be found here, and it should be remembered that the examples listed above are examples and not an exhaustive list, reflects the basic premise of a force majeure clause, namely that it serves to exempt a party from performance on occurrence of a force majeure event.

Construction contracts – FIDIC

One problem with the FIDIC form is that there is a risk of potential overlap and/or contradiction between sub-clause 19.1 and the definition of force majeure, which one can find in the civil codes of most, if not all, civil law jurisdictions. For example, the definition of force majeure under the Quebec Civil Code is much narrower in scope. Article 1470 simply provides that:

"A superior force [in the French version, force majeure] is an unforeseeable and irresistible event, including external causes with the same characteristics."

This has led one commentator to express caution that *"incorporating a clause such as Clause 19 into a contract not only duplicates what is usually provided for in the civil code of a civil law jurisdiction, but also enlarges the scope of the meaning and application of force majeure. This could result in the Parties getting into a muddle and a contradictory situation."*[1] In any event, the Particular Conditions note that the Employer should verify, before inviting tenders, that the wording of Clause 19 is compatible with the law governing the Contract.

In fact, there was no specific force majeure clause in the Old Red Book FIDIC 4th Edition. However, the Contractor was afforded some protection by Clause 65, which dealt with special risks including the outbreak of war, and Clause 66, which dealt with payment when the Contractor was released from performance of its contractual obligations. The scheme of the FIDIC form is that the party affected, which is usually the Contractor but could here be the Employer, is entitled to such an extension of time as is due and (with exceptions) additional cost where a "force majeure" occurs.

For frustration, what is required is a radical turn of events completely changing the nature of the contractual obligations. It is a difficult test to fulfil, but not as difficult as that of sub-clause 19.4 (force majeure) or the first limb of sub-clause 19.7 which both refer to the concept of impossibility

For Clause 19 to apply, the force majeure event must prevent a Party from performing any of its obligations under the Contract. The now classic example of this is the refusal of the English and American courts to grant relief as a consequence of the Suez crisis during the 1950's. Those who had entered into contracts to ship goods were not prevented from carrying out their contractual obligations as they could go via the Cape of Good Hope even though the closure of the Suez Canal made the performance of that contract far more onerous.

Clause 19.7 of the FIDIC form is also of interest. Here, the parties will be released from performance (and the Contractor entitled to specific payment) if (i) any irresistible event (not limited to force majeure) makes it impossible or unlawful for the parties to fulfil their contractual obligations, or (ii) the governing law so provides. It acts as a fall-back provision for extreme events (i.e., events rendering contractual performance illegal or impossible) which do not fit within the strict definition of force majeure laid out under sub-clause 19.1. It also grants the party seeking exoneration the right to rely on any alternative relief-mechanism contained in the law governing the contract.

If English law applies, following the landmark case of *Davis Contractors v Fareham UDC*, 2 All ER 145, the affected party will be able to rely on the common law concept of frustration, which *"occurs whenever the law recognises that without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract"*. Here, the contract was to build 78 houses for a fixed price in 8 months. Because of labour shortages and bad weather, it took the contractor 22 months to build the houses. The House of Lords held that the contract had not been frustrated. To claim frustration, therefore, it will not be enough for a contractor to establish that new circumstances have rendered its contractual performance more onerous or even dangerously uneconomic.

For frustration, what is required is a radical turn of events completely changing the nature of the contractual obligations. It is a difficult test to fulfil, but not as difficult as that of sub-clause 19.4 (force majeure) or the first limb of sub-clause 19.7 which both refer to the concept of impossibility (or illegality). To take the example put forward by A.Puelinckx[2] of a wine connoisseur signing a contract for the construction under his house of a very sophisticated wine cellar. If the house is burned down before

[1] Professor Nael Bunni – FIDIC's New Suite of Contracts Clauses 17 to 19 – www.fidic.org

[2] Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschä-ftsgrundlage, Unmöglichkeit, Changed Circumstances :A Comparative study in English, French, German and Japanese Law – Journal of International Arbitration, Vol. 3 No. 2 (1986)

execution of the contract, leaving the basement in perfect condition, this will certainly be considered frustration under English law. However, no claim could be put forward under sub-clauses 19.4 or 19.7 as the house could in theory be rebuilt and the contractual obligation to build the cellar performed. French law would apply the same reasoning as sub-clauses 19.4 or 19.7 and because performance is still possible, would hold the above-described events as a mere imprévision, which will not afford any financial relief to the affected party.

The force majeure event has to have caused Total to be unable to carry out its obligations … Total is unable to carry out that obligation if some event has occurred as a result of which it cannot do that. The fact that it is much more expensive, even greatly more expensive for it to do so, does not mean that it cannot do so.

What is common to both the notion of frustration and that of force majeure as interpreted under English law though, is that no relief will be granted in case of economic unbalance. A recent illustration concerning the interpretation of a force majeure clause under English law can be found in the case of *Thames Valley Power Limited v Total Gas & Power Limited,* (2006) 1 Lloyd's Rep 441. Here there was a 15-year exclusive gas supply contract between Thames Valley Power Limited (buyer) and Total Gas & Power Limited (supplier) for the operation of a combined heat and powerplant at Heathrow Airport. Clause 15 of the supply contract provided in part as follows:

"if either party is by reason of force majeure rendered unable wholly or in part to carry out any of its obligations under this agreement then upon notice in writing […] the party affected shall be released from its obligations and suspended from the exercise of its rights hereunder to the extent that they are affected by the circumstances of force majeure and for the period that those circumstances exist."

The supplier sought to rely on Clause 15 to stop supplying gas at the contract price as the market price for gas had increased significantly and rendered it "uneconomic" for the supplier to supply gas. Christopher Clarke J, however, found that:

"The force majeure event has to have caused Total to be unable to carry out its obligations under the [agreement]. […] Total is unable to carry out that obligation if some event has occurred as a result of which it cannot do that. The fact that it is much more expensive, even greatly more expensive for it to do so, does not mean that it cannot do so."

Clause 19 would certainly be interpreted in much the same way by English courts. In large projects where the performance of the parties' contractual obligations is spread over several years, the parties might thus consider whether or not to add a hardship clause to the contract which will stipulate when and how the parties will rearrange the contractual terms in the event the contract loses its economic balance.

The NEC 3rd Edition

At first look, the new NEC form, whose third edition was published in July 2005, does not include a force majeure event. However, reference to the guidance notes shows that clause 60.1(19) qualifies as a force majeure event. This clause refers to events which:

- Stops the Contractor from completing the works or
- Stops the Contractor completing the works by the dates shown on the Accepted Programme, and which
- Neither Party could prevent,
- An experienced Contractor would have judged to have such a small chance of occurring that it would have been unreasonable for him to have allowed for it and
- Is not one of the other compensation events stated in this contract.

Thus it looks very much like a force majeure clause and that is exactly what it is. Indeed, the reference to the Guidance Notes confirms this explicitly-referring to "force majeure". The drafting of this compensation/force majeure event is plainly very broad. Indeed, is it too broad? If so, it may well be that this is exactly the type of clause that employers will seek to delete or revise. And under common law jurisdictions, this will mean that no protection will be provided to the Contractor for typical force majeure events.

International Arbitration

International arbitration – The new liberal approach of the Court of Appeal

We have in previous years described how, with decisions such as that of the House of Lords in Lesotho Highland Development Authority v Impreglia, the position of London as a prime location for international arbitrations has been reinforced. In January of this year the Court of Appeal issued its own decision which further underlines this trend. In the case of Fiona Trust & Holding Corporation & Ors v Privalov & Ors [2007 EWCA Civ 20] the Court of Appeal indicated that a new approach needs to be taken by the English courts when considering questions relating to the jurisdiction of arbitration clauses in international commercial contracts. The Court of Appeal considered that the time had now come for a line to be drawn and a fresh start made for cases arising in an international commercial context. In particular, the Court of Appeal commented that ordinary businessmen would be surprised at what it termed "the nice" or fine distinctions drawn in the cases and the time taken up by argument in debating whether a particular case falls within one set of words or another very similar set of words.

The Fiona Trust case arose out of an ongoing dispute between the Russian Sovcomflot group of companies and a Mr Nikitin. Part of the dispute related to an allegation that a number of charterparty contracts had been procured by bribery. Each of the contracts contained a clause enabling disputes to be referred to arbitration in London. The charterers duly commenced arbitration proceedings. In response, the owners sought to restrain the proceedings pursuant to section 72 of the 1996 Arbitration Act, arguing that as they had rescinded the contracts owing to the bribery, the arbitration agreements contained within those contracts fell as well.

It is thought to be the first time that the question as to whether an arbitration agreement can be regarded as being separable in circumstances where the contract as a whole is under the suspicion of bribery has come before the English courts. At first instance, Morison J granted an injunction restraining the arbitration proceedings pending trial of the court action.

The Court of Appeal disagreed, ruling that if a contract is said to be invalid for reasons such as bribery, unless that bribery specifically relates to the arbitration clause, the arbitration clause will survive. This would mean here that the validity of the contract as a whole would be determined by the arbitrators, not the court.

For our part we consider that the time has now come for a line of some sort to be drawn and a fresh start made at any rate for cases arising in an international commercial context.

One of the issues related to the lengthy dispute resolution clause, which referred first to disputes "arising under" the contract, and later to disputes which have "arisen out of" the contract. In particular, the Court of Appeal had to consider arguments relating to the distinction, if any, between disputes arising "under" a contract and disputes arising "out of" a contract. Should "out of" have a wider meaning than "under", and if so, given the wording of this particular clause, which of the two should prevail? And it was the need to rule on the construction of this clause that lead the Court of Appeal firstly to review the authorities and then to rule that the time had come to take a fresh approach.

Noting that not all of the authorities were readily reconcilable and that hearings and judgments were getting longer as new authorities had to be considered, Longmore LJ concluded that arbitration clauses in international commercial contracts should be given a liberal interpretation:

"For our part we consider that the time has now come for a line of some sort to be drawn and a fresh start made at any rate for cases arising in an international commercial context... If business men go to the trouble of agreeing that their disputes be heard in the courts of a particular country or by a tribunal of their choice they do not expect … that time and expense will be taken in lengthy argument about the nature of particular causes of action and whether any particular cause of action comes within the meaning of the

International Arbitration

particular phrase they have chosen in their arbitration clause. If any business man did want to exclude disputes about the validity of the contract it would be comparatively simple to say so."

Accordingly, Longmore LJ indicated that:

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

In relation to the dispute at hand, this lead the Judge to the conclusion that:

"The words "arising out of "should cover every dispute except a dispute as to whether there was ever a contract at all." [1]

One of the reasons given in the authorities which favoured this liberal construction of arbitration clauses was the presumption in favour of one-stop arbitration. Again the Judge made reference to the expectations of the typical commercial man who would be most unlikely to deliberately and knowingly create a system which required first that a court should decide whether the contract should be rectified or avoided or rescinded and then secondly, if the contract was held to be valid, required the arbitrator to resolve the issues that had arisen.

The words "arising out of" should cover every dispute except a dispute as to whether there was ever a contract at all.

The Court of Appeal was also required to consider the relationship between sections 9 and 72 of the 1996 Arbitration Act. Section 9 deals with applications to stay proceedings to arbitration, whilst section 72 deals with applications in relation to the question of whether or not there is a valid arbitration agreement. Although the Court of Appeal considered that section 72 did not apply here, it held that where the court has conflicting applications before it either to stay court proceedings or for a declaration that there is no valid arbitration agreement, then the application under section 9 should be taken first. The Court of Appeal considered that this was not only the logical approach but would also reflect the UK's obligations under the New York Convention on the enforcement of arbitral awards.

In considering this issue, the Court of Appeal restated the four possible approaches to deciding whether an arbitration agreement exists to which section 9 might apply, as set out by HHJ LLoyd QC in the case of *Birse Construction v St David* (1999) BLR 194:

(i) to determine on the evidence before the court that such an agreement does exist in which case (if the disputes fall within the terms of that agreement) a stay must be granted, in the light of the mandatory "shall" in section 9(4). It is this mandatory provision which is the statutory enactment of the relevant Article of the New York Convention, to which the UK is a party;

(ii) to stay the proceedings on the basis that it will be left to the arbitrators to determine their own jurisdiction pursuant to section 30 of the 1996 Act, taking into account the subsequent provisions in the 1996 Act for challenge to any decision eventually made by the arbitrators;

(iii) not to decide the issue but to make directions pursuant to what is now CPR Part 62.8 for an issue to be tried as to whether an arbitration agreement does indeed exist; and

(iv) to decide that no arbitration agreement exists and to dismiss the application to stay.

On the facts here, it was clear that the first option was the appropriate one.

Conclusion

This decision, and the clear message of support given to international arbitration by the Court of Appeal, can only serve to confirm the attractiveness of London and England as an arbitration centre.

[1] A sentiment which of course applies just as equally to domestic adjudication

Damages

Recovery of management time

Inevitably, if a party suffers a loss caused by a tort, that party will incur wasted staff and management time when seeking to remedy or mitigate that loss. The question as to whether a claimant is then entitled to recover that wasted managerial and staff time is not always an easy one to answer. For example, does the injured party have to establish a loss of profit (i.e. show that income-generating opportunities were lost and/or additional expenses were incurred) before it is entitled to recover this time? This question recently came before the English Court of Appeal in the case of Aerospace Publishing Limited and Anr v Thames Water Utilities Limited.

The general position is that a claim for management time can, as a matter of principle, be recoverable on the same basis as overheads and profits. However, it is important to ensure that there is no overlap between any claim for management time and a claim for increased contribution to a contractor's overheads and profits. Equally important is the need to ensure that proper records are kept of time spent and the work carried out. For, as the *Aerospace* case demonstrates, there is a difference between time and expenditure incurred in dealing with the loss suffered, which may well be recoverable as damages, and time and expenditure spent in dealing with any potential claim, which may only be recoverable (and assessed) as costs of the action.

The key is detail. How much time is claimed? How and why were the staff diverted from their work activities? And remember that the records must be sufficient such that a third party – be they judge or adjudicator – can make sense of them many months (or maybe years) after the event.

In last year's Review we described the case of *R+V Versicherung AG v Risk Insurance & Reinsurance Solutions SA & Others*, where Mrs Justice Gloster held that as a matter of principle, the costs of wasted staff time are recoverable where the claimant was claiming, as damages, internal management and staff costs and internal overheads. Here, the Judge stated that it had to be demonstrated with sufficient certainty that the wasted time had indeed been spent and that the expenditure was directly attributable to the tort complained of. In other words, for an injured party to be able to recover, that party must show both that there had been a significant disruption to its business and that the staff had been deliberately diverted from their usual activities. If you cannot show this, then the alleged wasted expenditure on wages could not have been said to be directly attributable to the tort. In coming to this decision, the Judge had disapproved of a previous case, *Admiral Management Services Limited v Para-Protect Europe Limited*. As both decisions were of first instance, it was thought that there was some uncertainty about this issue. The Aerospace case has now resolved that uncertainty. In his judgment, LJ Wilson noted that although the difference between the two decisions was not, in his words, "as stark as may appear", to the extent that there was a difference, he preferred the approach of Mrs Justice Gloster.

The Aerospace case

The Aerospace case was an appeal following a quantum hearing. Liability had been admitted. Following a mains water-pipe burst, considerable quantities of water had entered the premises occupied by the claimants who were publishing companies. The water caused significant loss and damage to the claimants' archives, in particular to an extensive archive of aviation photographs and the reference material. As part of their claim, the claimants had sought their costs in respect of the diversion of staff work necessarily done in relation to, and consequent upon, the flood. The claim was in two parts, one in respect of the claimants' employees and one in respect of two ex-employees who had returned to work on a freelance basis.

In relation to the freelancers, Thames Water said that the work they carried out was an item of costs. LJ Wilson agreed that the assessment work done by them was directly referable to the preparation of the claim. Thus, that part of the claim would fall to be assessed as part of the overall costs of the action. The second part of the claim, that part referable to employees' work, related to work carried out in the months after the flood in respect of works of salvage and reorganisation, work which was reactive to the flood. The claimants said that had it not been for the flood, their employees would have carried out their usual activities, out of which they would have made money.

Damages

Thames Water said that such a claim must be strictly proven; it cannot simply be inferred. It was their view that the claimants had not demonstrated that the employees had been diverted from other relevant revenue-generating activities. Having considered the relevant authorities, LJ Wilson set out the following guidelines:

(i) The facts and, if so, the extent of the diversion of staff time have to be properly established and, if in that regard evidence which it would have been reasonable for the Claimant to adduce is not adduced, he is at risk of a finding that they have not been established;

(ii) The Claimant also has to establish that the diversion caused significant disruption to its business;

(iii) Even though it may well be that strictly the claim could be cast in terms of a loss of revenue attributable to the diversion of staff time, nevertheless in the ordinary case, and unless the Defendant can establish the contrary, it is reasonable for the Court to infer from the disruption that, had their time not been thus diverted, staff would have applied it to activities which would, directly or indirectly, have generated revenue for the Claimant in an amount at least equal to the costs of employing them during that time.

On the facts here, the Court of Appeal considered that the diversion of the time of a significant number of the claimants' employees was set out in sufficient detail and so was adequately established. Accordingly, there could be no sensible challenge to a conclusion that their business was thereby disrupted. The claim therefore succeeded. Thus, the Court of Appeal has given valuable guidance as to what you need to do to prove a claim for wasted management time. The key is detail. How much time is claimed? How and why were the staff diverted from their work activities? And remember that the records must be sufficient such that a third party – be they judge or adjudicator – can make sense of them many months (or maybe years) after the event.

Bridge v Abbey Pynford

The case of *Bridge UK.Com Limited v Abbey Pynford plc* which came before Mr Justice Ramsey in April provides further evidence of the way the courts will approach this matter. Here Bridge carried out a commercial printing and mailing business and in 2002 decided to move its business from Romford to Heybridge and to install there a Heidelberg 10-colour 102 Speedmaster printing press (the Press) before taking occupation. The Press needed adequate foundations as it weighed 62 tons and Bridge contacted Abbey to carry out the relevant piling and construction works.

The parties entered into a contract on 15 August 2002, a term of which was that the contract period would be 10 days. In fact, due to various difficulties, whilst piling was commenced on or about 27 August 2002 the Press was only commissioned and ready for printing by 28 October 2002. Bridge sued Abbey for its losses in not being able to use the Press at the time that it thought it would be able to. Part of that claim was for management costs. As part of its claim, Bridge claimed for 128 hours of a director's time in dealing with the problems caused by Abbey. The hours were based on a retrospective assessment made by looking through documents which recorded the events of the delay. The assessment was not based on records of time spent.

Judge Ramsey was asked whether a retrospective assessment of executive time, based on a witness statement and without records, was a sufficient method of assessment. He said that in the absence of records, evidence in the form of a reconstruction from memory is acceptable. However, he also thought it right that a discount be applied to the Court's award to reflect the uncertainty arising from this method – here 20%.

This is further authority to the effect that management time claimed can be supported by witness evidence rather than by written record. However, those wishing to rely upon this method of substantiation will be open to having a discount applied to the claim to combat uncertainty.

Fenwick Elliott news

We are pleased to announce that ***Julie Stagg*** joins us on 24 September 2007 as a partner. Julie who has previously worked at both Herbert Smith and SJ Berwin joins to strengthen our projects team.

Fenwick Elliott has "shown considerable leadership in the construction sector, particularly through its use and promotionof adjudication".

In addition, on 1 May 2007, ***David Robertson*** became a partner. David has been with Fenwick Elliott since February 2004 and has concentrated on international construction, energy and infra-structure projects. In particular, David has assisted Richard Smellie in providing advice on claims and disputes on the Baku-Tbilisi-Ceyhan Crude Oil Pipeline Project.

We also have two new Associates:

Richard Bailey who has been with us since May 2004 became an associate in January of this year; whilst

Alastair Oxbrough, who joined in November 2006 and had previously worked at both Beachcroft LLP and Multiplex became on Associate in June 2007;

Finally, there have been two other new members of staff to enhance our team:

Thomas Young who joined from Shadbolts & Co LLP in September 2006; and

Birgit Blacklaws who joined us in May 2007 from Hazelton Law a specialist construction law firm in New Zealand.

Mediation

Fenwick Elliott has always been committed to finding the most appropriate approach to resolving any dispute our clients may find themselves involved in. Our involvement with Project Mediation and the TCC mediation survey described above are two examples of this. We were therefore pleased to have been nominated for an award in the Professions Category in the 2006 CEDR Awards For Excellence.

The citation noted that Fenwick Elliott has *"shown considerable leadership in the construction sector, particularly through its use and promotion of adjudication".* We intend to build on this and continue to work together with our clients in looking for the best way to bring a particular dispute to an end.

Website

We are pleased to see that our website figures continue to show a regular monthly increase in the number of unique visitors.

The website, which can be found at www.fenwickelliott.co.uk, provides details of our upcoming seminars and other Fenwick Elliott news. The website also provides a valuable archive of papers and articles written by the Fenwick Elliott team and details of the newsletters prepared by us, examples of which can be found in the Case Round-Up below. Please feel free to log on and explore.

Seminars 2007

As can be seen from this year's Review, as well as running our ever popular Adjudication Update Seminars and our still relatively new Capital Projects in the Education Sector Seminar, members of the firm regularly speak at seminars both in England and abroad. Further details can be found on the website.

In recognition of our commitment to international work, we are pleased to announce that on 5 October 2007, we will be running with Keating Chambers an all-day seminar entitled "FIDIC Contracts Conference Practical and Legal Considerations on Major International Projects". Simon Tolson will be chairing the Seminar and the Fenwick Elliott speakers will be Richard Smellie, Jeremy Glover, Julie Stagg and Nicholas Gould. For further details please contact Marie Buckley.

Case law update

Case round-up

Our usual case round-up comes from two different sources. Tony Francis, together with Karen Gidwani, continues to edit the Construction Industry Law Letter ("CILL"). CILL is published by Informa Professional. For further information on subscribing to the Construction Industry Law Letter, please contact Clare Bendon by telephone on +44 (0) 20 7017 4017 or by email: clare.bendon@informa.com.

Second, there is our long-running monthly bulletin entitled Dispatch, which is now into its eight year. This summarises the recent legal and other relevant developments. If you would like to look at recent editions, please go to www.fenwickelliott.co.uk. If you would like to receive a copy every month, please contact Jeremy Glover.

We begin by setting out the most important adjudication cases as taken from the Dispatch. Then we set out summaries of some of the more important other cases from CILL.

Adjudication – Cases from the Dispatch

Late decisions

A C Yule & Son Ltd v Speedwell Roofing & Cladding Ltd

Yule sought to enforce an adjudicator's decision that they were entitled to payment of £191k. Speedwell claimed that as the decision was provided after the agreed extended period, it was a nullity. HHJ Coulson QC noted that following the Amec and Carillion cases, jurisdiction and natural justice challenges have become more difficult and the number of disputed applications to enforce adjudication decisions had fallen. Thus, what the Judge termed the "resourceful losing party" has had to look elsewhere and a new common ground was to allege that the adjudicator had not complied with the strict timetable required by the HGCRA.

What was important was that the benefits of speed and certainty underpinned the statutory requirements that the decision of an adjudicator "shall" be provided within 28 days (or the agreed extended period) and not thereafter.

Here, it appeared that the decision was completed out of time. Having been granted an extension, the decision was due on 3 April. Yet it was provided on 4 April. The Judge, having reviewed the authorities, concluded that paragraph 19 of the Scheme required that the adjudicator reach his decision within 28 days (and/or the agreed extended period). To be valid, an adjudicator's decision must be completed within this period. The Judge then took a closer look at the facts.

On 27 March, Yule provided a number of responses to queries raised by the adjudicator. Later that day, Speedwell sought time to respond. On the same day, the adjudicator agreed that Speedwell could have two days to respond but he required agreement that he be given two more days to issue his decision. Yule expressly consented to the request which took the time of completion of the decision to 5 April. Although Speedwell made no response to the request for further time, it did comment on the substantive issues. The adjudicator read these and raised various queries. Both parties made it clear that they could not respond over the weekend and would have to wait until Monday 2 April.

On the morning of 2 April, the adjudicator asked Speedwell for copies of invoices. Speedwell promised those that afternoon. They were not in fact provided until lunchtime on 3 April. They ran to 65 pages. On the morning of 4 April, the adjudicator indicated that he would provide his decision that day. There was no response from either party. There was no suggestion from Speedwell that this might mean the decision was out of time. Indeed, it was not until 14 May, that Speedwell first suggested that they were going to take the point that the decision was a nullity because it was late.

The Judge noted that this was "hardly an argument awash with merits" although it did fall within the guidance provided by the legal authorities. However, the Judge did not accept Speedwell's case for three reasons. The first was that the court had to be mindful of the difficulties imposed upon adjudicators by the timetable. There may be

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times when, late in the day, new information made it necessary for an adjudicator to ask for more time. This is exactly what happened here. When an adjudicator makes such a request, the Judge thought there was a clear obligation on both parties to respond plainly and promptly. If a party did not respond, there must be a strong case for saying that they had accepted, by their silence, the need for the extension.

An adjudicator can do no more than work out that he needs a short extension and seek agreement for that. The Judge duly inferred here that by their silence, Speedwell had accepted that the time was extended to 5 April. Second, Speedwell did more than acquiesce to an extension by silence. They, "*participated in a process which made it impossible*" for the decision to be provided by 3 April. For example, they failed to respond to a request for information causing the delay, then they promised further documentation but supplied it a day late and when they did supply it, did not indicate that in their view, 3 April was the last day for the adjudicator to complete his decision.

In other words, their conduct was consistent with having agreed to an extension. Thus, the Judge felt that Speedwell were estopped from denying that the decision of 4 April was a valid decision. They had failed to say in terms that they did not agree to the extension and they had participated in the exchange of information all the way through to the latter part of 3 April.

Although LJ Waller expressed some concern about the application, describing the point taken by the employer as "somewhat technical", he accepted it served no useful purpose to allow the appeal to go ahead where the would-be appellant was almost bound to lose.

Finally, the Judge commented on an argument made by Yule that even if the decision was completed outside the extended period, it should still be enforced. This was an argument made in reliance upon an Australian decision called *Brodyn v Davenport*. Although his comments do not form part of the ratio of his decision, and so are not binding, HHJ Coulson QC said that what was important was that the benefits of speed and certainty underpinned the statutory requirements that the decision of an adjudicator "shall" be provided within 28 days (or the agreed extended period) and not thereafter. In other words, if the Judge had concluded that the adjudicator's decision was a day late, it would have been a nullity.

The same dispute?
David and Theresa Bothma t/a DAB Builders v Mayhaven Healthcare Ltd

Here, the notice of adjudication identified four disputes, including the completion date, and the sum due under valuation 9. Bothma sought a number of remedies including that the adjudicator determine the revised date for completion and the sum properly payable to it. The adjudicator awarded an extension of time, said that the non completion certificate was invalid and ordered Mayhaven to pay just over £21k. Mayhaven resisted enforcement saying that an adjudicator only had jurisdiction to determine one dispute at the same time. At first instance, the Judge held that the adjudicator had decided two unrelated disputes being the correct figure for valuation 9 and whether the contractor was entitled to an extension of time and thus the validity of the non completion certificate. On the facts, any challenge to the non completion certificate was of no monetary consequence to the sum due under valuation 9.

LJ Dyson agreed. If interim valuation 9 had included a claim for extended preliminaries or other time related sums, there would have been a clear link between the figure claimed and the claim for an extension of time. Here, however, no disputes were identified which had any time implications at all. Although LJ Waller expressed some concern about the application describing the point taken by the employer as "somewhat technical", he accepted it served no useful purpose to allow the appeal to go ahead where the would-be appellant was almost bound to lose. If it did, the CA would be furthering an argument which was described as "practically hopeless", and this would simply give rise to further costs being incurred.

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Is adjudication compulsory at first instance? DGT Steel and Cladding Ltd v Cubitt Building and Interiors Ltd

It is well known that, following the case of *Hershel Engineering Ltd v Breen Property Ltd*, s108 of the HGCRA means exactly what it says. An adjudication can be commenced at any time, even if there are court proceedings already in progress. However, until now, the reverse question had not come before the courts. DGT were engaged by Cubitt to carry out external cladding works under a sub-contract, based on Cubitt's standard terms, which contained adjudication provisions. Clause 19.1 provided that:

"Any dispute, question or difference arising under or in connection with the sub contract shall, in the first instance, be submitted to adjudication…"

DGT referred a claim for some £193k to adjudication. This claim was rejected. DGT then issued court proceedings for some £242k. Cubitt said that this claim was very different to the adjudication claim and that as a result of the binding adjudication agreement in the contract, the claim should be stayed until the new claim had been adjudicated. DGT said there was no mandatory adjudication provision and even if there was, the new claim was essentially the same as that which had already been adjudicated. Alternatively, DGT said the court should exercise its discretion against exercising a stay.

This was a valuation dispute. Therefore in the view of the Judge, a construction professional would be better placed to consider it, at least in the first instance, than a Judge.

HHJ Coulson QC noted that if the parties have agreed on a particular method to resolve their disputes, then the Court has an inherent jurisdiction to stay proceedings brought in breach of that agreement. He referred, by way of example, to the case of *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* where proceedings had been commenced despite there being a term in the contract providing for an initial reference of disputes to a panel of experts. The Judge summarised the law as follows:

"(a) The court will not grant an injunction to prevent one party from commencing and pursuing adjudication proceedings, even if there is already court or arbitration proceedings in respect of the same dispute…

(b) The court has an inherent jurisdiction to stay court proceedings issued in breach of an agreement to adjudicate …just as it has with any other enforceable agreement for ADR…

(c) The court's discretion as to whether or not to grant a stay should be exercised in accordance with the principles noted above. If a binding adjudication agreement has been identified then the persuasive burden is on the party seeking to resist the stay to justify that stance."

The Judge held that the adjudication clause, because of the use of the word "shall," was mandatory. The right to submit any dispute to adjudication in the first instance, was just that; it was not discretionary. And it is important to remember that the right to adjudicate was a contractual one. Thus the provisions of the HGCRA were irrelevant. Having decided this, the Judge had to consider whether he should exercise his discretion to order a stay to enable the adjudication to be concluded.

The original adjudication brought by DGT was a technical one based on the alleged failure by Cubitt to operate the contractual mechanism correctly. It was not based upon any detailed evaluation of the work done by DGT. The court claim was a valuation dispute. Therefore the two claims were substantially different. In considering whether or not to exercise his discretion and order a stay, Judge Coulson identified two important factors:

(i) Failure to comply with the TCC pre-action protocol; and

(ii) Suitability of the Tribunal.

DGT had not complied with the TCC pre-action protocol. Thus, even if there had been no adjudication agreement, the Judge would have ordered a stay. This was a valuation dispute. Therefore in the view of the Judge, a construction professional would be

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better placed to consider it, at least in the first instance, than a Judge. Further, it was only cheaper to litigate than to adjudicate, if there was an early settlement of the litigation. Finally, DGT were not debarred from pursuing their claim. There would simply be a temporary stay which would last for a few weeks until after the adjudication. Accordingly, the Judge held that there was no reason not to exercise his inherent jurisdiction to stay the proceedings whilst the adjudication took place.

Costs of enforcement actions

Gray & Sons Builders (Bedford) Ltd v Essential Box Company Ltd

Essential Box engaged Gray to demolish and rebuild a unit on an industrial estate. In two adjudications, the same adjudicator concluded that Essential Box had wrongfully repudiated the contract and that the sum of £101,988.87 plus interest was due to Gray. Essential Box did not pay and so Gray commenced enforcement proceedings.

Although Essential Box filed the acknowledgement for service, and thereby indicated that they were going to defend the claim, they did not submit any evidence in opposition. There was no indication, however, from Essential Box that the claim was accepted. In addition the solicitors for Essential Box wrote two letters raising a number of technical points. Essential Box made an offer and a counter-offer from Gray followed. Both offers involved the payment of the full sum by instalments but neither offer was accepted. The day before the hearing, Counsel for Essential Box submitted a skeleton argument to the effect that the application of Gray would not be opposed. It followed therefore that Gray was entitled to judgment in the full sum claimed and it fell to the court to consider the point of costs.

The Judge had to consider what was the right basis for the assessment of costs where a Defendant resists enforcement until the date of the hearing. The Judge decided that the correct measure was indemnity costs. Essential Box knew or ought to have known that they had no defence to the claim.

What was the right basis for the assessment of costs where a defendant resists enforcement of an adjudication decision up until the date of the enforcement hearing? HHJ Coulson QC decided that the correct measure was indemnity costs. Essential Box knew or ought to have known that they had no defence. Their cyclical cash flow was irrelevant when considering the basis for the assessment of costs. Further, Gray had beaten the offers made by obtaining judgment in the full amount.

This decision provides further confirmation of the difficulties likely to be encountered by any party seeking to avoid the enforcement of an adjudicator's decision. The courts are apparently taking an increasing hard-line view as can be seen from the award of indemnity costs made by HHJ Coulson QC here. However, the courts have not adopted a "blanket-enforcement" approach. If there are genuine grounds to resist, then the courts will consider them. It is just that those grounds really must be genuine ones.

Breach of natural justice

Humes Building Contractors Ltd v Charlotte Homes (Surrey) Ltd

Humes sought to enforce an adjudicator's decision for some £160k. The building contract was based upon a JCT Intermediate Form with Contractors Design 2005 Edition. Relations between the parties deteriorated and Charlotte purported to terminate the contract under clause 8.4. Humes brought a claim for measured work and wrongful determination. Charlotte counterclaimed for defects and LADs. The adjudicator valued the contractor's claim but in his decision refused to consider the counterclaim on the basis that no withholding notice had been served.

Charlotte refused to pay on the basis that the adjudicator had exceeded his jurisdiction in deciding that the termination had been wrongful. Further, he had decided a different question to the one asked and had made an error by failing to consider the counterclaim merely because there was no withholding notice. This meant that the adjudicator had failed to consider the merits of their case in respect of the deduction of LADs and defects.

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HHJ Gilliland QC held that the adjudicator had answered the questions put to him. However, refusing to consider the defects and LADs claim was in the Judge's view wrong, regardless of the fact that a withholding notice had not been issued. That said, an error of fact or law would not be enough to refuse enforcement.

In my judgment what the adjudicator has done was manifestly and seriously unfair to the defendant... The adjudicator however rejected this claim (and any balance of the claim for liquidated damages) without considering it upon its merits as in my judgment he should have done.

However, Charlotte had also argued that it was unfair to enforce the decision because they had not been given the opportunity to address the adjudicator in respect of the adjudicator's incorrect legal reasoning. Were the actions of the adjudicator so unfair that the court should refuse to enforce. The Judge thought they were, holding that:

"In my judgment what the adjudicator has done was manifestly and seriously unfair to the defendant. The defendant's claims that the claimant's work was defective was an important part of its defence. The defendant claimed the defects amounted to £135,916.48 and if that was correct the amount of any award in favour of the claimant would have been very significantly reduced. The adjudicator however rejected this claim (and any balance of the claim for liquidated damages) without considering it upon its merits as in my judgment he should have done. The defendant has been deprived of any opportunity of persuading the adjudicator that his view of the law was incorrect and the consequence is that the adjudicator has excluded a very substantial part of the defence without consideration of its merits for reasons which are wrong in law. There is nothing to suggest that the defendant should have realised that the adjudicator might be of the view that a withholding notice was necessary before he could consider these claims. In my judgment the failure of the adjudicator to raise the point with the parties and to invite their comments before issuing his decision was so unfair to the defendant that the court should not enforce the decision summarily."

The House of Lords considers the Housing Grants Act

Melville Dundas Ltd & Ors v George Wimpey (UK) Ltd & Ors

This is the first time that the HGCRA has reached the House of Lords. The dispute here, which relates to payment obligations, highlighted the tension between an employer's payment obligations and the impact on those obligations of the contractor going into administration. On 2 May 2003, Melville applied for an interim payment. No withholding notice was served. The final date for payment was 16 May 2003. Wimpey did not pay, but on 22 May 2003 administrative receivers were appointed. Clause 27.6.5.1 of the contract, the Scottish Building Contract, with Contractor's Design, as is typical, stated that in these circumstances the parties must wait until the works are finished. Then an account will be taken and any balance paid to the receiver. The Scottish CA and the minority of the House of Lords held that at the time the receivership was announced, the payment was due as no notice of withholding had been served. If the final date for payment has passed, then the notice requirements of section111 cannot be applicable as they have to be implemented before the final date for payment. Therefore the monies ought to be handed over to the receivers.

And this of course represents the tension described above. When a contractor's employment has been determined and a receiver appointed, two consequences follow. The contractor no longer has any duties to perform and the liability to make interim payment is no longer provisional. While the employer retains the money, he can set it off against his cross-claim for non-completion against the contractor. More often than not, that cross-claim will exceed any claim the contractor may have for unpaid work. Once the employer has paid the money, it will be gone, swept up by, for example, floating charges. If Wimpey paid the money over, it would never see it again.

In the House of Lords there was limited discussion about the payment provisions of the HGCRA. Lord Hoffman noted that the object of these clauses was to introduce clarity and certainty as to the terms for payment and to dictate to the construction industry what those terms should be. He did not feel that section 110 necessarily achieved this, in particular with regard to the notice provisions.

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He agreed with other commentators that serving a notice under section 110(2) seemed to have no consequences. There was no penalty for doing so. He described its purpose as being "something of a puzzle" and noted that it seemed "to have dropped from heaven into the legislative process on its last day in the House of Commons…"

Was Wimpey entitled to withhold the interim payment when it did not serve a notice before the final date for payment on 16 May 2003? It would not have been possible for Wimpey to serve such a notice by 11 May 2003. The earliest that they could have known they were entitled to withhold the interim payment was when the receivers were appointed on 22 May 2003.

However, the crux of the issue was section 111. Was Wimpey entitled to withhold the interim payment when it did not serve a notice before the final date for payment on 16 May 2003? It would not have been possible for Wimpey to serve such a notice by 11 May 2003. The earliest that they could have known they were entitled to withhold the interim payment was when the receivers were appointed on 22 May 2003.

Lord Hoffman said the purpose of the section 111 Notice is to enable the contractor to know immediately and with clarity why a payment is being withheld. The notice is part of the machinery of adjudication in that it provides information which the contractor can challenge through adjudication if he so wishes. Clause 27.6.5.1 did not extend the final date for making an interim payment. He thought that the problem here had arisen because Parliament had not taken into account that parties would enter into contracts under which the ground for withholding a payment might arise after the final date for payment. Lord Hoffman decided that here section 111(1) "*should be construed as not applying to a lawful ground for withholding payment of which it was ... not possible for notice to have been given in the statutory time frame.*" Therefore he allowed the appeal.

Lord Hope of Craighead also allowed the appeal but for slightly different reasons. He chose to give a purposive construction to section 111(1). (Some might consider this to be an interesting choice of words given the reluctance of the CA to adopt such an approach to construing section 107 in the RJT case.) The mischief that section 111 addresses is to reduce the incidence of set-off abuse by formalising the process by which the payer claims to be entitled to pay less than that expected by the payee. Therefore, Lord Hope took the view that section 111 should not apply to situations where the employer wishes to exercise right of set-off given by clause 27.6.5.1 when he has determined the contractor's employment under the contract. Thus the view of the majority was that Wimpey could hold on to the money.

What did the House of Lords mean in the Melville Dundas case?

Pierce Design International Ltd v Johnston & Anr

We discuss above, the first HGCRA case to reach the House of Lords, *Melville Dundas v George Wimpey.* It did not take long for that case to be considered in the TCC. Here, the dispute was whether an employer, who had not paid sums due to the contractor under the contract, could prevent the contractor from enforcing its rights to payment of those sums by relying on its subsequent determination of the contractor's employment under that contract. In *Melville* the determination had been for insolvency; here it was alleged contractor default.

The Johnstons engaged Pierce under the 1998 JCT Contract With Contractor's Design as amended to carry out building works to a property they owned. Interim payments were valued by the employer's agent and became due subject to the issuing of a valid withholding notice. During the contract, the Johnstons failed to make interim payments in total of £93k. This sum was made up of underpayments from five interim valuations where no withholding notice had been served. Pierce sought summary judgment. There was no adjudication. However, the works were not completed by the completion date. The Defendants served a notice of default saying that Pierce was not proceeding regularly and diligently. They said the default was not remedied and purported to determine the contract. The Johnstons' claims, including for the costs of completing the works exceeded the sums claimed by Pierce.

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To begin with, the Judge considered the *Melville Dundas* case. He accepted Pierce's submission that there were two particular factors in that case, namely the particular problems caused by the insolvency of the contractor and the fact that it was impossible for the employer to issue a withholding notice in time because the insolvency took place after the final day for issue of the withholding notice. The Judge felt bound to follow the majority of the House of Lords and say that the operation of clause 27.6.5.1 was not limited to cases involving the insolvency of the contractor and/or the impossibility of serving withholding notices. In other words, the clause complied with s111 of the HGCRA. This meant that there were three questions for the Judge to consider in relation to the application for summary judgment:

(i) Were/are there amounts properly due to be paid by the employer to the contractor?

(ii) Did the contractor's rights to those amounts accrue 28 days or more before the date of determination?

(iii) Has the employer "unreasonably not paid" those amounts?

Judge Coulson said that his approach had the additional benefit of meeting head-on many of the concerns which have been expressed about the approach adopted in Melville Dundas, to the effect that the decision might allow an unscrupulous employer to use determination as a way of avoiding his responsibility to make interim payments.

The Judge considered that these sums were properly due. Further, those sums had accrued more than 28 days before the determination. Finally, the Judge said that if there was a withholding notice the sum identified no longer becomes due under the contract. It is reduced and/or extinguished. Therefore, a sum would reasonably not have been paid by the employer only if there was a valid withholding notice. The Johnstons submitted that what was unreasonable had to be looked at now, not when these sums became payable. Therefore, all their cross-claims had to be taken into account before the court could decide if the sums due were unreasonably not paid.

The Judge disagreed. It would be "unusual and unattractive" for a party to say that they were in breach of contract but the other side did nothing about it, but now there was a clause in the contract which allowed them to ignore this earlier default. There would always be cross-claims for the costs consequences of a determination, usually the costs of completing the work. If the Johnstons succeeded, an employer would be able to rely on cross-claims to justify non-payment of sums that should have been paid months earlier. In granting Pierce summary judgment, the Judge said that his approach:

"... has the additional benefit of meeting head-on many of the concerns which have been expressed about the approach adopted in Melville Dundas, to the effect that the decision might allow an unscrupulous employer to use determination as a way of avoiding his responsibility to make interim payments. Indeed, provided that the sum has been due and 'unreasonably not paid' more than twenty-eight days before the determination then, on my interpretation of the proviso, it would satisfy precisely Lord Hoffmann's point, at paragraph 13 of his speech, that employers should be "discouraged from retaining interim payments against the possibility that a contractor who is performing the contract might become insolvent at some future date (which may well be self-fulfilling)"...where there is no evidence whatsoever to suggest that the Claimant/contractor is or might be insolvent, my construction...does not and cannot cause any permanent prejudice to the Defendants. It is not a determination of their rights. All it does is to require them to pay, on an interim basis, the sums which, pursuant to the contract, they ought to have paid months ago."

Setting off other claims against adjudicators' decisions William Verry Ltd v The Mayor and Burgesses of the London Borough of Camden

WVL sought to enforce a decision of an adjudicator in its favour in the sum of just over £532k. There had been two previous adjudications between the parties. The first related to an interim application for payment initiated by WVL; the second concerned the valuation of certain specific elements of the WVL account initiated by Camden. As part of the decision, the adjudicator had indicated the entitlement of WVL to an extension of time and the entitlement of Camden to deduct liquidated damages for non-completion. This led to the total balance payable to WVL.

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Prior to the service of the adjudication notice, WVL had submitted a draft final account. Before the adjudicator made his decision, the contract administrator wrote to WVL enclosing a certificate for payment based on that draft final account. This final certificate showed a balance due to WVL of only £46k. WVL initiated adjudication proceedings (number 4) in respect of the final certificate. Those proceedings were stayed by consent. Camden, after receipt of the adjudicator's decision, sought a repayment from WVL. Camden took the final account valuation of the contract administrator and deducted from that the amount of LADs awarded by the adjudicator. Camden also served a further notice of adjudication (number 5) seeking a decision on a claim for defects. That decision was due in approximately six weeks time.

Camden resisted summary judgment on a number of grounds, including reliance of the final certificate and the claim made in adjudication 5. The contract was based on the JCT IFC 1998 Edition. Camden submitted that WVL's entitlement to an interim payment on practical completion under clause 4.3 of the contract, as determined in adjudication 3, was superseded by the final certificate issued under clause 4.6.1.1. The obligations to the parties were now regulated by the final certificate. In other words, these contractual obligations overrode the obligation to comply with the adjudicator's decision.

WVL said that the adjudicators' decisions are there to be enforced. The final certificate was not conclusive. Under clause 4.7.1, it was no more than a statement of valuation by the contract administrator which was in any event contested by WVL.

Mr Justice Ramsay said that questions raised in this case related to the ability of a party to resist payment of sums in the adjudicator's decision on two grounds:

(i) That the sums are inconsistent with sums certified in the final certificate issued subsequent to the certificate which forms the subject matter of the adjudicator's decision; and

(ii) That the opposing party has a counterclaim for un-liquidated damages for breach of contract in respect of defects, which is currently the subject of adjudication.

If payment of an adjudication decision on a sum due on an interim certificate had to be subject to the view and review of the contract administrator in a subsequent certificate, then the intention of Parliament for the purpose of adjudication would be defeated.

Mr Justice Ramsay relied on the Court of Appeal decision in *Ferson v Levolux*. As the Judge recognised, the problem here was the process of adjudication on the certificate of practical completion overlapped with the final certification process. The Judge held that the sums due in adjudication 3 should not give way to the disputed valuation of the final certificate. In particular, the Judge referred to the binding nature of the adjudicator's decision and the agreement of the parties to comply with that decision. If payment of an adjudication decision on a sum due on an interim certificate had to be subject to the view and review of the contract administrator in a subsequent certificate, then the intention of Parliament for the purpose of adjudication would be defeated. Each successive certificate would defeat the decision by an adjudicator on the previous certificates.

The provision in the contract that compliance of an adjudicator's decision is without prejudice to other rights under the contract, should be read as requiring compliance with the decision of the adjudicator. In addition here, the final certificate had no conclusive effect given that an adjudication had been commenced within 28 days of that final certificate. Provided that a matter was the subject of adjudication 3, then the final certificate could not be conclusive of that matter. The final certificate was a disputed payment certificate and had no conclusive effect.

The Judge was not prepared to order a stay in relation to the defects counterclaim. Again, the parties had agreed to comply with the adjudicator's decision. Camden had not sought to withhold sums for defects against the interim certificate. If an adjudicator decided that Camden's counterclaim was of merit then Camden would be entitled to payment on the basis of that decision. Camden could not deduct sums in the interim from an existing adjudicator's decision.

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Other cases
Construction Industry Law Letter

Construction Partnership UK Ltd v Leek Developments Ltd

Technology and Construction Court – Salford District Registry

His Honour Judge Gilliland QC

Judgment delivered 26 April 2006

The facts

Leek engaged CPUK to carry out refurbishment works in Macclesfield pursuant to a JCT Intermediate Form of Contract, 1998 Edition. Clause 7.9.1 of the Contract provided that if the Employer was in default of the contract provisions in various specified ways, then notice could be given by the Contractor specifying the default and if that default was not remedied by the Employer within a certain timescale, further notice could be given by the Contractor to determine the contract. This is a typical provision in a JCT standard form of contract.

...actual delivery is simply "transmission by an appropriate means so that it is actually received" ... what was important was actual receipt.

The contract administrator issued two certificates, certificates 15 and 16, which were not paid by Leek. On 23 December 2005, CPUK gave Leek notice pursuant to clause 7.9.1 of the contract stating that Leek was in default. That notice was in the form of a letter which was sent by fax and post. On 17 January 2006, CPUK served the further notice necessary to determine under the contract. Leek refused to pay the certificates and counterclaimed for liquidated damages. CPUK referred the matter to the High Court for summary judgment. One issue that came before the Judge was whether or not the determination by CPUK of the contract was valid and lawful and in particular whether the notice given on 23 December 2005 failed to comply with the notice requirements of clause 7.1 of the contract which stated:

"Any notice, which includes a notice of determination, shall be in writing and given by actual delivery or by special delivery or recorded delivery. If sent by special delivery or recorded delivery, the notice or further notice shall, subject to proof to the contrary, be deemed to have been received 48 hours after the date of posting, excluding Saturday and Sunday and public holidays."

This, too, is typical wording for the service of notices of determination in JCT contracts.

Issues and findings

Was the notice given on 23 December 2005 valid and lawful?

Yes. Delivery of the notice by fax constituted actual delivery for the purposes of the contract.

Commentary

On a practical level, this judgment is quite important. It is commonly considered that actual delivery means delivery by hand, which involves or people making a special journey to deliver the notice. The Judge disagreed, and held that actual delivery is simply "*transmission by an appropriate means so that it is actually received*" and that what was important was actual receipt. Therefore a fax constitutes actual delivery provided it is received, which can be easily ascertained from a fax transmission sheet.

The question that the Judge did not address (because it was not relevant in this case) is whether email transmission could also constitute actual delivery. It is submitted that given the amount of business that is now conducted by email and the recent decision of the court in *Bernuth Lines v High Seas Shipping* [CILL May 2006 2343], email would be considered an appropriate means of transmission for the purposes of actual delivery.

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Ian McGlinn v Waltham Contractors Ltd & Others

Technology and Construction Court

His Honour Judge Coulson QC

Judgment delivered 21 February 2007

The facts

The claimant procured the construction of a substantial private residence in Jersey. Construction commenced in January 1999 and by January 2002 the house was substantially complete. Following completion the claimant, on expert advice, was of the opinion that the house was so badly designed and so badly built that he was in fact entitled to demolish the property and start again. Accordingly, the claimant commenced proceedings for damages for breach of contract and/or negligence against the building contractors, Waltham Contractors Limited ("Waltham"), the architects, Huw Thomas Associates ("HTA"), the structural, mechanical and electrical engineers, DJ Hartigan ("DJH"), and the quantity surveyors and so-called project managers, Wilson Large Associates ("WL"). Waltham played no part in the hearing because they were in administration.

A claimant who carries out either the repair or reinstatement of his property must act reasonably. It is not enough simply to say that you have relied on the opinion of an expert.

The claimant's primary case was that he was entitled to damages by way of the actual cost of demolition and the estimated cost of rebuilding at a whole cost calculated at £3,649,481.34. Alternatively, the claimant argued that he was entitled to the estimated cost of repairing the individual elements of the property that were said to be defective in the sum of £2,487,246.21. For a number of reasons the defendants maintained that the claimant's decision to demolish the property was unreasonable and accordingly the correct measure of damages was the cost of the work necessary to repair the individual defects for which each individual defendant was liable.

Issues and Findings

Was the claimant entitled to damages measured by reference to the costs of demolition and rebuild?

No.

What was the claimant entitled to?

The correct measure of loss was the cost of the work necessary to repair the individual defects for each separate defendant was liable and responsible.

Commentary

Since the *The Board of Governors of the Hospitals for Sick Children and Anr v McLaughlin & Harvey plc and Others* (1987) 19 Con LR case, it has become something of a construction lawyer's "rule of thumb" that if a claimant wants to recover the cost of rectification it is more likely to do so if remedial works have been carried out upon a professional consultant's advice. Of course, as Judge Coulson's decision here makes clear, a claimant who carries out the repair or reinstatement of his property must act reasonably. It is not enough simply to say that you have relied on an expert's opinion.

The claimant here faced two particular difficulties. The first was that the Judge did not consider that the decision to demolish the property was justified on the evidence before him of the nature and extent of the defects. The second was the fact that there were four potential defendants. When it came to assessing liability for the costs of demolition and reinstatement, this could only be done on a global rough and ready percentage assessment. However,the alleged defects could be separately identified and the repair costs quantified and apportioned against the responsible party. The Judge felt that this approach, in the circumstances of this case, produced a fairer result.

Case law update

Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd

Technology and Construction Court

Mr Justice Jackson

Judgment delivered 6 March 2007

The facts

Multiplex engaged Honeywell under a subcontract dated 27 May 2004, in the form of an amended JCT DOM/2. By the subcontract, Multiplex subcontracted the design and installation of the electronic systems (including the BMS, IT and communications systems) for the new Wembley National Stadium. The subcontract contained a detailed programme for Honeywell to follow.

Honeywell's works fell into delay, the reasons for which were disputed. Honeywell sent notices of delay to Multiplex and requested an extension of time. Multiplex rejected the notices as not complying with the requirements of clause 11 of the subcontract (extensions of time). In the absence of valid notices and information required by clause 11, Multiplex advised Honeywell that it was unable to assess Honeywell's entitlement to an extension of time. Honeywell claimed that it was impossible to provide the information required. Clause 11 also made it a condition precedent to Honeywell's right to an extension of time that Honeywell must "*… have served all necessary notices on [Multiplex] … and provided all necessary supporting information …*'" The condition precedent went on to provide:

"In the event the Sub-Contractor fails to notify the Contractor … and/or fails to provide any necessary supporting information then he shall waive his right, both under the contract and at common law, in equity and/or pursuant to statute to any entitlement to an extension of time under this clause 11."

Did the condition precedent render time at large?

No. A condition precedent which bars a right to an extension of time if not complied with is valid.

During the course of the works Multiplex issued revised programmes to Honeywell under clause 4.2 of the subcontract which stated:

"The Contractor may issue any reasonable direction in writing to the Sub-Contractor in regard to the Sub-Contract Works (including the ordering of any Variation therein)."

A dispute arose as to whether time had become at large, by which expression it was meant that Honeywell's obligation to complete within the period stipulated in the subcontract had fallen away, and was replaced with an obligation to complete the works within a reasonable time. Honeywell alleged that time had become at large on four different grounds:

- The issue of further programmes as a direction under clause 4.2 caused a delay to the completion of the works for which no corresponding relevant event existed in clause 11 under which an extension of time could be granted. The "sweep up" relevant event in clause 11.10.7 ("… delay caused by any act of prevention or default by the Contractor in performing its obligations under the Sub-Contract") did not apply to legitimate acts under the subcontract (such as issuing a direction), only to acts of default. This was called the "construction point".
- Multiplex had failed to operate the extension of time machinery in the subcontract, and/or the machinery had broken down. This was called the "operational point".
- The condition precedent barred Honeywell from an extension of time. This was called the "Gaymark point", after the Australian decision of *Gaymark Investments Pty Ltd v Walter Construction Group Ltd* [1999] NTSC 143.
- The settlement agreement struck between Multiplex and its employer, WNSL, had superseded the extension of time mechanism in the main contract. Multiplex denied that time had become at large on any of these grounds and commenced

Case law update

an adjudication against Honeywell. Multiplex lost the adjudication, in which the adjudicator found that time was at large on the first ground above. Multiplex commenced proceedings for a declaration that time was not at large on the first ground. Honeywell counterclaimed for declarations that time was at large on all four grounds.

Issues and findings

Could directions issued under clause 4.2 give rise to a relevant event under clause 11?

Yes. Directions causing delay were acts of prevention and were covered by the "sweep up" relevant event in clause 11.10.7. An act of prevention may be a legitimate act. Time was not at large on this ground.

Had Multiplex failed to operate the extension of time machinery, or had the machinery broken down?

No. The extension of time machinery had been operated and had not broken down. Clause 11 only required Honeywell to do its best in supplying notices and information. Honeywell's evidence stated that Honeywell had done its best.

Jackson J affirms the view previously taken by the Inner House of the Court of Session in Scotland in City Inn, that there are good reasons for the employer requiring a contractor to give prompt notice of delay, and for creating sanction by way of condition precedent for a failure to give such notice.

Did the condition precedent render time at large?

No. A condition precedent which bars a right to an extension of time if not complied with is valid.

Did the agreement between Multiplex and Wembley place time at large?

No. A separate agreement between Multiplex and a third party cannot unilaterally affect Honeywell's right to an extension of time under the subcontract.

Commentary

Contractors claim that time is at large when they fall into delay or where the completion date of the contract is missed. This case demonstrates how difficult it is for such an argument to succeed, and that the courts will seek to uphold extension of time clauses whenever possible. The case also provides clarification on the effect of conditions precedent in the context of a contractor's right to an extension of time. Jackson J affirms the view previously taken by the Inner House of the Court of Session in Scotland in *City Inn*, that there are good reasons for the employer requiring a contractor to give prompt notice of delay, and for creating sanction by way of condition precedent for a failure to give such notice. The condition precedent in Multiplex did not seek to take advantage of any potential breach by Multiplex that may have prevented Honeywell from giving the requisite notice, because clause 11 did not require Honeywell to give notice if it was impossible to do so. This is an important qualification, since conditions precedent which do not take account of such impossibility would, based on the prevention principle, arguably be unenforceable.

Reinwood Ltd v L. Brown & Sons Ltd – Part 1

Technology and Construction Court

HHJ Gilliland QC

Judgment delivered on 9 November 2006

The facts

On 16 January 2003 Reinwood entered into a contract with Brown for the construction of 59 apartments in Manchester. The contract was a JCT Standard Form of Building Contract, 1998 Edition, Private With Quantities incorporating a Contractor's Designed Portion as amended. The contract contained the usual JCT provisions in relation to contractual determination at clause 28 and, in particular, that a default notice has to be served by a contractor prior to notice being served to determine the contract. On 4 July 2006 Brown served a notice to determine the contract pursuant to clause 28.2.4 of the contract. Reinwood issued proceedings seeking a declaration that the initial notice of default given on 26 January 2006 and the notice of determination given on 4 July 2006 were invalid.

Case law update

With regard to the 26 January notice, Reinwood argued that there was no requirement on the part of Reinwood to pay the LADs originally deducted, as the contract mechanism in relation to the deduction of LADs had not been properly followed. The architect had not produced a formal notification of a new completion date at the time that he issued the extension of time on 20 January 2006. Further, the LADs did not have to be repaid immediately but within a reasonable time, being 14 days.

It was submitted that that notice was only given in a certificate that was received by Brown on 30 January 2006 – after the final date for payment of interim certificate 29. As to the notice given on 4 July 2006, it was argued that this was invalid because it was given too soon after the repetition of a specified default. Reinwood also claimed that even if it was wrong about the validity of the notices, Brown had acted "*unreasonably or vexatiously*" within the meaning of clause 28.2.5 of the contract, and that therefore the notice of determination given on 4 July 2006 was void and ineffective. Reinwood claimed that Brown was in repudiatory breach of the contract in leaving the site. Brown said that it was entitled to and did properly determine the contract.

Issues and findings

Is a particular form required for the grant of an extension of time in writing?

No. Provided the document contains the information specified in the contract there will be a valid grant of an extension of time.

What is the effect of the fixing of a new completion date prior to payment of the interim certificate?

The fixing of a new completion date had the effect of cancelling the certificate of non-completion upon which Reinwood's right to deduct LADs was founded. Therefore, in principle with the cancellation of the certificate of non-completion, any right to deduct LADs based upon that certificate also terminated.

Was notice of determination given unreasonably?

No. The Judge listed out six propositions, set out opposite, on when determination may be considered to be unreasonable or vexatious.

Commentary

What constitutes unreasonable and vexatious behaviour when a notice of determination is served? Here the Judge took into account various factors including: Brown's own commercial interests and the state of completion of the project. Even though the failure to pay was due to an administrative error which was not deliberate, that did not render the notice to determine unreasonable. Another point that the Judge decided upon was the situation where payment is made prior to the final date for payment and where the amount due to the contractor changed between the date of payment and the final date for payment. The Judge was clear in holding that Brown's entitlement must be looked at on the final date for payment and thus further monies were due despite the early payment. It is therefore important that the architect and the employer coordinate in this regard to ensure that the correct amount is paid.

1 It is for the employer to show on the balance of probabilities that the contractor has determined the contract unreasonably or vexatiously.

2 Vexatiously means that the contractor determined the contract with the ulterior purpose of oppressing, harassing or annoying the employer.

3 An unreasonable determination is to be ascertained by reference how a reasonable contractor would have acted in all the circumstances.

4 The court cannot substitute its own view of what is reasonable for the view taken by the contractor if that is one which a reasonable contractor might have taken in the circumstances.

5 Although motive is relevant, the test of what is un-reasonable conduct is objective and the fact that the contractor may have thought that his conduct in determining the contract was reasonable is not conclusive.

6 The effect on the employer of determination by the contractor is a factor to be taken into account and a determination may be unreasonable if it disproportionately disadvantages the employer."

Reinwood Ltd v L Brown & Sons Ltd
Part 2 – the Court of Appeal

Court of Appeal (Civil Division)

Mummery LJ – Arden LJ – Dyson LJ

Judgment delivered 21 June 2007

The facts

As reported above, the Judge at first instance held that the first notice of default was a proper notice, as the issue of the extension of time by the architect had cancelled the certificate of non-completion and the right to levy liquidated damages in the amount levied. Reinwood appealed this point.

Case law update

Issues and findings

Was Brown entitled to give a notice of default in January 2006?

No. The contract does not extinguish the right to deduct the LADs even if the notice of non-completion is cancelled. The contract provides that the LADs are to be repaid within a reasonable period of time if the amount deducted is excessive.

Commentary

The Court of Appeal said that the amount due in respect of liquidated damages crystallizes when the notice is given regardless of what then happens with the entitlement to an extension of time.

The reasoning of Dyson LJ is clear. The amount due in respect of LADs crystallises when the notice is given regardless of what then happens with the entitlement to an extension of time. As this particular form of contract allows LADs to be repaid within a "reasonable time" the court considered that there would be little prejudice to the contractor. Whilst the legal interpretation is clear, the practical result may result in cash-flow difficulties if the LADs are not refunded promptly. There is no definition of "reasonable time" and contractors will be dependent on the employer's interpretation.

Skanska Rashleigh Weatherfoil Ltd v Somerfield Stores

Court of Appeal

Neuberger LJ – Richards LJ – Leveson LJ

Judgment delivered 22 November 2006

The facts

Somerfield invited Skanska to tender for the provision of maintenance services and included a draft of the proposed contract in the form of an incomplete facilities management agreement ("the June FMA"). Discussions then took place as to the scope and terms of the final contract. By mid-August 2000 there was a draft of the proposed FMA which, if finalised, would govern the relationship between the parties for three years. Whilst there would need to be further negotiations before they could enter into a contract, Somerfield wanted to receive the maintenance services immediately and sent a letter of intent to Skanska headed "Subject to Contract". The key clauses were:

"2. We now wish to appoint you to provide us with the Services, which are more particularly described in the contract ... enclosed with the Tender…

5. In consideration of the above, and whilst we are negotiating the terms of the Agreement, you will provide the Services under the terms of the Contract from 28th August 2000 (or such other date as we may advise to you) until 27th October 2000 ("the Initial Period"), such Services to be provided at the prices detailed in the Tender return provided by you ..."

Skanska signed and returned a copy of the letter agreeing to the terms. A dispute arose as to the meaning of the obligation to "*provide the Services under the terms of the Contract.*" Skanska said that the only purpose of referring to the June FMA was to identify the nature of the works to be performed. Somerfield contended that all of the terms of the June FMA were incorporated into the letter of intent. At first instance Mr Justice Ramsey agreed with Skanska. Somerfield appealed.

Issues and findings

Was the expression in the letter of intent "*provide the Services under the terms of the Contract*" sufficient to incorporate all of the terms of the proposed contract?

Yes. The terms of the contract being negotiated were not inconsistent with the terms of the letter of intent.

Commentary

This case has important potential implications for parties who enter into letters of intent which make reference to carrying out works in accordance with a contract in the process of negotiations as those terms may be implied into the letter of intent to the extent that they are not inconsistent with the terms of the letter.

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