



Fenwick Elliott

The construction & energy law specialists

Annual Review

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



2014/2015

The BIM generation: an update on the latest developments

Is it ever reasonable to refuse an invitation to mediate?

Is Sub-Clause 20.1 of the FIDIC form really a condition precedent?

Design liability: reasonable skill & care v fitness for purpose

ANNUAL REVIEW 2014/2015

Fenwick Elliott is the UK's largest specialist construction law firm with clients across the world. We advise on every aspect of the construction process in the building, engineering and energy sectors, including oil, gas, nuclear and power.

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

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



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Fenwick Elliott

The construction & energy law specialists


Simon Tolson

Senior partner

First word

It is my great pleasure to introduce the 2014/15 edition of the Fenwick Elliott Annual Review. This is our 18th such annual publication. It is always a dare to try to squeeze into one journal the pinnacles of the legal year. Our purpose is to be a teeny-weeny bit edifying to flag to you areas of the law and practice which we hope are germane to your business enterprise. We recognise that while you need to make sure you avoid getting on the wrong side of your contract, keeping up with the latest "advances" and staying ahead of the hounds is just one thing on your punch list to squeeze in to your busy day. The Review allows you to grab a latte, sit down and "catch-up". My intro is a skip through Fenwick Elliott's highlights, and gives you a résumé of some of our news.

It has been an eventful year in many senses. In September, the Queen awoke to find her Kingdom intact, parliament was recalled over international intervention against Islamic State, many countries in the Middle East that we have done business in are still in the middle of radical change and in West Africa the Ebola virus is officially an epidemic. But let's look to some cheer, the economy in the domestic construction market is booming! It is leading Europe by the ear. August 2014 saw a year-on-year increase in construction awards. UK economic growth has been revised up for the second quarter of the year by the Office for National Statistics and the UK GDP was 3.2% higher in the second quarter of 2014 compared with a year earlier.

This Review has to keep up with the fact that worldwide Fenwick Elliott is a truly international construction law business. We are particularly active in the energy sector. Our projects include advising on the largest independent power plant in Bahrain, the largest concentrated solar power plant in operation in the world in Abu Dhabi, advising a national gas company and Government Ministry on infrastructure matters in connection with a pipeline in Asia, and advising on power stations in China and South Africa and nuclear facilities across Europe.

London is a global leader in commercial dispute resolution and as a world centre of business. Fenwick Elliott aims to hold its central London position, for both our commercial legal work and for dispute resolution through litigation, arbitration or mediation.

At home, we act on a number of the biggest infrastructure projects in the UK including Crossrail and London Gateway Port, as well as numerous mainline rail networks, hospitals, universities and wind farms. Our dominance in the domestic legal construction and energy law market here at base remains our priority and is rightly nursed.

I am overjoyed to say it has been a year vibrant with activity; in fact, it has again been one of the busiest years I can recall in all my 27 years at Fenwick Elliott. The practice has expanded significantly and there are many new faces. I am also delighted we made up two of our senior associates to partners. Both David Bebb and Thomas Young's new roles took effect from April 2014 and they are doing fantastically.

Our range of construction and energy work is now more diverse than ever. It includes every aspect of the procurement and construction process on projects around the world; wind turbines, floating pontoon structures, highways, skyscrapers, process plants, airports, theme parks, tunnelling, gas fields and pipelines, waste to energy plants, subsea pipelines, water projects. You name it; we are on something exciting and/or muddy and messy. We are also working with pretty well every English language-based construction contract in use, and of course many are bespoke or adulterated from our friends FIDIC, IChemE, NEC3, JCT etc.

Our work continues to cover dispute avoidance strategy, litigation, international arbitration, adjudication and all forms of ADR/mediation. Our growing projects team have also been very busy – demonstrating London is buzzing with new building developments and we also have such work in far flung places across Africa, the Indian subcontinent and Seoul too.

I want to thank you all for the opportunities your legal problems have given us to resolve this past year. Long may this continue and be to our mutual advantage!

Simon Tolson
Senior Partner



Fenwick Elliott

The construction & energy law specialists



Jeremy Glover

Partner

Editor

In this issue

Welcome to the 18th edition of our Annual Review. As always, our Review contains a round-up of some of the most important developments from the past 12 months including from page 43, our customary summaries of some of the key legal cases and issues, taken from both our monthly newsletter Dispatch as well as the Construction Industry Law Letter.

One of the features of last year's *Review* was the impact in the UK of the latest reforms to the CPR or court procedural rules. The changes introduced led to a number of controversial decisions. Undoubtedly the "high-watermark" of these was the *Mitchell* case. At least, as at September 2014, whilst the political ramifications of "pleb-gate" rumble on, we can say that the legal (in the procedural sense) ramifications have to a large degree been settled. At pages 9-10, James Mullen and Rachel O'Hagan of 39 Essex Street explain what happened when we found ourselves having to apply *Mitchell* in the midst of an adjudication enforcement, whilst Lisa Kingston at pages 11-13 explains the new three-stage test introduced by the Court of Appeal to deal with applications for relief from sanctions, when court deadlines have been missed.

As the Government's 2016 deadline for all centrally procured projects to utilise Building Information Modelling (BIM) draws ever nearer, there have been a number of new developments. On pages 40-42 you can find an update on what we need to know, focusing on the legal and contractual implications. One of the items we discuss is the Government Soft Landings policy. This may have an impact on how we deal with practical completion issues. At pages 18-19, Jatinder Garha looks at a recent decision where the precise obligations on the party responsible for certifying completion were put under the judicial microscope.

One of the major concerns about BIM is the extent to which, if at all at level 2, design obligations may change. Sarah Buckingham at pages 14-17, discusses the importance of understanding your design duties and focuses on the distinctions between fitness for purpose and reasonable skill and care. The nature of these obligations is usually spelt out in the contract and Stacy Sinclair gives a timely warning of the need for clarity in architect's appointments at pages 20-21.

The basic approach of the FIDIC form is to apply a fitness for purpose obligation whenever a contractor undertakes design work. In the Summer of 2014, Mr Justice Akenhead delivered a very lengthy judgment involving a dispute under the FIDIC yellow book. This was quite unusual, as most FIDIC contracts provide for arbitration not litigation. The judgment dealt with a wide variety of topics, including the Sub-Clause 20.1 condition precedent notice provision and termination. You can find three articles arising out of the judgment at pages 27 through to 34.

We have not neglected arbitration and we look at arbitration agreements, including a clause which provided that the parties were to try to resolve their dispute through "friendly discussion" at pages 38-39. Whilst Monique Hansen looks at an attempt to prevent the enforcement of a Dubai arbitration award at pages 35-37. Our friend and colleague Heba Osman, at pages 25-26, reviews performance bonds from a UAE perspective.

Interestingly, 2014 saw the publication of new ICC rules on mediation, something which demonstrates the increasing international recognition of the importance and value of mediation in resolving construction disputes. This is why our *Review* this year begins with a look at alternative dispute resolution or ADR. As Christine Lockwood notes at pages 4-5, 76% of mediations settle on the day and as Martin Ewen explains at pages 6-8, the courts have been asked again to consider cases where parties have, it was said, unreasonably refused an offer to mediate.

If you want more, our website keeps track of our latest legal updates or you can follow us on Twitter or LinkedIn. As always, I'd welcome any comments you may have on this year's *Review*: just email me at jglover@fenwickelliott.com.

Jeremy Glover
Partner

Mediation

The increasing importance of mediation in the UK

There is no doubt that increasingly everyone is recognising the importance of looking for alternative ways to resolve their disputes. This is why our opening articles in this year's Review, focus on current trends in mediation. Every two years, the Centre for Effective Dispute Resolution or CEDR carry out a mediation audit which focuses on the use of mediation in the UK. Christina Lockwood discusses some of the trends in mediation identified by the audit.

The results of the Sixth CEDR Mediation Audit show that the UK mediation market has grown by 9% in the last year. The current size of the civil and commercial mediation market is estimated as being in the order of 9,500 cases per annum. This does not include community or family mediation nor the statutory ACAS service or the HMCS Small Claims Mediation Service, which are not included in the CEDR Mediation Audit.

In order to assess the overall economic impact of the commercial mediation field as a whole, CEDR combined the results of the six Mediation Audit surveys with detailed operational statistics taken from CEDR's own caseload and came to the following conclusion:

- The total value of cases mediated each year is approximately £9 billion. (Since the impact of "mega-cases" can significantly influence this total value of cases mediated, the effect of such mega-cases has been excluded.)
- Since 1990 the total value of mediated cases is approaching £65 billion.
- Currently the commercial mediation profession saves business around £2.4 billion a year by achieving earlier resolution of cases that would otherwise have proceeded through litigation.
- The results of CEDR's Sixth Mediation Audit suggest that the aggregate value of the mediation profession's total fee income is around £22.5 million per year.

75% of mediations settle on the day.

The survey of commercial mediator attitudes and experience shows that clients and advisers refer 66% of ad hoc cases directly to their chosen mediator rather than working through providers. As might be expected, direct referrals are particularly prevalent amongst the most experienced mediator group.

The market is still dominated by a small group, although it is slightly bigger than in previous years; around 130 individuals are appointed for 85% of all non-scheme commercial cases. In 2012 just 100 individuals held 85% of the market.

The mediators and their practices

The overall profile of respondents is very similar to previous audits: 56% Advanced mediators – who described themselves as "reasonably" or "very" experienced; 22% Intermediates – who categorised their lead mediator experience as "some" or "limited"; and 22% Novices – who were accredited but had no experience as a lead mediator.

The survey finds that the average female mediator is 50 years old, and the average male mediator is 57. The Advanced mediator group are only about a year older than the average. With regard to issues of diversity, things remain largely unchanged: 96% of mediators categorise themselves as being white, and 26% of respondents are women (2012: 22%; 2010: 19%). However, women already in the mediator profession seem to progress more quickly and now represent 25% of the Advanced group of mediators (2012: 18%). There are signs that more non-lawyer mediators are emerging. Only 52% of the respondents were legally qualified (2012: 62%). The non-lawyer mediators emphasise their profession when promoting themselves more frequently than lawyer mediators, but this does not seem to be working for them as well as it does for the lawyers.

Mediation

The number of full-time mediators is increasing; 47% now describe themselves as full-time mediators (2012: 39%; 2010: 37%).

For the first time the CEDR Audit reports a decrease in fee levels. The increased competition has had an impact on billing rates and overall income levels. Average fees of the less experienced mediator group for a one-day mediation have fallen to £1,422 (a decrease of 6.3%). Average fees of the more experienced mediators for a one-day mediation have fallen to £3,820 (a decrease of 10.7%).

A significant proportion of mediator time continues to be unremunerated, either because the mediator did not charge for all of the hours incurred or because the mediation was arranged on a fixed-fee basis. On average less experienced mediators wrote off over 6 hours, whereas amongst experienced mediators an average of around 4 hours was unpaid.

Factors for appointing a mediator

CEDR asked both mediators and lawyers to assess the relative significance of a number of factors in determining why individuals secured commercial mediation appointments. *“Professional reputation – experience/status”* has long been the clear winner with both mediators and lawyers, but this year lawyers place more emphasis on *“professional reputation – mediation style”*. This might reflect an increasing sophistication of lawyer use of the mediation process and lawyers getting better at selecting the right mediator for each particular set of circumstances.

Settlement rates

Mediators report that about 75% of their cases settled on the day, with another 11% settling shortly thereafter so as to give an aggregate settlement rate of around 86%. The settlement rates reported in previous surveys are very similar.

Promotion and regulation of mediation

Mediators now feel even stronger that the civil justice system should be taking a more directive approach towards the promotion of mediation: 76% compared with 66% two years ago. Fifteen per cent of mediators would support a fully mandatory system. Lawyers seem more inclined to favour the status quo and only 57% would like to see a toughening up of the regime.

Most mediators regard the market conditions as the biggest challenge for the development of their mediation practice, particularly the combination of an insufficient level of demand for mediation services and an over-supply of aspiring mediators seeking to break into a marketplace that remains dominated by a limited number of established players. With regard to questions about the Jackson reforms and their impact on the mediation market, most mediators (over 70%) believe that it is too early to tell and that on the assessment of Jackson's impact the jury is still out.

CEDR's Commercial Mediation Rules and Model Documents

On 23 June 2014 CEDR launched its revised and updated Commercial Mediation Rules and Model Documents, including ADR Contract Clauses. These can all be downloaded free of charge from the CEDR website and user comments are welcome in view of future editions.

ADR abroad

Finally, we would note that it is not just in the UK that you find an increasing emphasis on mediation. On 1 January 2014, the new ICC Rules of Mediation came into force. In the UK, there was a formal launch on 3 March 2014. This can only be seen as further confirmation that the ICC expects that the demand for mediation and other forms of ADR will continue to grow.

The average fee of a mediator for a one-day mediation is £3,800.

Mediation

Mediation update

*As Martin Ewen notes, the principles laid down about when it is reasonable to decline an offer to mediate were established 10 years ago in the case of *Halsey v Milton Keynes General NHS Trust*.¹ This was the first case in which the Court of Appeal addressed the extent to which it was appropriate for the court to use its powers to encourage parties to settle their disputes other than by trial.*

The principles set down by the court in *Halsey* can be summarised as follows:

- (i) The court should not compel parties to mediate even if it were within its power to do so;
- (ii) Nonetheless the court may need to encourage the parties to embark upon alternative dispute resolution in appropriate cases, and that encouragement may be robust;
- (iii) The court's power to have regard to the parties' conduct when deciding whether to depart from the general rule that the unsuccessful party should pay the successful party's costs includes powers to deprive the successful party of some or all of its costs on the grounds of its unreasonable refusal to agree to alternative dispute resolution; and
- (iv) For that purpose the burden is on the unsuccessful party to show that the successful party's refusal is unreasonable. There is no presumption in favour of alternative dispute resolution.

Section 7 of the TCC Guide: makes it clear that: "the court will provide encouragement to the parties and use alternate dispute resolution".

Supplementing those principles, the Court of Appeal adopted a list of factors likely to be relevant to the question as to whether a party had unreasonably refused alternative dispute resolution (such as mediation):

- (i) the nature of the dispute;
- (ii) the merits of the case;
- (iii) the extent to which settlement methods have been attempted;
- (iv) whether costs of the ADR would be disproportionately high;
- (v) whether any delay in setting up and attending the ADR would have been prejudicial; and
- (vi) whether the ADR had a reasonable prospect of success.

The *Halsey* guidelines were extended in the case of *PGF II SA v OMFS Company 1 Ltd*.² Here, the Court of Appeal had to consider, for the first time, the position of a party who, when invited to take part in a mediation, simply declined to respond to the invitation in any way. The Court of Appeal held, on the facts, that the defendant's silence in the face of two requests to mediate was unreasonable conduct sufficient to warrant a costs sanction. The Court of Appeal described this as a "modest" extension of the *Halsey* principles.

Recent developments

There have been two recent cases concerning a successful party's unreasonable refusal to engage in mediation.

R (on the application of Paul Crawford) v The University of Newcastle-upon-Tyne³

Here, the claimant's claim was dismissed and matters turned to the subject of costs. The defendant argued that it was the successful party and was entitled to its costs whereas the claimant argued, in essence, that the defendant unreasonably failed to agree to mediation and so the court should make no order as to costs.

1 [2004] EWCA Civ 576

2 [2013] EWCA Civ 1288

3 [2014] EWHC 1197 (Admin)

Mediation

The court held that the defendant had not unreasonably failed to agree to mediation. The claimant proposed mediation at a time when the parties were engaged in dealing with the claimant's complaint before the Office of the Independent Adjudicator, which the defendant was fully participating in. Further, although the defendant had effectively remained silent after initially indicating it agreed in principle to mediation, the court was not persuaded that, in the circumstances and in light of the defendant's participation in the complaints procedure, the defendant's silence was unreasonable or sufficient to deprive the defendant of all its costs.

Phillip Garritt-Critchley v Andrew Ronnan and Solarpower PV Ltd⁴

In this case, the claimant applied for its costs to be paid on an indemnity basis rather than a standard basis. In essence, the court had to decide whether the claimant was entitled to his costs on an indemnity basis due to the defendants' unreasonable failure to mediate. When asked in correspondence why they were not willing to mediate, the defendants' solicitors said that:

"Both we and our clients are well aware of the penalties the court might seek to impose if we are unreasonably found to refuse mediation, but we are confident that in a matter in which our clients are extremely confident of their position and do not consider there is any real prospect that your client will succeed, the rejection is entirely reasonable."

The defendants' position was repeated in further correspondence.

The court was unimpressed with the stance taken by the defendants and granted an indemnity costs order on the basis of the unreasonable failure of the defendants to engage in mediation. The court made a number of key findings, including the following:

- (i) This was an action of a typical kind where the allegation was whether a binding agreement had been made or not. It was a very fact-intensive and evidence-intensive exercise where the court would have to judge the credibility of the witnesses and look at the importance of contemporaneous documents. Accordingly, the defendants could in no way be certain that their position would be accepted by the court and this was, therefore, a case which was suitable for mediation.
- (ii) This was not an all or nothing case on quantum where the parties would have to agree that if liability was established the obvious amount of damages was £X.
- (iii) This was a case where there was ample room for manoeuvre within the range of possible quantum scenarios, thereby making it ideal for mediation.
- (iv) The defendants rejected mediation on the basis of there being no middle ground on liability. This was a binary issue and it was often the case that there was no middle ground on liability. The Judge decided that *"to consider that mediation is not worth it because the sides are opposed on a binary issue, I'm afraid seems to me to be misconceived."*
- (v) The defendants' statement that they were confident that no agreement will ever be reached was rejected by the Judge, who stated: *"Given the nature of this dispute, it does not seem to me to be realistic for someone... to say that all the odds are so stacked in his favour that there is really no conceivable point in talking about settlement. Indeed if that had been his view then it is surprising that no application for summary judgment was ever made, which it was not."*
- (vi) The defendants' position that they had "extreme confidence" was not a reasonable position to take and nor was it a satisfactory reason to reject mediation.
- (vii) The defendants maintained that there was considerable dislike and mistrust between the parties and that this was highly relevant to the decision not to mediate. The Judge commented that *"it is precisely where there may be distrust or emotion between the parties, which it might be thought is pushing them down the road to an expensive trial, where the skills of a mediator come in most useful."*

"Silence in the face of an invitation to participate in ADR is... unreasonable"⁵

⁴ [2014] EWHC 1174 (Ch)

⁵ *PGF II SA v OMFS Co. 1 Ltd* [2013] EUCA Civ 1288

Mediation

- (viii) This was not a case where there had been other settlement attempts made so that the party resisting mediation could say, "Well we've had very lengthy and detailed round table discussions, they have not gone anywhere and it's not sensible to spend any more money on the case."
- (ix) Parties don't know that they are "too far apart" until they sit down and explore settlement.

Technology and Construction Court Guide, third revision

The third revision came into effect on 3 March 2014. The TCC Guide reinforces the importance of *Halsey* and places an obligation on legal representatives to ensure that their clients are fully aware of the benefits of ADR. The TCC Guide also makes express reference to arguments on costs associated with a party's unreasonable refusal to mediate. Parties and those advising them have been warned. Section 7 of the TCC Guide concerns ADR. Key extracts include:

- "7.1.1 The court will provide encouragement to the parties to use alternative dispute resolution and will, whenever appropriate, facilitate the use of such a procedure. ... In most cases, ADR takes the form of inter-party negotiations or a mediation conducted by a neutral mediator. ... The parties are advised to refer to the ADR Handbook.*
- 7.1.3 Legal representatives in all TCC cases should ensure that their clients are fully aware of the benefits of ADR and that the use of ADR has been carefully considered prior to the first CMC.*
- 7.2.1 ADR may be appropriate before the proceedings have begun or at any subsequent stage. However the later ADR takes place, the more the costs which will have been incurred, often unnecessarily. The timing of ADR needs careful consideration.*
- 7.4.1 Generally. At the end of the trial, there may be costs arguments on the basis that one or more parties unreasonably refused to take part in ADR. The court will determine such issues having regard to all the circumstances of the particular case. In *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 WLR, the Court of Appeal identified six factors that may be relevant to any such consideration:*
- (a) the nature of the dispute;*
 - (b) the merits of the case;*
 - (c) the extent to which settlement methods have been attempted;*
 - (d) whether costs of the ADR would be disproportionately high;*
 - (e) whether any delay in setting up and attending the ADR would have been prejudicial; and*
 - (f) whether the ADR had a reasonable prospect of success.*
- ... See also *PGF II SA v OMFS Company 1 Ltd* [2013] EWCA Civ 1288, [2014] BLR 1, particularly in relation to silence in the face of a request to mediate."*

"Given the nature of this dispute, it does not seem to me to be realistic for someone... to say that all the odds are so stacked in his favour that there is really no conceivable point in talking about settlement"

Conclusion

The principles set down by the Court of Appeal in *Halsey* are still applicable today. A party to a dispute who is invited to engage in mediation (or any other form of ADR) should give very careful consideration as to whether to accept or reject such an offer. Whilst a party is not compelled to agree to mediation, if it is decided that a refusal to do so is unreasonable, costs sanctions will be applied by the courts. The burden is squarely on the party seeking to justify its refusal to mediate to demonstrate that its stance was reasonable in all the circumstances. The developing caselaw⁶ and the updated TCC Guide make maintaining such a position ever more difficult.

⁶ Something Mr Justice Ramsey made clear in a judgment released as the *Review* went to print, *Northrop Grumman Mission systems Europe Ltd v BAE Systems (Al Diriyah C41) Ltd*, [2014] EWHC [2955] (TCC)

Civil procedure – relief from sanctions

Relief from sanctions in adjudication enforcement proceedings

It is difficult to exaggerate the importance of the Mitchell case on the litigation process over the past 12-18 months. In short, the Court of Appeal held that a party who sent their costs budget late was not entitled to “relief from sanctions”, i.e. to be allowed to serve the budget albeit late.¹ A number of cases followed that decision. In April 2014 we found ourselves having to apply Mitchell in an adjudication enforcement case. James Mullen and Rachel O’Hagan of 39 Essex Street explain what happened.

The importance of adjudication enforcement proceedings being conducted efficiently and at proportionate cost is even more acute because the purpose of adjudication is to provide a “speedy mechanism for settling disputes in construction contracts on a provisional interim basis.”

On 12 March 2014, CBL commenced adjudication enforcement proceedings against Nordic. By an Order dated 13 March 2014, the Court gave standard directions which required Nordic to (amongst other things) file and serve its “further evidence” by 4 p.m. on 31 March 2014, and CBL to file and serve its evidence in response by 4 p.m. on 4 April 2014. CBL’s application for summary judgment was listed for Monday 14 April 2014, with the hearing bundles being due on 7 April 2014 and the skeleton arguments being due for exchange on 8 April 2014.

On 31 March 2014, Nordic submitted a Defence verified by a statement of truth from the Construction Manager of Nordic. However, Nordic failed to submit a witness statement to support its Defence, or any supporting documentation. On 2 April 2014, CBL’s solicitors wrote to Nordic, highlighting that Nordic had failed to serve any evidence, as required by the Court’s Order. Accordingly, CBL reserved its position as to whether or not Nordic had permission to file and serve a Defence and highlighted that the time for Nordic to file evidence had now passed and that CBL did not intend to include any of the additional documents referred to in the Defence within the hearing bundle.

Nordic’s application for relief from sanctions

On the evening of 3 April 2014 (the day before CBL’s responsive evidence was due), Nordic applied for: (i) relief from sanctions “following a misinterpretation of the Order of Mr Justice Ramsey dated 13 March 2014”; (ii) leave for Nordic to rely on the Witness Statement of its Construction Manager; and (iii) permission to vary the Court’s directions. In support of its Application, Nordic’s solicitor stated that he “did not file a witness statement on behalf of the Defendant [Nordic] through a misinterpretation of the Order”.

In the absence of a direction from the Court to the contrary, on 4 April 2014 CBL filed and served its responsive evidence in accordance with the Court’s Order dated 13 March 2014. CBL’s evidence and reply was prepared and filed on the basis that Nordic had not been given the permission requested in its Application for relief from sanctions. On the same day, CBL’s solicitors wrote to the Court opposing Nordic’s Application. Applying the guidance in *Mitchell v News Group Newspaper Limited* [2014] 1 WLR 795 (CA), CBL argued that Nordic’s failure was not trivial and that there was no good reason or explanation for the default. As to whether or not the default was trivial, CBL argued:

- The timetable for summary judgment proceedings is necessarily short and it is particularly important that the parties adhere to the Court’s timetable so as not to prejudice the hearing date.
- The importance of adjudication enforcement proceedings being conducted efficiently and at proportionate cost is even more acute because the purpose of adjudication is to provide a “speedy mechanism for settling disputes in construction contracts on a provisional interim basis”²:
- If Nordic’s Application were allowed, there was a real risk that the hearing date would be prejudiced.

Nordic’s paper Application went before Mr Justice Ramsey who ordered: (i) Nordic was permitted to rely on its Defence as its evidence; and (ii) insofar as Nordic sought to pursue

¹ The financial effect was that Mr Mitchell was treated as having filed a budget consisting of court fees only, not the substantial legal costs of a libel case.

² *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93.

Civil procedure – relief from sanctions

its Application, it would be heard at the substantive hearing on 14 April 2014. At the hearing, Nordic effectively withdrew its Application but maintained that a few documents that it wished to rely upon should be placed before the Judge.

The judgment

Mr Justice Ramsey said there was no serious challenge to Nordic's request for a limited number of documents to be put before the Court and so the Application for relief from sanctions had come to a natural end. However, he went on to say that had Nordic pursued its Application, it would have been refused. The reasoning was as follows:

- Nordic's failure to file evidence in response could not be seen as trivial.
 - This was an application to enforce an adjudication decision with a short timetable. This type of proceedings is subject to curtailed directions leading to a hearing within about a month of the proceedings being commenced. This means that there has to be compliance with the Court's timetable. In this case, CBL's responsive evidence had to be filed by 4 April 2014. CBL could not comply with this timetable if Nordic's Application was not made until the day before. CBL had to respond to Nordic's Application on 4 April 2014 and the hearing bundle was due to be filed on 8 April 2014, with skeleton arguments being exchanged on 10 April 2014. In the context of those directions, Nordic's failure to serve evidence in response was not "trivial". Further, the witness statement in respect of which relief from sanctions was sought ran to some 100 pages and CBL would have been required to respond to that statement.
- There was no good reason for Nordic's default.
 - The Judge found that Nordic's Defence was properly before the Court as evidence. However, he did not accept that there was anything reasonably open to misinterpretation of the standard directions given by the Court.

The Judge said that had the Application been pursued by Nordic there would have been "no question of granting relief". Everything pointed towards keeping costs proportionate and complying with orders of the Court. Therefore, had the matter come before the Judge seeking relief, it would have been refused. After giving judgment on the substantive matters and giving judgment in favour of CBL, the Judge had to consider the question of costs.

The Judge awarded CBL its costs of dealing with Nordic's Application for relief from sanctions on an indemnity basis. In reaching his decision, he took into account that the Application had been made based on a "misinterpretation" of an order, yet there was no possibility of a reasonable misinterpretation of the Court's Order which gave standard directions. It had been time-consuming and expensive for CBL to deal with Nordic's Application and at a time when CBL was preparing for the substantive hearing.

Lessons to be learnt for adjudication enforcement

Although Nordic's Application for relief from sanctions was effectively withdrawn at the hearing, Mr Justice Ramsey was quite clear that had it been pursued, the Application would have been rejected. The Judge emphasised that compliance with the procedural timetable was even more important in adjudication enforcement proceedings where the procedural timetable was necessarily curtailed.

The judgment, together with the award of costs on an indemnity basis, sends out a clear message that the Technology and Construction Court intends to take a robust approach to parties who fail to comply with court orders/directions and that in considering whether or not relief should be granted, the TCC will apply the current jurisprudence.

For parties defending applications for relief from sanctions, there is also another important lesson to learn from the facts of this case. In the absence of a court order varying directions of a previous court order, stick to the current directions that have been issued by the court. In the event that a party fails to comply with the court's directions in order to try and accommodate a procedural mishap of the other side, that party may also need to apply for relief from sanctions.

Compliance with the procedural timetable was even more important in adjudication enforcement proceedings where the procedural timetable was necessarily curtailed.

Civil procedure – relief from sanctions

Denton: the new Mitchell

It is fair to say that the Mitchell decision was a controversial one. Such was the concern about the effects that in July 2014, three conjoined appeals² were heard in the Court of Appeal. As Lisa Kingston explains, in an extract from our monthly Insight newsletter, the appellate court adopted a new test and so Denton, the lead (or first) case of the three has become the new Mitchell.

The basic legal framework is this. Where a party to litigation fails to comply with a rule, practice direction or court order, sanctions usually follow. The Civil Procedure Rules (“CPR”) allow the party in default to apply for relief from those sanctions. The Court of Appeal had to analyse CPR Rule 3.9(1), which provides:

“(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –

- (a) for litigation to be conducted efficiently and at proportionate cost; and
- (b) to enforce compliance with rules, practice directions and orders.”

The three cases

In *Utilise*, the claimant filed a costs budget late in breach of the terms of an unless order, and was also 13 days late complying with an order requiring it to notify the court of the outcome of negotiations. The first instance court refused the claimant’s application for relief from sanctions because the claimant had given no reason for its non-compliance. The claimant appealed.

In *Decadent*, the claimant sent a cheque to the court by DX on the date on which the unless order expired. The cheque then went missing. The non-payment became evident to the parties three weeks later at the Pre-Trial Review and the claimant finally made payment two days later. The first instance Judge refused relief from sanctions on the basis that two aggregate breaches had become one significant breach and the claim was struck out. The claimant appealed.

In *Denton*, the claimant served six new witness statements two months before trial that it alleged were necessary due to a change in circumstances four months earlier. The first instance Judge granted relief from sanctions and adjourned what would otherwise have been a meaningless trial without all the necessary witness evidence. The defendants appealed.

The Court of Appeal’s decision

The Court of Appeal noted that the Judges in *Decadent* and *Utilise* adopted an unreasonable approach to relief from sanctions as in each case the defaults were at the lower end of seriousness. The Judge in *Denton*, however, was unduly relaxed as the late filing of witness evidence so close to trial was wrong and eventually caused the trial to be vacated.

The Court of Appeal chose to amplify the guidance it had set down eight months earlier in *Mitchell*, and set out a new three-stage test for the granting of relief from sanctions which, for the first time, requires a consideration of all the circumstances of the case. The Court of Appeal emphasised that the new test should replace the decision in *Mitchell* (and the *Mitchell*-related satellite litigation), and should be used in isolation going forward.

“Mitchell has been misunderstood and is being misapplied... It is clear it needs to be clarified and amplified”.¹

¹ *Lord Dyson MR and LJ Vos in Denton*
² *Denton & Others v TH White & Anr, Decadent Vapours Ltd v Bevan & Others, Utilise TDS Ltd v Davis & Others* [2014] EWCA Civ 906

Civil procedure – relief from sanctions

The new three-stage test

The Court of Appeal decided that in considering applications for relief from sanctions, judges should:

Stage 1

Assess the significance and seriousness of the default which led to the application for relief.

NB1. If the default is not significant and serious, then relief will usually be granted and the court may not have to concern itself with Stages 2 and 3 below.

NB2. In assessing whether a default is significant and serious, consideration should be had to whether the breach is material, i.e. whether it might impact on future hearing dates, or otherwise disrupt the conduct of the litigation.

Stage 2

If the breach is significant and serious, consider why the default occurred and whether there was a good reason for it.

NB. The Court of Appeal was not prepared to provide factual examples in order to demonstrate Stage 2. Accordingly, each case has to be determined on its own particular facts.

Stage 3

(Irrespective of any conclusion that might have been reached at Stages 1 and 2) evaluate all the circumstances to enable the application to be dealt with justly: namely, the need for (i) litigation to be conducted efficiently and at proportionate cost and (ii) to enforce compliance with court rules, practice directions and orders.

NB. Persistent past breaches would be a relevant factor at this stage.

The new test is something of a departure from the previous test for relief from sanctions set out in *Mitchell*, which confirmed that the relevant sanction for any breach of a court rule would be applied unless the breach was trivial, or there was a “good reason” for it (such as if a party or its solicitor had suddenly been taken seriously ill).

Going forward, if there is a serious or significant breach, and there is no good reason for the breach, then any application for relief from sanctions will not automatically fail as had been the case in the past. Further, it is no longer correct to focus on the triviality of the breach (albeit the Court of Appeal pointed out that the triviality of the breach may be a useful concept when deciding whether a breach was significant or serious). Post the *Denton* appeals, the significance and seriousness of the default, the reason why the default occurred, and the surrounding circumstances all have to be considered.

It is important to note that there was a divergence of opinion amongst the Judges as to the weight that should be attached to Stage 3, which requires a consideration of the surrounding circumstances. Lord Dyson MR and Lord Justice Vos took the view that Stage 3 should be given more weight. Lord Justice Jackson (the architect of the Jackson reforms), however, thought the surrounding circumstances were amongst the matters to be considered and no greater weight should be attached to Stage 3 than to the other stages.

Whilst this difference in opinion did not affect the outcome of the *Denton* appeals, the correct balance between the three stages is likely to be revisited by the Court of Appeal. If Lord Dyson MR’s and Lord Justice Vos’s approach is followed when the third stage of the test is considered, it is possible that the test may become softer still as the ability to consider all the circumstances may provide for discretion where none had existed previously.

“It should be very much the exceptional case where a contested application for relief from sanctions is necessary”³

³ Lord Dyson MR and LJ Vos in *Denton*

Civil procedure – relief from sanctions

Practical tips

For defaulting parties:

- Continue to ensure wherever possible that you comply with court rules and orders, as the Court of Appeal has made it very clear that there is to be no return to the previous culture of non-compliance. If you have a history of past breaches, then you may fall foul of Stage 3 of the test and relief from sanctions may not be granted.
- If it appears that you are in danger of missing a court deadline, or will be unable to comply with a court rule or order, then you should endeavour to agree an extension of time under the new buffer direction at CPR 3.8. The new buffer direction allows parties to agree a 28-day extension of time in writing provided the extension of time does not put any hearing dates at risk.
- If your opponent is not prepared to provide an extension of time under the buffer direction, make a prompt application to the court for relief from sanctions prior to the deadline expiring.

For non-defaulting parties:

- If you are the non-defaulting party, try and avoid getting involved in a contested application for relief from sanctions, as relief may be easier to come by now than it has been in the past.
- The new three-stage test potentially provides greater scope for relief than the more restrictive *Mitchell* test as it requires a consideration of the surrounding circumstances.
- Be reasonable if your opponent asks you for an extension of time. If the breach is not significant and serious, and will not impact upon future hearing dates, then agree a 28-day extension of time in line with the buffer direction.
- If you act unreasonably and do not agree to an extension and later find yourself contesting an application for relief from sanctions, going forward, the court will be more willing to penalise you if it considers you are being opportunistic, and you may find yourself on the receiving end of a heavy costs penalty. In appropriate cases, this may extend beyond the remit of the costs of the application for relief from sanctions, and costs may be awarded against you on an indemnity basis at the conclusion of the trial.⁴

It is as unacceptable for a party to try and take advantage of..., inadvertent error as it is for the rules of CPR to be breached in the first place.

Conclusion

The decision in the *Denton* appeals represents a clear softening of the previous approach to relief from sanctions that was taken by the Court of Appeal in *Mitchell*, which had led to judges in many of the lower courts taking a very draconian approach to applications for relief from sanctions.

In the *Denton* appeals, the Court of Appeal expressed its hope that the new three-stage test would remove the need for judges to refer to *Mitchell* (and the extensive satellite authorities that followed it) in the future, but, at the same time, the Court of Appeal emphasised there would be no return to the pre-Jackson approach (and, indeed, pre-Woolf reforms approach) of determining claims purely on their legal merits.

Whilst procedural discipline and compliance with court rules and orders therefore still rule supreme, parties who try and tie their opponent to too strict an approach may face themselves heavy costs sanctions. A good balance between the two is key.

⁴ This may have the effect of releasing the winning party from the confines of its costs budget.

Understanding your design duty

Understanding your design duty – “reasonable skill and care” vs. “fitness for purpose” – mutually incompatible or comfortably coexistent?

The clearly defined roles and responsibilities of the parties involved in a traditional construction project, where design is carried out by professional consultants and construction by contractors, have become increasingly blurred. Under modern procurement routes contractors assume a dual role as they are responsible for all or part of the design. They are increasingly expected to give undertakings as to design or suitability and to complete the work in accordance with certain standards or specifications. All of this can have serious implications in terms of liability and professional indemnity insurance cover and so it is a key issue for contractors to identify and understand the level of their responsibility at the outset. This involves considering both the terms of the contract and the design obligations which are implied by law. In this article, Sarah Buckingham examines these difficult issues and reviews recent case law, including the case of MT Hojgaard a/s v E.ON Climate Renewables UK Robin Rigg East Ltd¹ (the “Robin Rigg case”).

A fitness for purpose obligation imposes a higher duty, as it is an absolute obligation to achieve a specified result, a breach of which does not require proof of negligence.

“Reasonable skill and care”

The law provides that in the absence of any written terms and conditions to the contrary, a professional designer will have a duty to act with reasonable skill and care. This duty comes from the Supply of Goods and Services Act 1982² which requires the supplier of a service to provide the service with reasonable skill and care, and the common law test for negligence which provides that a professional person is not negligent if he carries out his work to the same standard that another reasonably competent member of his profession would have met. What has become known as the “*Bolam Test*”³ established that where special skill and competence are involved, the test for negligence is not that of the man on the Clapham omnibus, as he does not possess this special skill. Neither is it necessary for the professional consultant to possess the highest skill. “*It is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.*”⁴ Therefore, if a consultant can show that he acted in accordance with the usual practice and professional standards current at the time the design was carried out he will escape liability.

These statutory and common law duties are usually combined into a single clause requiring the consultant to use the level of reasonable skill and care to be expected of an experienced member of his profession. For example,

“In performing the Services the Consultant shall exercise all the reasonable skill, care and diligence to be expected of an appropriately qualified and competent consultant experienced in carrying out equivalent services for developments of a similar size, scope, complexity, value and purpose to the Development.”

Due to the reliance on skill and judgement, a designer’s duty does not necessarily require him to achieve a particular result as long as he has exercised the requisite level of care. By way of analogy, doctors cannot guarantee to always cure their patients.⁵

“Fitness for purpose”

By contrast, a fitness for purpose obligation imposes a higher duty, as it is an absolute obligation to achieve a specified result, a breach of which does not require proof of negligence. This duty stems from the Sale of Goods Act 1979⁶ which imposes implied terms on any seller acting in the course of business that the goods supplied will be of satisfactory quality and, where the purchaser makes known any particular purpose, are reasonably fit for their intended purpose.

In a construction context, this means that a contractor is effectively guaranteeing that the components and the finished building will be fit for their intended purpose.

1 [2014] EWHC 1088 (TCC).

2 Section 13, Supply of Goods and Services Act 1982.

3 *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118

4 McNair J. in his judgment in the case of *Bolam v Friern Hospital Management Committee*

5 Or lawyers to win every case.

6 As amended by The Sale and Supply of Goods Act 1994.

Understanding your design duty

A consultant and a contractor who carry out effectively the same design function can be subject to different levels of responsibility in relation to that design simply because the contractor also constructs the building.

Why does it matter?

A reason why the distinction between these two levels of responsibility is so contentious is because most professional indemnity ("PI") policies will cover the holder only in the event of a claim arising out of the holder's professional negligence (i.e. a failure to exercise reasonable skill and care). This leaves the designer uninsured against a contractual claim for breach of a fitness for purpose obligation. Where a defect arises and no allegations of negligence are made (when the employer doesn't need to prove negligence, why would he allege it?), the policy is unlikely to respond to the claim and insurers may refuse to pay costs associated with the defence of the claim. Further, not only do PI policies generally expressly exclude a fitness for purpose risk (since it is difficult to quantify this risk in respect of both probability of occurrence and magnitude of loss), some may even be completely invalidated if a consultant has agreed to any fitness for purpose obligations within an appointment. Whilst the consultant may therefore suffer uninsured losses, employers need to be careful too as this may seriously limit their potential for financial recovery.

Where the lines become blurred and hackles rise

The dual role of a design and build contractor has presented quite a challenge in determining the level of his responsibility and it could be said that he is under conflicting obligations in respect of the two distinct functions of design and construction. Case law has developed over the years supporting the view that, in the absence of an express contractual rebuttal, a design and build contractor must ensure that the works are completed so that they are "fit for their intended purpose". This was confirmed in *IBA v EMI and BICC*⁷ where the Court of Appeal Judges stated,

*"We see no good reason... for not importing an obligation as to reasonable fitness for purpose into these contracts or for importing a different obligation in relation to design from the obligation which plainly exists in relation to materials."*⁸

It may seem unfair that a consultant and a contractor who carry out effectively the same design function are subject to different levels of responsibility in relation to that design simply because the contractor also constructs the building. However, the main rationale for this thinking is that design and build contractors are more akin to sellers of goods (producing a finished product) rather than professional advisers (just providing a service). It means, though, that an employer only needs to prove that the design was not fit for the intended purpose upon which he was relying, irrespective of extraneous factors or whether the contractor exercised reasonable skill and care.

Although some doubt was thrown on the above default position by a judgment relating to the failure of a specialist fire suppression system in a popcorn factory⁹ – which appeared to draw a distinction between "standard kit" (classed as goods) and "bespoke product" (classed as a service) – it is not easy to reconcile this decision with the rationale of the previous cases. As this is a developing area of law, it remains sensible for contractors to continue to assume that they will be subject to an implied fitness for purpose obligation when carrying out design work.

Avoiding fitness for purpose

In light of the potential absence of insurance coverage, it is reassuring that many design and build contracts (for example, the JCT and ICE contracts) contain express provisions which absolve the contractor from a fitness for purpose obligation. They limit the contractor's liability for design to the standard required of an architect or other appropriate professional designer, thereby imposing a reasonable skill and care obligation with the intention of overriding any implied or common law fitness for purpose obligation. The position under the NEC3 contract is different. Whilst the contract appears to be silent on the matter, the requirement that the contractor provide the works in accordance with the Works Information, will probably amount to a fitness for purpose obligation. That said, you can expressly impose a reasonable skill and care duty by selecting secondary option clause X15. However, if the contractor fails to do this, a fitness for purpose obligation may be implied. Despite the diluting effects of the above, contracts

⁷ [1980] 14 BLR 1.

⁸ *IBA v EMI and BICC* [1980] 14 BLR 1.

⁹ *Trebor Bassett Holdings & Cadbury UK Partnership v ADT Fire and Security plc* [2012] EWCA Civ 1158.

Understanding your design duty

Unfortunately, the industry-wide, and universally accepted, independent, international standard applicable to the design of such foundations turned out to be incorrect.

will often include wording that seeks to either subtly enhance the most basic level of responsibility (of reasonable skill and care) or even to achieve a fitness for purpose obligation “by the back door”.

Raising the standard by increments

The standard JCT clause, for example, is often amended by employers to raise the standard of skill and care to that of a competent consultant “with experience of projects of a similar size and scope”. Some amend it further to make the standard of skill and care that of a “competent design and build contractor”. On the face of it, the latter wording appears circular, but it could well re-introduce a fitness for purpose obligation with the obvious consequences for PI cover.

Full-blown fitness for purpose “in disguise”

In light of the above, the very words “fitness for purpose” will understandably trigger alarm bells in the ears of many contractors. However, without using this highly identifiable and word-searchable phrase, absolute obligations may still be imposed. A common way to achieve this is to slip in a requirement for the contractor to warrant that the completed works shall comply with the employer’s requirements and/or any performance specification. This type of wording commonly follows immediately after a reasonable skill and care obligation, which may lull the unsuspecting contractor into a false sense of security.

For example, we recently came across an amended clause to a standard JCT Without Quantities 2011 which required the contractor to warrant that the design of the CDP would be carried out using “the skill, care and diligence to be expected of a properly qualified and competent architect or engineer”. This was immediately followed by a clause warranting that the CDP, “when completed, shall be suitable for the purpose stated in the Contract Documents and will, when complete, comply with any performance specification or requirement included or referred to in the Contract Documents.” Regardless of a reasonable skill and care obligation, the effect of the mandatory wording is to add something different – an obligation of strict liability.¹⁰

This type of amended wording has obvious advantages from an employer’s point of view, as it has the same power and effect of a fitness for purpose clause but without having to shout about it.

Playing “trump”

In the recent Robin Rigg case, MTH was contracted to design, construct and install the foundations for sixty offshore wind turbines. Clause 8.1 of the contract provided that these functions “shall” be completed with: the due care and diligence expected of appropriately qualified designers, engineers and constructors; in accordance with Good Industry Practice; so that each item of plant and the Works as a whole “shall be fit for its purpose as determined in accordance with the Specification using Good Industry Practice”; and when completed comply with and “be wholly in accordance with this Agreement and any performance specifications or requirements of the Employer as set out in this Agreement.” The employer’s requirements referred to a minimum site-specific design life of 20 years and required that “The design of the foundations shall ensure a lifetime of 20 years in every aspect without planned replacement”.

Despite exercising reasonable skill and care and following best industry practice, the foundations were found to be defective. However, unfortunately, the industry-wide, and universally accepted, independent, international standard applicable to the design of such foundations turned out to be incorrect. E.ON alleged that MTH was in breach of “overriding fitness for purpose obligations” and MTH responded by saying that any fitness for purpose obligation was qualified by its duty to comply with the standard. The point of disagreement between the parties was whether the terms of the contract imposed a strict obligation to achieve a service life of 20 years or merely an obligation to design the foundations on the basis of a 20-year design life in accordance with the standard.

Understanding your design duty

In his judgment, Mr Justice Edwards-Stuart referred to two Canadian cases¹¹ as authority for the proposition that “*the existence of an express warranty of fitness for purpose by the contractor can trump the obligation to comply with the specification even though that specification may contain an error*”. He went on to assert that, “*It is not uncommon for construction and engineering contracts to contain obligations both to exercise reasonable skill and care... and to achieve a particular result*” and that “*the two obligations are not mutually incompatible*” and therefore can coexist side by side. He held that MTH did assume full design responsibility and warranted a service life of 20 years upon which E.ON was entitled to rely, notwithstanding that MTH was required to design in accordance with the standard. Since the foundations failed within two to three years, MTH was in breach of that strict obligation. MTH was given leave to appeal.

Other points to look out for

Even if an appointment expressly provides for a performance obligation of reasonable skill and care or is silent on this matter, a consultant should be aware of not entering into a collateral warranty with a fitness for purpose obligation as he will automatically be increasing his potential liabilities with similar repercussions for his PI cover. These issues also need to be considered in the now fairly common situation where the employer’s design team is novated to the contractor. Questions should be raised not only in relation to the extent of the contractor’s responsibility for that design but also as to the potential for there to be differing standards of design responsibility. If the contractor has a fitness for purpose obligation and, as is likely, the professional designers are merely required to exercise reasonable skill and care, this potentially creates a “mismatch” and means that the design liabilities do not flow consistently down the contractual chain.

Care also still needs to be taken even where a contractor thinks he has no design responsibility at all. For example, it is not uncommon for a contractor, assuming he is authorised to do so, to delegate particularly complex design work to a specialist or he may be instructed by the employer to enter into a subcontract with a nominated subcontractor who will do some design work on behalf of the employer. The contractor will be under a duty to use reasonable skill and care in selecting the third party and his duty will generally be held to have been satisfied providing he does this. However, where the third party’s work is defective, and a reasonably competent designer ought to have noticed the defect, the designer will be under a duty to warn the employer.

The infamous case of *Walter Lilly v Mackay*¹² highlighted the importance, for employers, not only of the presence, but also of the effectiveness, of any terms relating to design liability. Here, it was a requirement of the contract that the employer must notify the contractor of any work that was to be the subject of contractor design. Such notification was not given and a dispute arose concerning defective work. The Judge found for the contractor, emphasising the need for a clear CDP notification for it to be effective.

Conclusion

What can we learn from recent case law? It is of fundamental importance for both parties to consider the issues relating to risk and responsibility when negotiating any construction contract, but particularly where design and build are combined. Absolute obligations for fitness for purpose relating to design (regardless of whether that obligation includes such express wording) should still be approached with caution and diluted where possible, as a reasonable skill and care clause may not offer much protection against an absolute obligation to achieve a certain standard of work.

For contractors, the risk of performance to a higher standard must first be identified and, if necessary, counterbalanced by seeking to limit their overall liability under the contract or else by pricing it into the deal – but always with the awareness of the consequences for PI cover. Employers must balance their desire to ensure that the completed works fulfil their requirements against the danger of imposing uninsurable obligations.

“The existence of an express warranty of fitness for purpose by the contractor can trump the obligation to comply with the specification even though that specification may contain an error”.

¹¹ *The Steel Company of Canada Ltd v Willand Management Ltd* [1966] SCR 746 and *Greater Vancouver Water District v North American Pipe and Steel Ltd* [2012] BCCA 337.

¹² [2012] EWHC 1773 (TCC).

Practical completion

Practical completion: an update

Cases about what constitutes practical completion are perhaps surprisingly rare. The term is generally understood within the construction industry to mean the stage at which the works are reasonably ready for their intended use. Jatinder Garcha looks at a dispute on a PFI project when one of the parties sought to take a prescriptive view of the contractual definition of practical completion.

The traditional view of the courts can be summarised by the words of Judge John Newey in the case of *HW Neville (Sunblest) Ltd v William Press & Sun Ltd*¹ where the Judge said that:

"I think that the word 'practically' in Clause 15(1) gave the Architect a discretion to certify that William Press had fulfilled its obligation under Clause 21(1) where very minor de minimis works had not been carried out: but if there were any patent defects in what William Press had done the Architect could not have given a certificate of practical completion."

In the earlier House of Lords' judgment in *City of Westminster v Jarvis*, Viscount Dilhorne had said:

"The Contract does not define what is meant by 'practically completed'. One would normally say that a task was practically completed when it was almost but not entirely finished; but 'Practical Completion' suggests that that is not the intended meaning and that what is meant is the completion of all the Construction work that had to be done."

Recently Mr Justice Edwards Stuart had to consider the role of the independent tester in clarifying practical completion.

*Laing O'Rourke Construction v Healthcare Support*²

On 4 May 2005 the Newcastle upon Tyne Hospitals NHS Foundation Trust ("the Trust") entered into an agreement ("the Project Agreement") with Heath Support (Newcastle) Ltd ("HSN") for the design, construction and finance of hospital facilities in Newcastle. On the same date HSN engaged Laing O'Rourke Construction Ltd ("Laing") to design and build the facilities ("the Construction Contract").

Under a separate contract Faithful & Gould were appointed Independent Tester and required to carry out various inspection and certification functions under the Construction Contract and the Project Agreement. The hospital facilities were divided into nine phases to be completed sequentially. Clause 22.5.1 of the Project Agreement (which was stepped down into the Construction Contract as clause 22.12) provided that:

"Pursuant to the terms of the Independent Tester Contract, the parties shall procure that the Independent Tester shall, when he is satisfied, subject to clause 22A.3.4 that completion of a Phase has occurred in accordance with the Completion Criteria, issue a Phase Certificate of Practical Completion to that effect..."

The Completion Criteria for Phase 8, which comprised office facilities for hospital staff, included fifteen particular requirements including the *"Clinical offices blocks 1 and 2 being available and ready for Trust use"* and *"Link bridges... available and ready for use by the Trust"*.

As part of the completion process clause 22.5 of the Construction Contract required Laing to give the Independent Tester three months' notice of the date on which it considered the phase would be complete *"in accordance with the Trust's Construction Requirements, the Completion Criteria and this Contract"*.

During mid-2012 Laing contended that Phase 8 was complete but Faithful & Gould identified five grounds preventing the issue of the completion certificate as follows: toilet areas too small, daylight levels not meeting relevant British Standards, inadequate window restrictors, incorrect link bridge steelwork and potentially inadequate cooling systems.

Did the certifier have to be satisfied that all work had been carried out strictly in accordance with the contract before completion could be certified?

¹ [1981] 20BLR78

² [2014] EWHC 2595 (TCC)

Practical completion

Laing disagreed, contending that these issues were not expressly included within the Completion Criteria. The Trust responded that under clause 22.5 of the Construction Contract completion required compliance not only with the Completion Criteria but also with the Trust's Construction Requirements and all other terms of the Construction Contract.

The Trust therefore maintained that in assessing whether practical completion had been achieved, wider failures to meet the specifications should be taken into consideration, not just compliance with the tests expressly set out in the Completion Criteria.

Laing contended that:

- (i) the wording of the Project Agreement was absolutely clear so that when certifying completion the Independent Tester had to consider whether the Completion Criteria had been met and nothing else;
- (ii) that there was no provision in the Project Agreement that required the Independent Tester to be satisfied that all work had been carried out strictly in accordance with the contract before completion could be certified; and
- (iii) that in any event, expressions such as "available" and "ready for Trust use" should be construed as meaning that a breach of specification which did not have any materially detrimental effect on the amenity and functional use of the building should not prevent the issue of the completion certificate.

The certifier had to consider whether the alleged non-conformities had a materially adverse effect on the use of the building.

The issue

The issue at the heart of this case was whether any breach of contract relating to quality or conformity of works was grounds for preventing the issue of the completion certificate by the Independent Tester, or whether all that was required was compliance with the Completion Criteria set out in Part 2 of Schedule 12 to the Project Agreement.

The decision

As a matter of interpretation the Judge concluded that practical completion should be assessed by reference to the requirements under clause 22.5.1 of the Project Agreement, i.e. satisfaction of the Completion Criteria only. There was no justification for importing a requirement that any breach of the specification, however technical or minor, could prevent completion from being certified.

As regards Laing's third point, the Judge held that expressions such as "available and ready for use by the Trust" were not precise but must relate to the anticipated use of the Phase 8 offices. The Independent Tester was required to ignore the parties' disagreements and decide for himself/herself whether or not any alleged non-conformity was likely to have a materially adverse effect on the use of the building by the Trust in the manner contemplated by the agreements. If not, the Independent Tester could issue the completion certificate and leave the Trust to its remedy in damages for any such non-conformities.

Conclusion

The unsurprising conclusion of the Judge was that unless the wording of a particular contract points to a contrary conclusion, then the general rule is that practical completion can be achieved notwithstanding minor non-compliances.

The case does, however, stand as a useful reminder that the certifier must exercise professional judgement in assessing whether any non-compliances can be considered material to the intended use of the building.

Fee agreements

Mind your language¹: are you sure your bespoke contract is tight enough?

Perhaps the most important term of your appointment, from a commercial point of view, is the payment provision: how much and when you will be paid. As Stacy Sinclair notes, recent case law demonstrates that you must take care when drafting bespoke fee schedules.

Introduction

Pickard Finlason Partnership Ltd v Mr and Mrs Lock, the first judgment of 2014 in the Technology and Construction Court, principally concerns professional fees and highlights just how wrong things can go if your payment terms are not clear. The Locks purchased a Grade II listed property in Prestbury, Cheshire, known as Butley Hall, with a view to its development. At the time Butley Hall was subdivided into 7 self-contained apartments. The Locks had purchased Butley Hall with the aid of funding from their bankers, Allied Irish Bank, who had also agreed in principle to make funding available for the development.

In April 2008 the Locks retained PFP to provide what was effectively a full professional service in relation to the design and construction of the development. In return, they would receive 10% of the final cost of the project. The parties did not contract on the RIBA standard form of appointment – bespoke terms were created and tailored to the particular client and project. The fee was payable in four stages and included terms entitling them to 40% of the total fee upon planning permission being obtained and the development cost accurately established.

The Architect was aware that the client required funding for the project and agreed to keep their fees low until planning was achieved and further funds raised. Accordingly, the following terms were agreed which specifically concerned the planning period:

- *"In accordance with RIBA guidelines we are entitled to 40% of our overall fee for the work up to planning determination, however for your project we recognise the need to be flexible and we therefore offer to reduce our invoicing to 20%."*
- *"Our fee entitlement remains at 40% but this proposal keeps our fee payments low during the early stages of a project. Once planning is obtained a more accurate cost of the building and contract works can be established and the professional fee entitlement and overall fee is recalculated and the balance of our fees due becomes payable. At that stage we would agree a lump sum for the remainder of our fees."*
- *"We will recalculate and re-advise you of our fee entitlement when the development area and cost become firm."*

By the time planning permission was granted, the relationship between the parties had broken down. The Architect raised their invoice but the Locks did not pay. The Locks were unable to obtain funding for the revised scheme which ultimately had been granted permission. They considered that the Architect had failed to give them proper advice at the relevant times about the risks and costs of this revised scheme. In addition, the Locks claimed that the Architect had failed to obtain firm costs from contractors which would have enabled them to move the development forward

Ultimately the Architect commenced proceedings claiming the balance of their 40% fee.

PFP's case was that all that it was required to do was to revisit its cost plan as provided under stage two and to undertake any recalculation of that cost plan as might be necessary consequential upon the outcome of the planning application. Thus if, for example, the planning application was for a development of 20,000 ft², but the planning permission limited the development to 15,000 ft², it would be necessary to recalculate the cost plan accordingly. The same would be true, for example, if a condition of the planning

If there was any ambiguity as to what was meant by the phrase "when the cost becomes firm" in the bespoke appointment terms, then it should be resolved against the Architect on the basis that they had drafted the appointment.

¹ A version of this article was first published in *The RIBA Journal*, March 2014

Fee agreements

permission required the Locks to undertake some further expensive works not included in the cost plan. It did not, however, require PFP to undertake any further detailed design to refine costs, or to enter into discussions with contractors to obtain a price estimate, or indeed to take any other of the steps which were required under stage three.

The Locks' case was that it required PFP, post-planning permission, to establish an accurate cost of the building and contract works so that the cost became firm. The Judge considered that this could connote two possible scenarios. The first was that all that was required was that a more detailed cost plan should be provided, perhaps with the benefit of price estimates given by prospective contractors. The second was that PFP must provide such of the stage three services as are reasonably necessary to procure a tender from a contractor which the Locks are ready, willing and able to accept, such that there is thus a known contract sum.

The Judge held that, on proper construction of their bespoke terms, the Architect's claim failed – they were not entitled to their invoiced amount of approximately £182k. They had not established, post-planning permission, a firm and accurate cost for the building works – which was a condition precedent to rendering their invoice.

The express wording of their appointment made it clear that the cost only became "firm" once the "cost estimates are refined and the contract sum is known" and once "a more accurate cost of the building and contract works is established". There were two expressly stated purposes of establishing the cost of the works. The first was to establish the balance of the 40% fee entitlement. The second was to establish the "overall fee" so that "at that stage we would agree a lump sum for the remainder of our fees".

The Judge did not consider that it was possible for a lump sum to be agreed until, at the earliest, such time as there is an agreed contract sum. It would on any view not be possible to do so on the basis of the broad cost plan, adjusted as necessary post-planning permission, which is all that PFP say they were required to do. It was not enough to simply revisit the cost plan and undertake any recalculation required. As the Architect had not procured a tender from a contractor which the Locks were willing and able to accept, they were not entitled to present their invoice.

The Judge also held that the Architect failed to comply with their obligation to provide an indication of the magnitude of the cost of the revised scheme at any time during the feasibility stage.

One issue that parties often raise in disputes such as these, especially if the contract has been drafted by the other side, is the *contra proferentum* rule.

Contra proferentem

The full phrase of this Latin term is: "*verba chartarum fortius accipiuntur contra proferentem*" or "the words of an instrument shall be taken most strongly against the party employing them".

Legally, it is a rule of construction whereby doubt about the meaning of words will be resolved against the party who has put them forward.

In the case of *Pickard Finlason Partnership Ltd v Mr and Mrs Lock* (discussed above), the Judge noted that if there was any ambiguity as to what was meant by the phrase "when the cost becomes firm" in the bespoke appointment terms, then it should be resolved against the Architect on the basis that they had drafted the appointment and were then seeking to rely on a particular construction of it when enforcing their right to payment.

Conclusion

The findings in this judgment are of course very fact specific. Nevertheless, they are a timely reminder that when you draft bespoke, complex provisions, you do so at your own peril.

The Locks' construction is more "consistent with the plain and ordinary meaning of the words used in the service and fee proposal".

Injunctions, limitation of liability clauses

Injunctions, limitation of liability clauses and the meaning of “adequate remedy”

In the case of AB v CD¹, the Court of Appeal had to consider the proper approach to the granting of interim injunctions. More specifically, the courts had to consider the impact of limitation of liability clauses when a party seeks an interim injunction. When deciding on whether to grant an injunction, the well-known principles set out by Lord Diplock in the case of American Cyanamid Co v Ethicon Ltd² will be applied. These include whether there is a serious question to be tried and whether damages would be an adequate remedy.

Where a party to a contract stipulates that if he breaches his obligations his liability will be limited or the damages he must pay will be capped, that is a circumstance which in justice tends to favour the grant of an injunction to prohibit the breach in the first place.

The parties had entered into a licensing agreement concerning an eMarketplace – an internet-based electronic platform used internationally to buy and sell goods. Clause 11.4 of this agreement limited the damages either party could recover and excluded certain heads of loss altogether, including loss of profit. On 6 June 2013 CD gave notice that it would terminate the agreement at midnight on 31 December 2013. AB did not accept this and expressly reserved its right to seek an injunction to stop this. On 20 December 2013, AB commenced an arbitration under the LCIA Rules and applied to the court under s.44 of the Arbitration Act 1996 for an interim injunction to restrain CD from terminating the agreement, pending the outcome of the arbitration.

The view at first instance

Mr Justice Stuart-Smith³ held that there was a serious question to be tried and then went on to consider the meaning of “adequate remedy”: does it mean full compensation for what had been lost or something that might be less than this, yet regarded as adequate in the eyes of the law? Lord Diplock had said that:

“the governing principle is that the court should first consider whether... he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant’s continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable would be [an] adequate remedy and the defendant would be in a financial position to pay them, no interim injunction should normally be granted, however strong the plaintiff’s claim appeared to be at that stage.”

AB submitted that if the termination went ahead, its business would cease to exist as it would lose its only source of income and therefore it would not be able to fund the costs of the arbitration. The fact that the parties had entered into an agreement which limited the recovery of damages should not prevent the court from looking objectively at whether those recoverable damages amount to full compensation. AB further asserted that it would not be able to recover “adequate damages” because its main head of claim would be for loss of profits, which might be excluded by clause 11.4. Therefore AB urged the court to follow the Court of Appeal’s approach in *Bath and North East Somerset DC v Mowlem plc*⁴ and grant the injunction. In *Bath*, the parties had an agreed LADs clause. The Court of Appeal upheld the injunction, recognising that it may be difficult to assess the totality of any likely loss before the event and that such an assessment (the agreed LADs rate):

“may prove in the event not to give rise to adequate compensation, so that to leave a party to a claim in damages may mean that it will suffer loss which the grant of an interlocutory injunction would completely avoid.”

However, Mr Justice Stuart-Smith noted that there was a tension between the decision in *American Cyanamid*, as applied by the Court of Appeal in *Bath*, and the approach suggested in *Vertex Data Science Ltd v Powergen Retail Ltd* (2006).⁵ In *Vertex*, there was also a limitation clause that excluded liability for loss of profit and imposed other limitations on recoverable damages. Powergen served notice on Vertex terminating their contract for

1 [2014] EWCA Civ 229

2 [1975] AC 396

3 [2014] EWHC 1 (QB)

4 [2004] EWCA Civ 115

5 [2006] EWHC 1340 (Comm)

Injunctions, limitation of liability clauses

the outsourcing of customer management services. Vertex applied for an injunction on the basis that it would suffer unquantifiable loss for which an award of damages would be an inadequate remedy. Whilst injunctive relief was not granted, Mr Justice Tomlinson described the *Bath* case as being:

“an extraordinary case on the facts where the contractor, Mowlem, sought indefinitely to delay completion of the high profile Millennium Bath Spa project, a project which was intended and expected to confer significant benefits upon the local economy.”

Here, AB submitted that the court should follow the *Bath* case. The fact that the parties had entered into agreement about the recoverable measure of damages should not prevent the court from looking objectively at whether the damages recoverable by AB would amount to full compensation. AB was submitting that liquidated and ascertained damages clauses and limitation clauses are conceptually the same, being prior to contractual agreements determining the measure of recoverable damages, and the court should have been prepared to look behind that prior agreement to the substance of whether or not damages were an adequate remedy.

Mr Justice Stuart-Smith held that the distinction between the authorities boiled down to what the intention of the parties was when they entered into the contract. In *Bath*, the agreement and intention was that the Council's losses should be fully compensated (via the LADs clause), while in *Vertex* the agreement and intention was that the relevant heads of damage should not be compensable. Here, the inability to claim loss of profits was something that was part of the agreement between the parties. This therefore demonstrated the importance of considering the potential impact of any limitation of legality clause when negotiating a contract, especially when it comes to any limitations on damages which are linked to wrongful termination. As Mr Justice Stuart-Smith put it, clause 11.4 was a *“part of the price that the Claimant agreed to pay when executing the Licensing Agreement”*.

He therefore refused to grant the interim injunction, finding that AB was not able to demonstrate that damages were an inadequate remedy. The commercial expectations of the parties were set by the package of rights and obligations that constituted the agreement (namely clause 11.4). Damages were therefore an adequate remedy.

However, the Judge admitted to “a degree of unease at the result” which stemmed from the authorities he considered in his judgment. He had a “nagging doubt” that the approach that he had adopted “may be too inflexible in a case such as the present”. He therefore awarded permission to appeal given the potential wider implications.

The appeal

On appeal, Underhill LJ noted that where the parties to a commercial contract have agreed that in the event of a breach, damages for certain heads of loss will be irrecoverable, it is right in considering whether an injunction should be granted, to ignore the fact that the innocent party may suffer loss falling under those heads. He then broke down clause 11.4 into two, noting first that liability was excluded for certain types of loss, including “lost profits”, and second that there was a cap on such damages as might nevertheless be recoverable. There was thus a serious risk that AB's claim for damages would be excluded or limited. Underhill LJ then went on to consider the *Bath* case, noting that Mance LJ said:

“The Council accepts – indeed it asserts – that it would be bound in any claim for damages by its contractual agreement regarding liquidated and ascertained damages. The Council is not seeking to avoid that agreement, but to rely on it. It is the reason why the Council seeks an injunction, and why the Council submits that interlocutory injunctive relief is appropriate. Mowlem is not entitled to breach its contract. The agreement on liquidated and ascertained damages is not an agreed price to permit Mowlem to do so, and it does not preclude the court granting any other relief that may be appropriate. In my view, the Council's case is right in principle.”

The primary commercial expectation must be that the parties will perform their obligations. The expectations created (indeed given contractual force) by an exclusion or limitation clause are expectations about what damages will be recoverable in the event of breach, something rather different.

Injunctions, limitation of liability clauses

Therefore Mance LJ concluded that it was open to the Council, despite the liquidated and ascertained damages clause, to rely on the probable higher level of the actual loss that it would suffer without an injunction, in order to show that it would not be adequately compensated if it were left to a claim in damages.

On behalf of AB, it was submitted that the *Bath* case constituted binding authority that an applicant for an injunction was entitled to argue that damages would not be an adequate remedy for a threatened breach of contract because the recoverable damages were limited by a clause excluding or limiting liability for the kind of loss which was likely to be caused by the breach.

AB also submitted that this was the correct position in principle. The primary obligation of a party to a contract was to perform his contractual obligations. The obligation to pay damages in the event of breach is a secondary obligation, and an agreement to restrict the damages recoverable in that event (whether by excluding certain types of loss or imposing a cap) did not constitute an agreement that a party could walk away from his primary obligations even in circumstances where an injunction would otherwise be workable.

On behalf of CD, the focus was on the rule that the court would not normally grant an injunction where damages would be an adequate remedy. The damages with which the rule was concerned were the damages “recognised by the contract”. For a court to hold that damages were not an adequate remedy for a breach because the parties had agreed – in a clause that affected both parties equally – to restrict the damages recoverable would fail to give effect to their commercial expectations.

Underhill LJ noted that the *Bath* case was an unusual one where the court had been concerned by the broader damage to the public interest if the project had been delayed. He agreed that the *Bath* case did constitute binding authority on the point and was right in principle. Mance LJ’s comments above, draw a distinction between a claim to recover damages and a claim for an injunction designed to avoid any cause for a claim to such damages. Agreement as to the quantification of loss is conclusive to the first point but not the second. Thus the purpose of clause 11.4 here was to deal with the damages a party can recover if the other is liable for breach of contract.

The primary obligation of a party is to perform the contract. The requirement to pay damages in the event of a breach is a secondary obligation, and an agreement to restrict the recoverability of damages in the event of breach cannot be treated as an agreement to excuse performance of that primary obligation. Therefore Underhill LJ concluded that there was no question of the commercial expectations of the parties being undermined. The primary commercial expectation must be that the parties will perform their obligations. The expectations created (indeed given contractual force) by an exclusion or limitation clause are expectations about what damages will be recoverable in the event of breach, something rather different.

Accordingly, the Court of Appeal allowed the appeal.

Conclusion

The other two Appellate Judges sitting with Underhill LJ provided their own short statements of principle to reinforce the detailed judgment made by their colleague. Ryder LJ noted that he favoured:

“re-casting the question to be asked on an application for injunctive relief, which is: ‘Is it just in all the circumstances that a [claimant] be confined to his remedy in damages?’ per Sachs LJ in Evans Marshall & Co Ltd v Bertola SA [1973] 1 WLR 349 @ 379H.”

Whilst Laws LJ succinctly dealt with the issue in this way:

“Where a party to a contract stipulates that if he breaches his obligations his liability will be limited or the damages he must pay will be capped, that is a circumstance which in justice tends to favour the grant of an injunction to prohibit the breach in the first place.”

On an application for injunctive relief, the question the court should ask is this: “Is it just in all the circumstances that a [claimant] be confined to his remedy in damages?”

Performance bonds

Performance bonds: the UAE perspective

Most, if not all, construction contracts, whether standard forms or bespoke contracts, require the contractor to provide the employer with a performance bond guaranteeing the contractor's performance under the contract. The purpose of such performance bonds is to provide the employer with an efficient and fast remedy should the contractor default in carrying out its obligations under the construction contract. This is fairly universal. Here, Heba Osman, one of our friends and colleagues, who works out of Dubai, takes a look at how performance bonds are treated in the UAE.

Article 417 (2) of the UAE Commercial Code provides that: in exceptional circumstances, the court may prevent a call on a bond provided that there are "serious and certain reasons".

As a starting point it is always important to distinguish between performance bonds and guarantees. A guarantee will only be paid once the loss under the primary contract has been proved. The employer's right to liquidate this performance bond is triggered upon the occurrence of a certain default on the part of the contractor. It is not an absolute right to the employer and the decision to liquidate a performance bond has to be exercised with caution.

On the other hand a true "on-demand" bond is really a stand alone agreement meaning that a bondsman will pay immediately on the first written call by the beneficiary. Remember that the use of the words "on demand" will not in every case suggest that a bond is in fact "on demand" in nature, if it is clear that on a proper construction the parties intended it to be "conditional" in the sense that there are preconditions to the issuer's liability. With a performance bond, it is accepted that an employer has the right to liquidate the performance bond if the contractor has clearly defaulted on its obligations, such as in the event of abandoning the works or refusing to proceed with the works for no reason.

However, when the relationship turns sour between the employer and the contractor, there appears to be a tendency by employers to liquidate the performance bond even without sufficient causation. In instances where the contractor is not in default or its default is not sufficiently grave to warrant the liquidation of its performance bond, the employer has no right to liquidate the performance bond.

During the Dubai financial crisis that started towards the end of 2008, many employers caused great harm to many contractors who as well as not being paid at the time, were also being subjected to the liquidation of their bonds. This has also caused difficulty for these contractors when they later went to obtain performance bonds from banks.

Performance bonds are essentially letters of guarantee issued by a bank on the request of the contractor, by which that bank undertakes to make a payment to the employer upon the employer's demand.

The UAE Commercial Code

The UAE Federal Commercial Law No. 18/1993 (the Commercial Code) regulates, inter alia, the issuance and use of letters of guarantee and defines them in Article 414 thereof as:

"an undertaking issued by the guaranteeing bank on the request of his client to pay a certain amount (or an amount that can be ascertained) to another person (the beneficiary) without restriction or condition, unless the letter of guarantee is conditional, if [the bank] is requested to do so within the period specified in the letter of guarantee. The letter of guarantee shall state the reason for which it is issued."

This means that a performance bond may be conditional or unconditional. However, the trend is that performance bonds issued by the contractor are payable to the employer "on demand" without any condition.

Performance bonds

If the performance bond is unconditional and on-demand, the bank is obliged to make the payment in accordance with Article 417 (1) of the Commercial Code, which provides:

“The bank shall not be entitled to refuse payment to the beneficiary for reasons relating to the bank’s relation with the client or the client’s relation with the beneficiary.”

This means that the bank cannot refuse liquidating the performance bond on the basis that there is a dispute between the contractor and the employer for example. The bank is obliged to make the payment to the employer in accordance with the terms of the performance bond itself and has no interest in, and should not consider, the terms of the construction contract between the parties.

The contractor’s remedy

A contractor who feels that the employer intends to liquidate the performance bond on unjustifiable or fraudulent grounds can have recourse to the summary court seeking an order to stop the liquidation of the performance bond. This is also provided for in Article 417(2) of the Commercial Code:

“In exceptional circumstances, the court may on application of the client place an attachment on the amount of the guarantee with the bank provided that the client has serious and certain reasons for its request.”

It is an established principle with the Dubai Court of Cassation that even though the issuing bank is obliged to liquidate the letter of guarantee upon the beneficiary’s first demand without the need to obtain the permission of the client, the law still allows the client – who has a dispute with the beneficiary and fears that the latter may demand the bank to liquidate the letter of guarantee – to have recourse to the court to place an attachment order on the amount of the guarantee whenever this client has serious and certain reasons for doing so. The court would only order the bank not to liquidate the letter of guarantee in exceptional circumstances and provided that grounds for such stopping of liquidation are present and are clear and evident from the documents of the case.

Serious and certain grounds can include the fact that the project was completed and handed over, large pending payments are due to the contractor or, there are letters or documents showing that the employer has no right to liquidate, etc.

In the event that the performance bond is liquidated, the remedy available to the contractor is to file a case (or file for arbitration if the contract provides for arbitration) and seek the repayment of the amount of the performance bond, along with interest or damages, as the case may be.

A comparison with the UK

In this there is little difference with the approach of the UK courts. The basic premise behind the general UK approach can be found in the well-known case of *Edward Owen Engineering Ltd v Barclays Bank International Ltd*¹, where the bond stated that it should be paid “on-demand bond without proof or conditions”. Barclays Bank had provided the bond to an English supplier, Edward Owen Engineering. They in turn had contracted to supply goods to a Libyan customer. The Libyan customer made a call on the bond when he himself was in default. Edwards Owen Engineering sought an injunction against Barclays Bank in order to restrain payment of the bond. Lord Denning concluded that the bank must pay on first demand and without proof default or conditions. The bond could, therefore, be called upon even if the breaches were non-existent. The basic exceptions to this rule are where there is fraud or where the bond had expired by virtue of the underlying contract.

From a UAE perspective, that is certainly a similar starting point, although the “serious and certain” reasons test, does provide a small measure of comfort to contractors, provided it is understood that it is a small measure only and that the hurdle that must be climbed to prevent a call on the bond is a high one.

Serious and certain grounds can include that the project was completed and handed over or that large payments are due to the contractor.

¹ [1978] 1 QB 159

FIDIC: making a claim

Conditions precedent: Sub-Clause 20.1 of the FIDIC form of contract

In April 2014 Mr Justice Akenhead had to consider a case arising from disputes relating to a project to build a tunnel at Gibraltar airport. The case, Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar,¹ was unusual because the contract in question was in the FIDIC Form. Usually disputes under the FIDIC Form are heard in private, in arbitration proceedings. Needless to say the case raised a number of interesting issues. In the first of three articles arising out of the decision, Matthew Simson introduces the case and looks at the Judge's comments on the Sub-Clause 20.1 notice.

Under English law, a notice provision will be construed as a condition precedent, and so would be considered to be binding provided:

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

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

Introduction

On 21 November 2008, the Government of Gibraltar ("GOG") engaged Obrascon Huarte Lain SA ("OHL") to design and construct a new road and tunnel under the runway of Gibraltar Airport ("the Works"). The General Conditions of Contract were, subject to some minor amendments, those contained in the FIDIC Yellow Book ("the Contract").

There were a number of disputes between the parties and the judgment was a lengthy one. The Judge noted that the main underlying issue revolved around whether the extent and amount of contaminated materials in the ground to be excavated were or were not reasonably foreseeable by an experienced contractor at the time of tender; if not so foreseeable, then that would not be OHL's risk. OHL's case was that the amount and location of contaminated materials were such that it had to re-design the work particularly in the tunnel area, which it did after the original contract period had expired. Such re-design having been approved, it was OHL's case that it was ready, willing and able to proceed with the work but it was unable to proceed with the works due to various obstacles put in its way by GOG when GOG purported to terminate the contract.

The Commencement Date was 1 December 2008 and the Time for Completion was 24 months thereafter. By October 2010 OHL was in serious delay, with only 25% of the Works having been carried out.

On 20 December 2010, OHL served a report on the engineer concerning, amongst other things, the presence of contaminated materials on site. OHL requested authorisation for an immediate suspension of the Works, and on 23 December 2010, without any authorisation to do so, OHL suspended the Works.

On 11 January 2011, GOG gave written notice to OHL that it had failed to complete the Works within the contractual Time for Completion.

On 16 May 2011, the engineer sent to OHL at its site office a "Sub-Clause 15.1 Notice to Correct" in which the engineer set out a number of contractual obligations it considered OHL was failing to carry out. These included:

- (i) Sub-Clause 8.1 in failing to proceed with due expedition and without delay;
- (ii) Sub-Clauses 3.3, 4.1 and 8.1 in failing to provide acceptable details of methods which OHL proposed to adopt for tunnel excavation work;
- (iii) Sub-Clause 8.1 in failing to proceed with dewatering with due expedition;
- (iv) Sub-Clauses 3.3, 8.3 and 8.6 in failing to comply with instructions by the engineer to produce a revised programme; and
- (v) Sub-Clause 4.1 and/or 5.2 in failing to provide the engineer with appropriate signed certificates for various components of the Works.

The engineer required OHL to make good those failures by remedying them within specified times.

¹ [2014] EWHC 1028 (TCC)

FIDIC: making a claim

On 24 May 2011, OHL responded to the 16 May 2011 Notice to Correct asserting it was not in breach of contract and that there was no entitlement to issue the Notice to Correct.

On 28 July 2011, GOG sent to OHL a Notice of Termination at its site office stating that the Contract would be terminated on 12 August 2011 as a result of:

- (i) OHL's failure to comply with the Notice to Correct issued pursuant to Sub-clause 15.1 (per Sub-Clause 15.2(a)); and/or
- (ii) OHL having demonstrated an intention not to continue performance of its obligations under the Contract (per Sub-Clause 15.2(b)); and/or
- (iii) OHL's failure to proceed with the Works in accordance with Clause 8 (per Sub-Clause 15.2(c)).

"I see no reason why this clause should be construed strictly against the contractor... it should be construed reasonably..."²

On 3 August 2011, OHL replied to the Notice of Termination claiming that the letter was invalid and therefore ineffective for a number of reasons, including that the Notice of Termination was sent to the wrong address (site as opposed to the Madrid office) and there were no grounds under the Contract which justified termination. OHL claimed that the Notice of Termination was a repudiatory breach of contract and purported to accept that repudiatory breach as bringing the Contract to an end.

On 4 August 2011, GOG served the Notice of Termination letter at OHL's Madrid office dated 28 July 2011, saying that termination would take place 14 days later.

On 20 August 2011, GOG informed OHL that it was terminating the Contract, alternatively accepting repudiation on the part of OHL. GOG took possession of the site on or shortly after 20 August 2011.

Claim brought by OHL

Amongst a number of claims, OHL sought an extension of time of 474 days.

Sub-Clause 20.1 – extension of time claims

Under, Sub-Clause 20.1 of the FIDIC form, a contractor must give notice of a claim for an extension of time or additional payment *"as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance."* If the contractor fails to give such notice within 28 days then time shall not be extended and the contractor loses the right to payment. The perennial questions that arise are whether this clause is a condition precedent and whether a court will enforce it.

Under English law,³ a notice provision will be construed as a condition precedent, and so would be considered to be binding provided:

- (i) it states the precise time within which the notice is to be served, and
- (ii) it makes plain by express language that unless the notice is served within that time the party making the claim will lose its rights under the clause.

Further the English courts have confirmed their approval for conditions precedents, provided they fulfil the conditions laid out above. For example, in the case of *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd*,⁴ Mr Justice Jackson held that:

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

So when does the 28-day period referred to in Sub-Clause 20.1 start? It does not run from the actual occurrence of the event or circumstance giving rise to the claim. Instead, it runs from when the contractor "became aware, or should have become aware, of the event or circumstance" giving rise to the claim. That is something rather different and introduces a subjective element into the test.

² Mr Justice Akenhead

³ *Bremer HandelsGesellschaft MBH V Vanden* [1978]

² Lloyds Rep 109

⁴ [2007] EWHC 447 (TCC)

FIDIC: making a claim

Mr Justice Akenhead said that:

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

In coming to this conclusion, the Judge, made reference to Sub-Clause 8.4 of the FIDIC conditions, which sets out the circumstances in which the contractor is entitled to an extension of time. Sub-Clause 8.4 states that:

"The Contractor shall be entitled subject to Sub-Clause 20.1... to an extension of the Time for Completion if and to the extent that the completion for the purposes of Sub-Clause 10.1... is or will be delayed by any of the following causes..."

This suggested that the extension of time can be claimed either when it is clear that there will be delay (a prospective delay) or when the delay has been at least started to be incurred (a retrospective delay). Thus notice does not have to be given until there actually is a delay. The Judge in particular noted that the wording of the clause is not: "is or will be delayed whichever is the earliest". The Judge further confirmed that the onus is on the employer to establish that a notice is not given in time.

There is also often discussion about the form that a notice must take. The Judge recognised that there is no particular form of notice required by the FIDIC form. However by virtue of Sub-Clause 1.3, it must be in writing. Further, and this is important, the notice must be recognisable as a "claim". In this case, OHL had tried to rely on a monthly progress report. This is not unusual, especially, where a contractor has recognised that it failed to provide a particular notice under Sub-Clause 20.1. The problem for OHL was that the report relied upon for its adverse weather claim, stated that: "The adverse weather condition (rain) have [*sic*] affected the works". This made no reference to OHL being delayed and could not be said to amount to notice that a claim for an extension of time was being made. In the Judge's view, this was "clearly nowhere near a notice under Sub-Clause 20.1".

The Judge therefore ruled that OHL had failed to give notice of the exceptionally adverse weather within the 28-day period. This is to be contrasted with the wording of its claim in relation to unforeseeable conditions, where OHL had used the words: "*In our opinion the excavation of all rock will entitle us to an extension of time...*" This clearly constituted a claim.

Conclusion

Although the Judge's conclusion favoured the employer, the judgment makes a number of important observations about the approach to take when considering the overall effect of Sub-Clause 20.1. It is clear that as an overall approach, Mr Justice Akenhead did not consider that Sub-Clause 20.1 should be construed strictly against a contractor, especially given the potentially serious effect it might have on what could otherwise be good claims for breach of contract against the employer. Further, although the *Obrascon* case only considered the approach to extension of time claims, it is likely that the same principle will also apply to claims for additional payment.

It is also likely that the Judge's comment that for the purposes of the 28-day time limit in Sub-Clause 20.1, the "event or circumstance" can mean either the incident itself or the delay (or cost) which results from the event in question, is one which will be referred to in many future claims, especially where the delay or cost effect of an event is not felt until some time after the actual event itself.

Contractors too will take some further comfort in the Judge's comments that, in unamended FIDIC forms at least, there was no special form that the claims' notice should have, save that it must be in writing and should be in the form of a claim. That comfort though must be tempered by considering the Judge's overall conclusions on the facts and his opinion that OHL had failed to comply with Sub-Clause 20.1.

There is no particular form called for in Clause 20.1... It must be recognisable as a "claim".⁵

⁵ Mr Justice Akenhead

FIDIC: serving contractual notices

Serving contractual notices under the FIDIC form of contract

Parties must always ensure that any contractual notice is validly served. As a general rule, you should always read the contract carefully and ensure that any notice is served in the correct way and on the correct people. If the words of the contract impose a condition precedent about how notices are to be served, you might find that your right to terminate is lost, even if the notice was delivered into the hands of the other party.

Termination is a serious step. There needs to be substantive compliance with the contractual provisions to achieve an effective contractual termination.

This was another issue that came before Mr Justice Akenhead in the *Obrascon Huarte Lain SA v Gibraltar* case.

Was the notice served on the correct address?

Mr Justice Akenhead had to consider whether the termination notice had been correctly served. The termination notice letter was delivered by hand to OHL's site office in Gibraltar where it was signed for by one of OHL's employees. It was dispatched promptly by the site office to the main Madrid office. Sub-Clause 1.3 required all notices called for in the Conditions to be delivered by hand or sent by mail or courier to OHL's Madrid office. There was also the following wording:

"However: (i) if the recipient gives notice of another address, communications shall thereafter be delivered accordingly; and (ii) if the recipient has not stated otherwise when requesting an approval or consent, it may be sent to the address from which the request was issued."

Was service of the termination notice at the site office effective?

Throughout the project correspondence had been frequently sent to OHL's site office without any objection being made by OHL. Indeed, the Sub-Clause 15.1 notices were sent to the site office. The project was being run by OHL from the site office as from late 2009. The project manager was based there. In these circumstances, in effect and in practice, the parties operated as if the site office was an appropriate address at which service of notices could be made.

In discussing this point, Mr Justice Akenhead referred to the adoption of a "commercially realistic interpretation" on what parties agree and noted that the courts in the past have been slow to regard non-compliance with certain termination formalities, including service at the "wrong" address, as ineffective, provided that the notice has actually been served on responsible officers of the recipient. He gave a number of examples including *Worldpro Software Ltd v Desi Ltd*,¹ where the notice provision stated:

"Notices permitted or required to be given hereunder shall be in writing and shall be delivered by hand or despatched by registered airmail, facsimile, or cable, shall be deemed given upon receipt thereof, and shall be sent to the parties at the following address..."

The actual termination letter was handed over physically by one director to another. Mr Justice Ferris held that there had been valid service, saying:

"There is no provision for despatch by ordinary, recorded delivery or registered post. It would be quite wrong, in my view, to treat successful service by any of these means, or delivery by hand to the managing director of WorldPro, as having no effect. Regard must be had... to the subject matter and the object to be fulfilled."

FIDIC: serving contractual notices

The decision

The Judge concluded that in relation to termination clauses in engineering and building contracts in general and specifically in relation to the Contract in this case:

- (i) Termination is a serious step. There needs to be substantive compliance with the contractual provisions to achieve an effective contractual termination;
- (ii) Generally, where notice has to be given to effect termination, it needs to be in sufficiently clear terms to communicate to the recipient clearly the decision to exercise the contractual right to terminate;
- (iii) It is a matter of contractual interpretation, first, as to what the requirements for the notice are and, secondly, whether each and every specific requirement is an indispensable condition compliance without which the termination cannot be effective. That interpretation needs to be “tempered by reference to commercial common sense”;
- (iv) In the FIDIC Contract here, neither Sub-Clause 1.3 nor Sub-Clause 15.2 used words such as would give rise to any condition precedent or make the giving of a notice served only at OHLs Madrid office a precondition to an effective termination;
- (v) The primary purpose of Sub-Clause 1.3 is to provide an arrangement whereby notices, certificates and other communications are dispatched effectively to and received by the contractor;
- (vi) The primary purpose of a Sub-Clause 15.2 termination notice is to ensure that the contractor is made aware that its continued employment on the project is to be at an end.

Therefore, the service of a Sub-Clause 15.2 notice at the Madrid office of OHL was not an indispensable requirement. Provided that service of a written Sub-Clause 15.2 notice was actually effected on OHL personnel at a sufficiently senior level, then that would be sufficient service to be effective. There was no doubt that the notice was received by OHL on the day in question and its contents were immediately passed on to the senior directorate. Thus the notification went through to all the relevant senior people within OHL. Therefore, it followed that the termination notices had been validly served and that the employer had validly terminated the Contract pursuant to Sub-Clause 15.2.

Conclusion

From a practical point of view, it is important that all parties are aware of the correct address to which communications should be sent. Care must be taken by both parties to ensure that those working at the place to which communications are to be sent are also aware of this. For example, there is little point in giving a formal registered office address if that registered office is not used on a regular basis as this may mean that the notices and the like are not dealt with within either the contractually required or a reasonable time, if they are dealt with at all.

Care must also be taken to ensure that proper procedures are in place to monitor fax machines, to the extent they are still used, and computers. In the case of *Bernuth Lines v High Seas Shipping*,² arbitration proceedings were served at an email address which appeared in the Lloyds Maritime Directory and on the company’s website. The email was received, but then ignored by the clerical staff. The Judge held that the service was valid and the failings of the internal administration were the responsibility of the company concerned.

The wording of the clause in *Obrascon* enabled the Judge to adopt what he termed a “commercially realistic interpretation”. Had the clause expressly included words such as: “the notice shall only be valid if...”, then the position may have been different.

Here those words were not present, but it is always better to check what the contract requires before the notice is served; it may just save you the time, expense and trouble of having to justify the steps you took to serve that notice before a court or tribunal.

Under the FIDIC form the primary purpose of Sub-Clause 1.3 is to provide an arrangement whereby notices, certificates and other communications are dispatched effectively to and received by the contractor.

² [2005] EWHC 3020 (Comm)

FIDIC: termination by the employer

Termination by the employer under the FIDIC form of contract

As Jeremy Glover writes, termination is a serious step and is never one to be taken lightly. It is important that determination provisions are followed precisely. If a dispute arises, those procedures will usually be carefully considered and strictly applied. These issues also came before Mr Justice Akenhead in the Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar case where the Judge had to consider whether or not the employer was entitled to terminate the contract. The contract was the FIDIC Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant, and for Building and Engineering Works, Designed by the Contractor, 1st edition, 1999 (better known as the "Yellow Book").

Sub-Clause 15.1 states that: "If the Contractor fails to carry out any obligation under the Contract, the Engineer may by notice require the Contractor to make good the failure and to remedy it within a specified reasonable time."

Sub-Clause 15.2 lists the circumstances in which an employer may terminate upon the giving of 14 days' notice, including if the contractor:

"(a) fails to comply... with a notice under Sub-Clause 15.1...

(b) ... plainly demonstrates the intention not to continue performance of his obligations under the Contract,

(c) without reasonable excuse fails:

(i) to proceed with the Works in accordance with Clause 8."

"Any breach" will be held to refer only to important breaches, to exclude minor breaches, and to include only such breaches as are of substantial importance.

Sub-Clause 15.1: notice to correct

First of all, the Judge considered Sub-Clause 15.1, noting the following:

- (i) Sub-Clause 15.1 related to "more than insignificant contractual failures" by the contractor, for example a health and safety failure, bad work or a serious delay on aspects of the work. Given the potentially serious consequence of non-compliance, the notices need to be construed strictly, and the Judge noted that *"generally in relation to termination for fault clauses, courts have often construed them in a commercial way so as to exclude reliance on trivial breaches"*.²
- (ii) The specified time for compliance with the Sub-Clause 15.1 notice must be reasonable in all the circumstances prevailing at the time. What is reasonable is fact sensitive.
- (iii) Sub-Clause 15.1 is designed to give the contractor an opportunity and a right to put right its previous, identified contractual failure.
- (iv) The Judge noted with approval the comments of the editors of *Hudson's Building and Engineering Contracts* (12th edition) at para 8.056:

"Termination clauses occasionally allow termination on the ground of 'any breach' or 'any default'. Although in principle, parties may agree whatever they wish, the courts will generally be reluctant to read such wording literally. 'Default' will be read as meaning a default relevant to the contract, and the courts will treat matters which are not a breach of contract as excluded from the meaning of default. 'Any breach' will be held to refer only to important breaches, to exclude minor breaches, and to include only such breaches as are of substantial importance."

FIDIC: termination by the employer

- (vi) The FIDIC contract has a warning mechanism whereby termination could be avoided by the contractor's compliance with the Sub-Clause 15.1 notice:

"Commercial parties would sensibly understand that this contractual chance is a warning as well to the Contractor and the remedy is in its hands in that sense."

Further, termination could not legally occur if the contractor has been prevented or hindered from remedying the failure within the specified reasonable time. Under English law, there is an implied term that the employer shall not prevent or hinder the contractor from performing its contractual obligations and usually an implied term of mutual cooperation. If after a notice has been served, the employer hindered or prevented the contractor from remedying the breach, the employer could not rely on the contractor's failure in order to terminate the Contract.

The project Sub-Clause 15.1 notices

Two Sub-Clause 15.1 notices were served, one on 16 May 2011 and one on 5 July 2011. The Judge noted that prior to the first notice, for the preceding 5 months, no critical, substantive or permanent work had been done by OHL, the contractor. Under the notice, OHL was called upon to "resume tunnel excavation work" and "proceed with the cropping and repairs to the diaphragm walls unaffected by standing water" by 30 May 2011. The Judge considered the time given to rectify the breach was reasonable, especially as the detailed design was approved sufficiently and the relevant approval forms were provided in a timely fashion well within this initial 14-day period. If they had not been, it might have been more arguable that there was some prevention on the part of the employer.

The next failure alleged was that OHL had failed "to commence temporary sheet piling of the subway". Here the Judge was not satisfied that OHL was by 16 May 2011 in breach of Clause 8 in respect of the alleged failure to start sheet piling for the subway. The work was not on the critical path and it was therefore difficult to find that a deferment of the sheet piling until later would necessarily have led to any overall delay to the project. This meant that it could not be said that there was a failure to proceed without delay.

The next complaint was regarding a failure to start underwater trenching and ducting work. Here the Judge concluded that OHL was in breach of Sub-Clause 8.1 in that it was not and had not been proceeding with due expedition and without delay. Indeed the contractor was already in culpable delay as from about October 2009 when the work could and should have been completed. However, the Judge was not satisfied that the time given to start this work (3 weeks) had been established as being reasonable. The onus was on the employer to establish this.

A notice was also served in respect of OHL's failure to provide acceptable method statements which OHL proposed to adopt for tunnel excavation work. This was a breach of Sub-Clause 8.1, as an acceptable method statement was a prerequisite to starting the excavations for and in connection with the tunnel. There was no evidence that there was any good excuse or even explanation as to why an acceptable method statement had not been produced by 16 May 2011. Here, following the service of the notice, OHL submitted an unacceptable revised method statement late which was duly rejected 21 days later. Accordingly, OHL did not comply with the notice.

The next item on the 16 May 2011 Sub-Clause 15.1 notice was the failure "to proceed with the dewatering of the site with due expedition and without delay". Even on OHL's programme, it should have been operational by 16 May 2011. It was, in the view of the Judge, perfectly reasonable to require that the dewatering commenced by 30 May 2011. However, there was a continuing breach and non-compliance with the notice as no dewatering actually started by or even on 30 May 2011.

A further notice was issued on 5 July 2011, relating to the exposure of some panels. It was suggested that this notice was part and parcel of a long-established strategy by the employer to terminate the Contract. The Judge considered that the second notice was intended in effect "as a test to encourage OHL to get on and do some work". The Sub-Clause

"Commercial parties would sensibly understand that this contractual chance is a warning as well to the contractor and the remedy is in its hands in that sense."

FIDIC: termination by the employer

15.1 notice was issued when no work had been done to comply with an Instruction. The Judge thought that the motivation of the employer was not relevant, unless it was shown to be in bad faith. It would not be bad faith to issue any such notice if it was justified under the Contract, even if it was issued in circumstances in which the engineer and the employer believed that it would not be complied with and, if not, termination might, could or would follow thereafter. On the facts, the engineer was entitled to issue the second notice as not only had OHL not complied with the relevant instruction, but also it had shown no real intention of complying with it.

Next the Judge had to consider the extent to which the Sub-Clause 15.1 notices were or were not complied with. The Judge found that nothing was done by OHL with regard to the cropping of the diaphragm walls and the related excavation works. There was no good reason why OHL did not resume this work. Further, no adequate explanation was offered as to why an appropriately revised method statement could not have been provided. There was continued non-compliance up to the date of termination in this regard. The real reason for, and indeed the true cause of, the continuing delay was in fact that OHL was unable to secure a sign off on the design because there was a very real problem with the stability of the revised tunnel design. However, this was the risk and the fault of OHL.

The position with the diaphragm panels was somewhat different: work started on 13 July 2011 (albeit 8 days after the notice) and continued until 21 July 2011. The precise detail of compliance was not fully investigated at the trial and the Judge noted that had this been the only item upon which the termination was based, he would not have found that there was sufficiently significant non-compliance with the scope of the instruction. For example, the engineer actually instructed, whilst these works were going on, various changes to the original instruction.

Notice of termination – Sub-Clause 15.2

Having concluded that there were continuing grounds of non-compliance by OHL with the Sub-Clause 15.1 notices after the times given for compliance had expired, the Judge went on to consider whether OHL had by 28 July 2011, the date of the termination letter, “plainly demonstrate[d] the intention not to continue performance of these obligations under the Contract” or “without reasonable excuse fail[ed]. . . to proceed with the Works in accordance with Clause 8”, within the meaning of Sub-Clauses 15.2(b) and (c). Again, whilst noting that this must be primarily a matter of fact and degree, the Judge set out some basic points of principle:

- (i) The test must be an objective one. If OHL privately intended to stop work permanently but continued openly and assiduously to work hard at the site, this would, objectively, not give rise to a plain “demonstration” of intention not to continue performance. Similarly, the fact that OHL was, and had been for many months, doing no work of any relevance without contractual excuse could, if judged objectively, give rise to a conclusion that it had failed to proceed in accordance with Clause 8.
- (ii) The grounds for termination must relate to significant and more than minor defaults on the grounds that it cannot mutually have been intended that a (relatively) draconian clause such as a termination provision should be capable of being exercised for insignificant or insubstantial defaults. For example, a few days’ delay in the context of a 2-year contract would not justify termination on the Clause 8 ground and an unwillingness or even refusal to perform relatively minor obligations would not justify termination on the “intention not to continue” ground.

The decision

The Judge was, on the facts, wholly satisfied that OHL had failed, almost from start to finish of this project, to proceed in accordance with Sub-Clause 8.1 of the Contract Conditions. The lack of expedition on the part of OHL had led to what amounted to a 2-year delay on a 2-year contract, for which there was at best a minimal entitlement to extension of time. Accordingly, the employer was entitled to terminate the contract.

The grounds for termination must relate to significant and more than minor defaults on the grounds that it cannot mutually have been intended that a (relatively) draconian clause such as a termination provision should be capable of being exercised for insignificant or insubstantial defaults.

International arbitration – Dubai

English courts refuse bribery-based application to set aside Dubai arbitration award

If you have obtained a judgment or arbitral award outside England and Wales, you may wish to enforce it in England or Wales because your debtor is located or has assets here. If so, it is positive to know that English courts do not tread lightly regarding requests to set aside orders enforcing foreign arbitral awards. As Monique Hansen writes, this was recently demonstrated by the TCC in London, in the case of Honeywell International Middle East Limited v Meydan Group LLC¹ where Mr Justice Ramsey made it clear that the English courts will take a robust approach to challenges to the enforcement of foreign arbitration awards, even where allegations of bribery are involved.

“The intention of the New York Convention... is that the grounds for refusing recognition and enforcement of arbitral awards should be applied restrictively”.

Background

In September 2007 Meydan (a company incorporated in Dubai) entered a contract with a main contractor Arabtec-WCT JV under which Arabtec agreed to carry out certain works at the Meydan Racecourse. The employer’s representative under the contract between Arabtec and Meydan was Teo A Khing Design Consultants SDN Bhd (Dubai Branch) (“TAK”) who were engineering consultants.

In March 2008 TAK, on behalf of Meydan, invited Honeywell to submit a tender for the supply and installation of an Extra-Low Voltage System at the Racecourse. In order to secure its nomination as a subcontractor, the invitation to tender included provisions requiring Honeywell to pay TAK AED 526,000 (approximately £85,000) in deposit, documentation and lithography fees.

In June 2008 Meydan nominated Honeywell to be appointed by Arabtec, though no formal agreement was made between Arabtec and Honeywell. Seven months later Meydan terminated the contract with Arabtec, and in June 2009 a contract was signed between Meydan and Honeywell.

Arbitration (DIAC Case 201/2010) was commenced by Honeywell against Meydan under the rules of the Dubai International Arbitration Centre (DIAC) in July 2010 and was triggered by the fact that Honeywell had not been paid since December 2009 and had subsequently suspended work. Honeywell was seeking the sums it claimed were owed under the contract.

Meydan did not nominate an arbitrator or participate in the proceedings but despite Meydan’s lack of cooperation Honeywell proceeded with the tribunal to a hearing in February 2012. However, in January 2012 Meydan commenced a separate DIAC arbitration against Honeywell (DIAC Case 18/2012). Notwithstanding this new arbitration, DIAC Case 201/2010 proceeded and Honeywell was awarded just over AED 77 million (approximately £12.6 million).

Eager to seek ratification of the award in DIAC Case 201/2010, Honeywell commenced proceedings before the Dubai courts. Meydan opposed the application and argued that the award should be held void and/or invalid, asserting (with reference to an opinion from an English Queen’s Counsel relating to DIAC Case 02/2009 between Arabtec and Meydan) that there were concerns that TAK and Arabtec had engaged in criminal acts of corruption, though further evidence would be needed to substantiate these allegations.

In November 2012, Honeywell made a without notice application before the English courts under the Arbitration Act 1996 seeking leave to enforce DIAC Case 201/2010 in the UK. The application came before Mr Justice Akenhead who made an order granting Honeywell leave to enforce the award.²

¹ [2014] EWHC 1344 (TCC)

² Mr Justice Akenhead qualified this order by stating that it should not be enforced for 21 days after service of the relevant documents on Meydan or, in the event that Meydan applied within those 21 days to set aside the order, until such application had been finally disposed of.

International arbitration – Dubai

Meydan in turn applied to have the order set aside and it is Meydan's application to set aside this order which was brought to a hearing before Mr Justice Ramsey in February 2014.

Prior to Meydan's application to set aside the order, there were developments in Dubai. In February 2013 the Dubai Court of First Instance ratified the award in DIAC Case 201/2010. Meydan appealed this decision and the appeal proceedings were stayed by the courts in November 2013 (and remained stayed at the date of Mr Justice Ramsey's judgment).

“The court needs to assess what is put before it with a critical eye”.

In staying the proceedings the court referred to a bribery complaint against Honeywell made in October 2013 to the Dubai Public Prosecutor as well as a letter from the Head of Dubai Public Funds Prosecution Department to the head of a local Dubai police station in November 2013 requesting that investigations be conducted against Honeywell pursuant to UAE Federal Civil Procedures Law.

In August 2013 the tribunal in DIAC Case 18/2012 (brought by Meydan) held that the claims raised by Meydan were barred by *res judicata* and therefore could not be considered by the tribunal because the parties were the same as in DIAC Case 201/2010. Despite this, Meydan nonetheless submitted a memorial to the tribunal referring to the same documents that had caused the Court of Appeal proceedings to be stayed.

Decision

The Judge was wholly dissatisfied by all of these arguments and rejected Meydan's application to set aside the order.

The invalidity of the arbitration agreement

In accordance with s.103(1) of the Arbitration Act 1996, recognition or enforcement of a New York Convention award shall not be refused except under the grounds listed at s.103(2) and (3). If one of these grounds is met, then recognition or enforcement of the award “may be refused”. Mr Justice Ramsey noted that this discretion “is not open-ended and the court would be unlikely to exercise its discretion to enforce an award which is subject to a fundamental or structural defect”. He also reiterated that “the intention of the New York Convention... is that the grounds for refusing recognition and enforcement of arbitral awards should be applied restrictively”³

Meydan asserted that, pursuant to s.103(2)(b) which states that recognition or enforcement of an award may be refused if the arbitration agreement was invalid under the law to which the parties subjected it, a ground for refusing enforcement under s.103(2) had been met. Meydan argued that the award in DIAC Case 201/2010 was invalid under UAE law as it resulted from a contract which was procured by Honeywell bribing public servants in Dubai. It argued that the tender invitation evidences an agreement between Honeywell and TAK for Honeywell to pay a bribe under the false cover of “lithography”, “tender” and “document fees”. Meydan submitted that these payments amounted to bribery under English law, citing *Fiona Trust v Yuri Privalov*⁴ where a bribe was defined as a secret commission; a payment which is kept secret from the principal.

The burden was on Meydan to establish a ground under s.103(2), and the Judge was not satisfied by the arguments put forward for a number of reasons and stated that “the court needs to assess what is put before it with a critical eye”.

Whilst the Judge accepted that a payment was made to TAK, he was not satisfied that it was a secret commission because within days of the letter of invitation being sent to Honeywell, they made their suspicions regarding the payment known to a senior member of Meydan's staff. It was not a secret payment made by Honeywell to TAK.

However, the Judge went further to say that even had he not come to that conclusion, the evidence of bribery was available to Meydan at the time of the arbitration but Meydan chose not to participate or to raise the allegations in that arbitration. Further, the alleged bribe arose in the context of a tender where Honeywell was nominated as a subcontractor to Arabtec. There was no allegation that a bribe had secured the contract

³ In doing so, Mr Justice Ramsey quoted from *Redfern and Hunter on International Arbitration* at para 11.60

⁴ [2010] EWHC 3199 (Comm).

International arbitration – Dubai

between Honeywell and Meydan. Ramsey J therefore found it *“difficult to see how the bribe could affect the Contract between Meydan and Honeywell or the arbitration clause within that Contract”*.

Finally, the Judge stated that even if there was a causative link between the alleged bribe and the Contract between Meydan and Honeywell, it would have to be shown that as a matter of UAE law, the arbitration agreement within the Contract was itself procured by bribery. While this had not been alleged, Mr Justice Ramsey noted Article 6.1 of the DIAC Rules which deals with the separability of the Arbitration Agreement and provides that unless the parties agree otherwise, “the Arbitration Agreement shall... be treated as a distinct agreement”. Therefore, even if the allegation of bribery was made out and found to have affected the Contract between Meydan and Honeywell, it would not have affected the arbitration agreement due to the principle of separability.

Procedural rules

Meydan also contended that, pursuant to s.103(2)(f) which states that recognition or enforcement of an award may be refused if the award is suspended by a competent authority in the country in which it is made, a ground for refusing enforcement under s.103(2) had been met. Because Honeywell’s application for ratification had been stayed by the Dubai Court of Appeal, it had therefore been suspended by a competent authority in the country in which it was made.

The Judge also rejected this argument, stating that under the DIAC Rules the award was final and binding. As the New York Convention has limited the *“double exequatur”* requirement, there was therefore no requirement for anything to occur in the local courts for the award to be given some further status in terms of its binding nature. Proceedings in the local court were of no relevance as to whether an award was binding, and the process currently being followed in the Dubai courts had not led to the award being *“set aside or suspended”*.

Meydan also argued that the request for arbitration wrongly named *“Meydan LLC”* rather than *“Meydan Group LLC”* but Mr Justice Ramsey was entirely unsatisfied with this. The request was addressed to Meydan LLC, a party with all the attributes of Meydan Group LLC, which meant that it would reasonably, and did, come to the attention of Meydan Group LLC.

Public policy and bribery

Meydan further asserted that English public policy prevents enforcement of awards that would give a person who bribes the fruits of their bribery and that therefore enforcement of the award was contrary to English public policy.

The Judge rejected this on the basis that bribery had not been proven. He also stated that even if bribery was proven, there is no principle of English law to the effect that it is contrary to English public policy to enforce a contract which has been procured by bribery. He emphasised the distinction between the enforcement of contracts to commit fraud or bribery and contracts that are procured by bribery; only the former are contrary to public policy.

Conclusion

The Judge rejected all of Meydan’s claims and found that Meydan had not raised any grounds for contending that recognition or enforcement of the Award should be refused under s.103 of the Arbitration Act 1996. This decision is yet another illustration that the English courts are taking a critical and narrow view in terms of their willingness to refuse recognition and enforcement of foreign arbitration awards.

This case further demonstrates that even with a shield of bribery allegations you cannot presuppose that a ground under s.103 of the Arbitration Act 1996 will be made out. The English courts will resist using their discretion under s.103 to refuse recognition and enforcement of a New York Convention award.

The English courts will take a robust approach to challenges to the enforcement of foreign arbitration awards, even where allegations of bribery are involved.

Arbitration: was there a binding agreement to arbitrate?

Arbitration: was there a binding agreement to arbitrate?

We often find that contracts are increasingly setting out alternative ways to approaching dispute resolution. Often these include reference to arbitration and also references to preconditions on the right to arbitrate. Two recent cases demonstrate just how important clear drafting of these clauses can be. Sometimes, it is possible for a party, who might not wish to go along the dispute resolution path in the manner adopted by the claiming party, to take advantage of either unclear drafting or the failure to follow the requirements of the contract, to find ways to block and/or otherwise frustrate what the claiming party is trying to do.

Kruppa v Benedetti & Anr¹

Benedetti made an application to stay proceedings brought by Kruppa pursuant to section 9 of the Arbitration Act 1996. The main question for Mr Justice Cooke to decide was whether or not the clause in question constituted an arbitration agreement within the meaning of the Act. The relevant clause reads as follows:

"Laws of England and Wales. In the event of any dispute between the parties pursuant to this Agreement, the parties will endeavour to first resolve the matter through Swiss arbitration. Should a resolution not be forthcoming the courts of England shall have non-exclusive jurisdiction."

The arbitration clause should be clear and unequivocal. Remember the importance of ensuring that your contract contains a clear and certain governing law and jurisdiction clause.

Benedetti said that this clause required the parties to arbitrate their dispute. Further, the word "arbitration", on its own, was sufficient for an English court to find a binding arbitration agreement. Benedetti sought to argue that, given the court's general pro-arbitration stance, the clause should be construed so that substantive issues would be resolved by arbitration while the English court retained supervisory jurisdiction. The clause here had been drafted by professionals and the words "Swiss arbitration" referred only to arbitration and not to mediation or some other form of ADR. Parties would be expected to know the difference between "arbitration" and "mediation". When the word "arbitration" is used, it should be given its ordinary and natural meaning.

However, the Judge considered that there were a number of difficulties with that approach. First, the parties had not specifically agreed to refer any dispute to arbitration. They had agreed to "endeavour" to resolve the matter through Swiss arbitration. Secondly, the clause plainly envisaged the possibility of two stages in the dispute resolution process. The parties had agreed to attempt to resolve the matter first by arbitration and if that did not result in a solution then there would be a need for litigation in the courts.

The clause was a two-tier dispute resolution clause which provided for a process referred to as "Swiss arbitration", with a right to the parties to refer the matter to the jurisdiction of the English court, "should a resolution not be forthcoming" through the Swiss procedure envisaged. It was logically not possible to have an effective multi-tier clause consisting of one binding tier (i.e. arbitration) followed by another binding tier (i.e. litigation).

In the Judge's view, what the parties had in mind was that there should be an attempt to agree a form of arbitration between them in Switzerland. If they failed to do so, the English court was to have non-exclusive jurisdiction.

The nature of that obligation showed that there was not a binding agreement to arbitrate but merely an agreement to attempt to resolve the matter by a process of arbitration which itself had not been set out in the clause or elsewhere in the contract. The absence of provisions relating to the number of arbitrators, the identity of the arbitrators, the qualifications of candidates for arbitration or the means by which they should be chosen further demonstrated the need for the parties to reach further agreement on the subject because the reference to "Swiss arbitration" did not specify the seat of the arbitration nor the court that could make any appointment in lieu of the parties' agreement.

¹ [2014] EWHC 1887 (Comm)

Arbitration: was there a binding agreement to arbitrate?

The requirement to submit finally to a binding arbitration is absent and would, on the face of the clause, be inconsistent with its terms because of the two-stage process envisaged.

Benedetti's application was dismissed.

Emirates Trading Agency Plc v Prime Mineral Exports Private Ltd²

Clause 11 of the contract between the parties provided the following procedure for resolving disputes:

"In case of any dispute or claim arising out of or in connection with or under this LTC..., the Parties shall first seek to resolve the dispute or claim by friendly discussion. Any party may notify the other Party of its desire to enter into consultation to resolve a dispute or claim. If no solution can be arrived at in between the Parties for a continuous period of 4 (four) weeks then the non-defaulting party can invoke the arbitration clause and refer the disputes to arbitration."

The question at the heart of this case was: in a dispute resolution clause is an obligation requiring the parties to seek to resolve a dispute by friendly discussions in good faith and within a limited period of time enforceable as a condition precedent to the dispute being referred to arbitration? ETA said that this amounted to a condition precedent which had to be satisfied before the arbitrators would have jurisdiction to hear the claim and if it was not satisfied this would mean that the tribunal lacked jurisdiction. Prime argued (as did the arbitrators) that the clause was unenforceable as it was merely an agreement to negotiate and in any event, it had been satisfied.

Mr Justice Teare accepted that the first part of clause 11.1 provided that before a party can refer a claim to arbitration there must be friendly discussions to resolve the claim. Such friendly discussions were a condition precedent to the right to refer a claim to arbitration.

However, the Judge doubted that the second part of the clause required the friendly discussions to continue for four weeks. The clause provided that "if no solution" could be found "for a continuous period of 4(four) weeks" then arbitration could be invoked. The discussions may last for a period of four weeks but if no solution is achieved a party may commence arbitration. Or the discussions may last for less than four weeks in which case a party must wait for a period of four continuous weeks to elapse before he may commence arbitration.

The reference to a period of four continuous weeks ensured both that a defaulting party could not postpone the commencement of arbitration indefinitely by continuing to discuss the claim and that a claimant who is eager to commence arbitration must have the opportunity to consider such proposals as might emerge from a discussion of his claim for a period of at least four continuous weeks before he may commence arbitration.

The Judge also considered previous authorities in determining whether the clause was a mere "agreement to negotiate" and therefore unenforceable. It was not, and Mr Justice Teare dismissed ETA's application and held that the arbitrators had jurisdiction over the dispute as the clause was enforceable and on the facts of the case, had been satisfied.

Conclusion

If you want to arbitrate, the arbitration clause should be clear and unequivocal. Whilst both cases provide a further demonstration of the preference of the courts to enforce jurisdiction clauses provided that they are clearly drafted and reflect what the parties had freely agreed at the time of entering the contract, the fact remains that there is a regular stream of such cases across all the courts. Those drafting and entering into agreements with similar clauses must remember the importance of ensuring that your contract contains a clear and certain governing law and jurisdiction clause. Indeed, the object of clauses such as the one in the *Emirates'* case was actually to try and prevent costly arbitration proceedings.

In case of any dispute or claim arising out of or in connection with or under this LTC..., the Parties shall first seek to resolve the dispute or claim by friendly discussion.

The BIM generation

The BIM generation

Building Information Modelling cuts across the entirety of the construction process, from design and design development, and value engineering through to take-offs, facilities management and whole-life costing. It is the depository of as-built data to the building process. Within Fenwick Elliott, we are increasingly finding ourselves being asked to deal with issues relating to BIM and this reflects the general increased knowledge of, take-up and use of BIM. The latest NBS National BIM Report¹, released in April 2014, noted that awareness of BIM has risen from 58% of participants in 2010 to 95% today. More importantly, in the last year, 54% have used BIM on at least one project – 15% more than in 2012. Developments continue apace within BIM itself.

Everyone should be aware by now that in the UK, the government's construction strategy requires all centrally procured government projects to utilise BIM in the form of a fully collaborative 3D computer model (Level 2) by 2016, with all project and asset information, documentation and data being electronic. It is, indeed, three years since that strategy was first published. The government believes that the wide implementation of BIM technologies, both domestically and abroad could improve sector productivity and lower costs due to improved information flow and greater collaboration. This is why BIM has been placed at the forefront of the government's ambitions to achieve:²

- (i) 33% reduction in the initial cost of construction and the whole-life costs of built assets;
- (ii) 50% reduction in the overall time, from inception to completion, for new build and refurbished assets;
- (iii) 50% reduction in greenhouse gas emissions in the built environment; and
- (iv) 50% reduction in the trade gap between total exports and total imports for construction products and materials.

The seven components of Level 2 BIM

During 2014, the government's BIM Task Group set out the following key components of Level 2 BIM:

- (i) PAS 1192-2:2013 Specification for information management for the capital/delivery phase of assets using building information modelling;
- (ii) PAS 1192-3:2014 Specification for information management for the operational phase of assets using building information modelling;
- (iii) BS 1192-4 Collaborative production of information. Part 4: Fulfilling employers information exchange requirements using COBie-code of practice;
- (iv) Building Information Model (BIM) Protocol;
- (v) GSL (Government Soft Landings);
- (vi) Digital Plan of Work (in preparation); and
- (vii) BIM Classification System (in preparation).

Two of the items on the list, PAS 1192-2:2013 and the CIC BIM Protocol, came out last year. Two more, as we discuss, came out in September 2014, whilst to date there seem to be no plans for a formal GSL policy document. As can be seen, two are works in progress.

One of the key issues that has taken on an increased importance over the past year is what happens when the building is finished. How does BIM fit in with facilities management? In theory it should do so rather well.

PAS 1192-3:2014

March 2014 saw the introduction of PAS 1192-3: Specification for information management for the operational phase of construction projects using building information modelling. PAS 1192-3 introduces three key concepts:

- (i) organisational information requirements (OIR): the data and information required to achieve the organisation's objectives;

The essential principle behind the government's GSL philosophy is that the ongoing maintenance and operational cost of a building during its lifecycle far outweighs the original capital cost.

¹ www.thenbs.com

² Construction 2025 – Industrial Strategy: government and industry in partnership (HM Government)

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- (ii) asset information requirements (AIR): the data and information requirements of the organisation in relation to the asset it is responsible for; and
- (iii) the asset information model (AIM): the data and information that relate to assets to a level required to support an organisation's asset management system.

The idea is to try and ensure that the OIR and the AIR will be linked to the Employer's Information Requirement under the construction process and that the construction BIM model (the Project Information Model) will seamlessly link into or contribute to the AIM. One of the key ways to do that is to encourage, if not ensure, greater engagement at the outset of a project. This is closely linked to the GSL policy.

Government Soft Landings (GSL)

The essential principle behind the government's GSL philosophy is that the ongoing maintenance and operational cost of a building during its lifecycle far outweighs the original capital cost. If this is recognised through early engagement in the design process, then there is greater scope to achieve both savings and increased functionality. The simple premise is to use BIM to ensure that the finished building matches the client's expectations or to put it another way, to align the design and construction of a building with its operation and management. Further, the BIM process will leave a lot of information behind; potentially this will be a valuable resource for those actually using the building. The four key areas are:

- (i) functionality and effectiveness;
- (ii) environmental;
- (iii) facilities management; and
- (iv) commissioning, training and hand over.

There are already signs of industry collaboration and cross over. Stage 7 of the RIBA Plan of Work 2013 includes post-handover monitoring and feedback. Indeed, it is important to be able to measure progress and performance. With the government's scheme, there is a considerable focus on the setting of targets and on measuring progress against those targets. Outcomes are defined at the beginning of a project and incentives are set to achieve those outcomes. One potential result of this need for some form of monitoring might be a changed approach to handover, with the project team not finishing and leaving on practical completion but extending their contract to provide support and a Post-Occupancy Evaluation ("POE") in relation to the operation systems for up to three years post-completion (the time-scale that is usually put forward). That said, it would seem to make practical sense to carry out the POE to coincide with the end of the defects liability period.

This new approach is inevitably going to lead to new legal questions. The building contract may need to make reference to the extended involvement on site. How will this extended involvement cut across practical completion, the warranty period and insurance? How do you judge whether or not the building is living up to expectations and/or is meeting the required standards? What might the consequences be? And if there are standards or expectations that must be met, that is presumably edging towards a fitness for purpose obligation.

BS 1192-4 Collaborative production of information

The BS 1192-4, which was released in September 2014, defines the UK usage of COBie (or Construction Operations Building information exchange). COBie is an internationally agreed information exchange schema for exchanging facility information between the employer and the supply chain. The idea is that COBie can help by providing a common structure for the exchange of information about new and existing facilities, including both buildings and infrastructure. The intention behind the BS 1192-4 and COBie is that information can be prepared and used without the need for knowledge of the sending and receiving applications or databases thereby ensuring that the information exchange can be reviewed and validated for compliance, continuity and completeness.

Awareness of BIM has risen from 58% of participants in 2010 to 95% today.

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The missing components

The two remaining components needed to complete the suite of standards, protocols and guidance that will deliver the government's definition of Level 2 BIM and satisfy forthcoming public sector requirements are the Digital Plan of Work and the new BIM classification system. The NBS has secured the contract to develop a free-to-use Digital Toolkit that will serve as an online checking and validation system for BIM projects. Use of the toolkit will be compulsory for all public sector projects when the requirement to meet Level 2 BIM comes into effect in 2016. The plan is for the BIM toolkit to make available a Digital Plan of Work alongside a BIM classification system that will incorporate definitions for over 5,000 construction objects at each delivery stage of a project.

The European Union and BIM

Europe is catching on too.³ The new European Union Public Procurement Directive (EUPPD) which came into force on 17 April 2014 aims to encourage the use of BIM in public works. The EUPPD states:

"For public works contracts and design contests, Member States may require the use of specific electronic tools, such as of building information electronic modelling tools or similar."

Whilst clearly the use of BIM will not be mandatory, the EUPPD does go some way in encouraging or pushing member states to recommend or specify the use of BIM. One particular point that those issuing UK tenders need to take into consideration is that when implementing the EUPPD, member states and contracting authorities must take care not to fall foul of the non-discriminatory requirement. The EUPPD is clear that the tools and devices to be used either in electronic communication or BIM must be non-discriminatory, generally available and interoperable with the ICT products in general use. The tools and devices must not restrict access to public procurement. If the tools and devices proposed are not generally available, the contracting authorities must offer an alternative means of access. Furthermore, public contracts must comply with the principles of the Treaty on the Functioning of the European Union: equal treatment, non-discrimination, proportionality and transparency.

Therefore, contracting authorities in each member state must consider the technical platforms/standards which they intend to use and ensure that they do not restrict access or competition between potential tenderers. Using an open and neutral data format (IFC), of course, assists with interoperability and should therefore limit issues of discrimination.

LODs (levels of detail or development): what the client expects

We have always maintained that the adoption of Level 2 BIM should not mean any radical change to contracts. We still hold to that view. Traditional design responsibilities should not change. As we have discussed, the GSL policy might lead to changes in how we deal with completion. However there is one issue that perhaps an eye does need to be kept on, and that is the level of information that an employer wants. And the opportunities offered by BIM might mean that an employer considers that they want to see a higher level of detail at an earlier stage in the construction process than is traditional. The formal LOD system is a rating system of five levels, from LOD 100 to LOD 500. It is often described in the following way: LOD 100 simply means a chair; at LOD 500, information must be provided about the manufacturer, supplier, colour, model number and date of supply. The BIM Protocol is likely to provide details of the LOD that is expected. If, as is recommended, the BIM Protocol is a contractual document which takes precedence over existing arrangements relating to BIM, then what happens if the Protocol talks about the early provision of a high level of LOD, which conflicts with the information set out in the employer's requirements? A simple building maintenance strategy might unexpectedly become a whole lot more onerous. This is not necessarily a problem, but it is an example of the care parties should take when agreeing their contracts.

Conclusions

BIM will continue to evolve and present new technical, practical and maybe legal challenges. However, they are challenges which, it is clear, everyone is more than willing to overcome, because they recognise the potential benefits. Watch this space!

Will there be a need to change our approach to contractual completion in order to incorporate the GSL?

³ That is, Europe in the European Union sense – certain countries such as Finland and the Netherlands have been at the forefront of BIM development, encouragement and innovation.

Case law update

Case law update

Our usual case round-up comes from two different sources. First, there is the Construction Industry Law Letter (CILL), edited by Karen Gidwani. CILL is published by Informa Professional. For further information on subscribing to the Construction Industry Law Letter, please contact Kate Clifton by telephone on +44 (0) 20 7017 7974 or by email: kate.clifton@informa.com. Second, there is our long-running monthly bulletin entitled Dispatch. This summarises the recent legal and other relevant developments. If you would like to look at recent editions, please go to www.fenwickelliott.com. If you would like to receive a copy every month, please contact Jeremy Glover. We begin by setting out the most important adjudication cases as taken from Dispatch.

Adjudication: Cases from Dispatch

Adjudication: limitation periods

Aspect Contracts (Asbestos) Ltd v Higgins Construction plc

As Mr Justice Akenhead pointed out, when the case came before him, this case raises an important issue as to when a dissatisfied party to an adjudicator's decision must issue proceedings if they want to overturn that decision. The issue was of such importance that it ended up before the CA which had to decide whether a claim by the losing party to the adjudication for repayment of sums paid over to the successful party was subject to a time bar accruing at the time of the (supposed) original breach of contract, or only from the date of the (supposedly) unnecessary payment made as a result of the adjudication. Mr Justice Akenhead held that the cause of action accrued "whenever it otherwise did before the decision was issued". Lord Justice Longmore set out a brief chronology of events:

- (i) March 2004: Aspect carried out an asbestos survey;
- (ii) 27 April 2004: Aspect sent their survey report to Higgins;
- (iii) 24 June 2004: Higgins paid Aspect's invoice;
- (iv) February 2005: alleged discovery of asbestos-containing material (or "ACMs");
- (v) July 2005: additional ACMs removed by Falcon;
- (vi) 26 June 2009: Higgins refers dispute with Aspect to adjudication;
- (vii) 28 July 2009: adjudicator issues decision in favour of Higgins;
- (viii) 6 August 2009: Aspect pay the Decision sum of £658,017;
- (ix) 3 February 2012: Aspect issue Claim Form;
- (x) 4 May 2012: Higgins' Defence and Counterclaim served.

When Aspect began proceedings, it was much more than 6 years after their supposed breach of contract or duty, which occurred back in 2004, but less than 6 years after making the payment. Aspect sought to imply the following term into the contract:

"that in the event that any dispute between the parties was referred to adjudication pursuant to the Scheme and one party paid money to the other in compliance with the adjudicator's decision made pursuant to the Scheme, that party remained entitled to have the dispute finally determined by legal proceedings and if or to the extent that the dispute was finally determined in its favour, to have that money repaid to it."

LJ Longmore noted that here the contract incorporated the Scheme and expressly provided that the adjudication is only to be binding until the dispute is finally determined. Thus, the final determination may be different. This means that it will be the final determination that is to be determinative of the rights of the parties. If the final determination decides that a particular party has paid too much, repayment of any "adjudication monies" must be made. The appellate Judge concluded, and in doing so disagreed with Mr Justice Akenhead, that if the contract is construed in accordance with what it appears to say, namely that any overpayment can be recovered, then the correct

When should a dissatisfied party to an adjudicator's decision issue proceedings if they want to overturn that decision?

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answer to the question posed would be that the accrual of that cause of action is the date of overpayment since the losing party is (on this hypothesis) "entitled" to have the overpayment returned to him. Therefore the claim had been brought in time.

Adjudication: breaches of natural justice

Bouygues E&S Contracting UK Ltd v Vital Energi Utilities Ltd

Bouygues sought to challenge an adjudicator's decision that they should pay some £1.6 million to Vital. They raised a number of familiar arguments. First Bouygues said that before any payment order could be made, the adjudicator was required to decide whether and to what extent the works they carried out were defective. This the adjudicator had failed to do, which prevented him from addressing an important part of the defence, namely that Vital had not proved that there was any defective workmanship. Vital said that the adjudicator was asked to quantify the costs of completion of the subcontract. This was what he did. It was immaterial whether the costs related to defective or incomplete work. The adjudicator decided that all of the awarded costs fell into one or other of those categories, and were supported by invoices. Lord Malcolm agreed. In essence, Bouygues was asking the court to hold that the adjudicator had reached the wrong answer to their line of defence. It was not a breach of the rules of natural justice.

If you ask the court to hold that the adjudicator had reached the wrong answer to your line of defence, that will not be a breach of the rules of natural justice.

Bouygues then referred to advice the adjudicator sought and received from a consultant engineer who was asked to assess whether, on their face, the invoices, of which there were a large number, related to matters which needed to be carried out for the completion or rectification of the subcontract works. Based on a sample of 10% of the invoices, the assessor said yes. The adjudicator accepted this advice. However, Bouygues said that they had not been given an opportunity to respond to this view. The adjudicator should have found out which invoices were considered by the assessor; the criteria adopted to select the 10%; and the basis on which it was thought that this sample was representative of the whole. This all went to "*the heart of the adjudicator's decision*". Vital noted that the assessor reviewed the same invoices that their expert relied upon. These had been provided to Bouygues. This was not a case where the adjudicator considered evidence of which the parties were unaware.

The Judge agreed. There was no unfairness in the adjudicator taking into account the assessor's advice based on a sample of the invoices. He did not have to seek additional information, nor give the parties an opportunity for further comment. He had Bouygues' views on the assessor's sampling exercise in their response to the draft determination. This was another complaint as to the merits of the adjudicator's decision. Particularly given that the assessor was an expert, the adjudicator was entitled to accept his advice without seeking more information. While Bouygues disagreed with his decision to rely on the assessor's advice, there was nothing manifestly unfair in the way he went about his task.

Finally, Bouygues submitted that the parties should have had an opportunity to comment on the adjudicator's intention to rely upon his own experience. Again, the Judge disagreed. It was common for a decision-maker to draw on his own experience without giving advance notice of this to the parties. There is nothing particularly unusual here, but it does reinforce the robust approach of the courts to enforcement.

Adjudication: negligent misstatement

Hillcrest Homes Limited v Beresford and Curbishley Limited

Hillcrest engaged B&C under a JCT D&B Contract to design and construct a residential property in Prestbury. The Contract contained the standard wording that if "any dispute or difference arises under the Contract" it could be referred to adjudication under the Scheme. Before entering into the Contract, Hillcrest had engaged structural engineers. The Employer's Requirements provided that the engineer's appointment would be novated to B&C. The engineer was reluctant to sign the novation agreement, although it did eventually in October 2012. Practical Completion had been achieved in September 2012.

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Claims for negligent misstatement and misrepresentation are usually outside the ambit of adjudication provisions.

B&C commenced adjudication proceedings against Hillcrest seeking declaratory relief relating to the failure to novate the structural engineer's appointment. The adjudicator decided (amongst other things) that (i) Hillcrest had made a negligent misstatement regarding novation; (ii) the negligent misstatement was a misrepresentation that entitled B&C to recover damages but not loss and expense; and (iii) the novation agreement was void and the structural engineer's appointment had not been novated. The Judge decided that:

- (i) The claims for negligent misstatement and misrepresentation were outside the ambit of the Contract's adjudication provisions because they did not arise under the Contract but under the law of negligent misstatement or under the Misrepresentation Act 1967 ("Act") and so the adjudicator did not have jurisdiction to deal with them.
- (ii) B&C had referred more than one dispute to adjudication: (a) a dispute relating to negligent misstatement and the Act; and (b) a dispute as to whether there had been an effective novation of the structural engineer's appointment to B&C (this dispute did fall within the ambit of the Contract's adjudication provisions).
- (iii) The adjudicator's decision that the novation agreement was void was not based on legal arguments advanced by the parties and so the adjudicator had breached the rules of natural justice.
- (iv) Hillcrest was not entitled to damages: it was not a breach of contract to refer a dispute to adjudication that fell outside the ambit of the Contract's adjudication clause nor was there an implied term that the parties would only refer a dispute to adjudication that fell within the ambit of the Contract's adjudication clause.

Adjudication: third party rights

Hurley Palmer Flatt Ltd v Barclays Bank plc

As Mr Justice Ramsey explained, this claim raised an issue of the extent to which the rights of a third party enforceable under the Contracts (Rights of Third Parties) Act 1999 ("the 1999 Act") enabled that third party (Barclays Bank plc) to adjudicate a dispute arising under a professional appointment entered into between HPF and Barclays plc (the client). Disputes arose over the chilled water system engineered by HPF. Clause 14.3 of the appointment contained the following provision:

"Any Affiliate with a direct interest in the Project shall be entitled to enforce the terms of this Agreement as "Client" always provided that the Consulting Engineer shall be entitled [to] rely on the equivalent defences in respect of such liability which it has against the Client."

Clause 2.3 of the appointment noted as it not uncommon, that unless expressly stated otherwise nothing in the agreement conferred or was intended to confer any rights on any third party pursuant to the 1999 Act. The appointment also provided for adjudication. The third party gave a notice of adjudication, seeking damages against HPF in relation to the claim of defects in the chilled water system based on rights as an Affiliate under the appointment. HPF then sought declarations at the TCC that the third party was not entitled to commence the proceedings and that the adjudicator lacked jurisdiction.

The Judge considered that clause 2.3 meant that, with the express exception of clause 14.3, no rights were conferred on a third party which were enforceable under the 1999 Act. Some of the contract clauses related to substantive terms and gave rise to potential liability of HPF to the client. Other provisions contained rights which were more akin to procedural rights, e.g. the right to suspend. The wording of clause 14.3 strongly indicated that it was the terms of the appointment which related to HPF's liability to the client not the procedural rights which were intended to be enforced under the terms of clause 14.3. There was therefore no freestanding right to enforce the adjudication provision.

Section 1(4) of the 1999 Act sets out the basis on which a third party can enforce a term of a contract such that a third party's right of enforcement is subject to the contract terms

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If you want to grant a third party the right to refer a dispute to adjudication you must expressly agree to it as part of the contract.

and conditions and here the Judge gave as an example, the “classic case” where this provision would be engaged, namely where there is an arbitration clause. Adjudication is a voluntary method of dispute resolution in the sense that one party to a contract may, but is not obliged to, have a dispute temporarily resolved, pending a final determination by the courts or, if applicable, arbitration. It therefore differs in nature from the terms of an arbitration clause under which a party’s rights can only be determined by arbitration. Here, the adjudication provisions merely said that the Scheme should apply. The Scheme refers in paragraph 1(1) of Part I to a party to a construction contract being able to give written notice to refer disputes to adjudication. Barclays, the third party, was not a party to a construction contract.

Without provision making adjudication applicable to the relationship between Barclays as third party and HPF, the terms of the adjudication provisions would not be applicable. This was the first time the TCC has been asked to consider whether a third party was granted a right to refer a dispute to adjudication under a contract’s adjudication clause. The clear answer to the question raised was no. Therefore if parties want to grant a third party the right to refer a dispute to adjudication they must expressly agree to it as part of the contractual arrangements.

Adjudication: letter of intent

Twintec Ltd v Volkerfitzpatrick Ltd

VFL was the main contractor for the construction of a warehouse and wine bottling plant. By a Letter of Intent (LOI) dated 5 October 2007, VFL selected Twintec to construct the floor slabs stating that it was not yet in a position to enter into a subcontract. The LOI authorised Twintec to proceed immediately in accordance with certain documents which confirmed the parties’ agreement to use all the terms of the DOM/2 standard form of subcontract. The dispute resolution clause in the DOM/2 standard form includes a list of adjudicator nominating bodies and provides that in default of the parties’ selection, the nominating body will be the President of the RICS.

Twintec carried out the works under the LOI. The employer then alleged that the warehouse floor was unfit for purpose. VFL arranged for the defects to be investigated and tested at a cost of £850k. VFL commenced adjudication against Twintec, who applied to the TCC for an order restraining the adjudication because the adjudicator had not been appointed under a provision that was part of its agreement with VFL.

The Judge accepted that the LOI was a simple free-standing contract that would govern the parties’ legal relations until a formal subcontract was entered into. The words “in accordance with” were to be given their natural meaning. However, as a matter of construction, secondary obligations within the DOM/2 conditions such as compliance with indemnity clauses and completing the dispute resolution clause were not incorporated into the LOI and equally were not necessary to give business efficacy to the LOI. Thus, the adjudicator did not have jurisdiction to hear the dispute and the Judge granted an injunction to restrain VFL from continuing with the adjudication.

Adjudication: final certificates

University of Brighton v Dovehouse Interiors Ltd

Dovehouse was engaged under an amended JCT Intermediate Building Contract with Contractor’s Design to carry out the fit-out of the University centre. The Contract provided for disputes or differences to be referred to adjudication under the Scheme. Practical completion was certified three months late and the parties fell into dispute concerning issues relating to time, money and incomplete works and defects. Six weeks later the final certificate was issued. Clause 1.9.1 of the Contract provided that the final certificate “shall be conclusive evidence” of the matters stated in it save that it further provided that it would not be conclusive if adjudication, arbitration or other proceedings were commenced no later than 28 days after it had been issued. Agreeing that this would be insufficient time to negotiate a settlement, the parties extended this period to 66 days. No settlement was reached.

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On day 65, Dovehouse served a notice of adjudication, referring to the final account dispute, but identifying the wrong adjudicator nominating body and giving an address different from the one specified in the Contract. It was, however, received by the University that day. The adjudicator resigned a week after his appointment as he accepted that he lacked jurisdiction. A second notice of adjudication was then served three days later correcting the error regarding the ANB. The Judge decided that:

- (i) Adjudication proceedings were commenced when the notice of adjudication was given under paragraph 1 of the Scheme (as Dovehouse argued) and not when referral was given under paragraph 7 (as the University argued). The court applied a “purposive commercial construction” to the Contract, identifying that clause 1.9.2 enabled the parties to determine for themselves the extent to which a final certificate would be evidentially conclusive and that a notice of adjudication given under the Scheme was a critical document as it defined the scope of the adjudication.
- (ii) The first notice of adjudication was not invalid even though the wrong address was given and it was served at the wrong address. As not every breach renders a notice of adjudication invalid and, as the purpose of the notice is to inform the other party (and the ANB) of what the dispute is about and to define the dispute, a technical failure to identify the correct address was not considered a fundamental non-compliance. Further, the Contract entitled the parties to serve a notice by “any effective means” and it was not disputed that the University had received the notice on the same day. The notice’s substantive purpose of commencing proceedings was achieved.
- (iii) The wrong ANB did not invalidate the first notice. As the court had already held that proceedings were “commenced” by service of the first notice and because Dovehouse was not obliged to identify the ANB in the notice, the “wrong ANB” argument fell away.
- (iv) The parties intended the saving provision in clause 1.9.2 to remain engaged – once triggered it could not be reversed – and this was consistent with what a reasonable person would envisage.

As not every breach renders a notice of adjudication invalid and, as the purpose of the notice is to inform the other party (and the ANB) of what the dispute is about and to define the dispute, a technical failure to identify the correct address was not considered a fundamental non-compliance.

Other cases: *Construction Industry Law Letter*

Access to site – mandatory injunction – ICC Rules – s.44 Arbitration Act 1996 – emergency arbitrators *Seele Middle East FZE v Drake & Scull Int SA Co*

TCC; before Mr Justice Ramsey; judgment delivered 11 December 2013

The facts

Seele was a subcontractor to Drake & Scull (“D&S”) for the façade works at the King Abdullah Petroleum Studies and Research Centre in Saudi Arabia. Clause 34.3 of the subcontract provided for arbitration in London under the ICC Rules to be governed by English law. A number of disputes arose between the parties. During November 2013 Seele removed several members of staff from site saying it wished to reorganise its works to work more efficiently. On 27 November 2013 D&S notified Seele that following the reduction in the number of workers, in accordance with the contract Seele was required to provide within 14 days a detailed schedule showing how it would remedy this “substantial and material breach of contract”.

Seele sought guarantees as to the position of its workers which D&S did not provide. From 4 December 2013 Seele would not allow its workforce to return to site with the result that the façade works came to a halt. On 7 December 2013 D&S secured Seele’s offices and storage facilities explaining that these actions were “protective measures until further notice”. On 8 December 2013 D&S issued a letter stating that all work under the sub-contract was suspended until such time as Seele had complied with the request for

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a detailed remedial programme. D&S' letter also stated that Seele would not be allowed to return to site until it had properly fulfilled this obligation.

Thereafter, Mr Perkins of Seele had a conversation with Mr Amitrano of D&S. Mr Perkins said that he needed access to the documents in Seele's site offices to reply to D&S and prepare the necessary plans. Mr Amitrano replied that he thought that Seele had all the documents because Seele personnel had been seen taking them off site. This was denied by Mr Perkins. Mr Perkins said that the only place it had all of the documents available was on site but Mr Amitrano still refused access.

Do not neglect Article 25 of the ICC Arbitration Rules which provide for the appointment of an emergency.

Under cl. 34.3 of the subcontract the seat of any arbitration was in England. Seele therefore issued an application in the TCC under s.44(3) of the Arbitration Act 1996 seeking an urgent mandatory injunction that D&S be ordered to allow Seele access to the site in order to search for and remove documents. Seele's application identified six categories of documents that it said it needed to see to enable it to respond to the 27 November 2013 letter: (1) work plans; (2) Primavera P6 files; (3) procurement schedules; (4) Seele's internal proprietary installation plan including a bespoke 3D model; (5) procurement and billing records including information on profit margins; and (6) internal records kept relating to the preparation of Seele's claims for extensions of time and additional costs, including some legal advice. Seele claimed that the documents in category (4) were proprietary and confidential, those in category (5) were commercially sensitive and confidential, and those in category (6) were protected by legal professional privilege.

Issues and findings

Did s.44 of the Arbitration Act 1996 apply?

Yes. D&S' letters of 27 November and 8 December 2013 suggested that some form of suspension or termination of the subcontract was imminent so the requirement for urgency stipulated by s.44(3) was satisfied. As no arbitrators had been appointed, the proviso within s.44(5) that the Court should only intervene if and to the extent that the tribunal was for the time being unable to act effectively, was also satisfied.

If s.44 applied, should the Court exercise its discretion in favour of granting an injunction?

Yes, where: (i) there was a high degree of assurance that at trial, Seele would be able to establish its right to ownership in the six categories of documents; (ii) damages would not be an adequate remedy; and (iii) the documents were needed by Seele so that the balance of convenience favoured the granting of an injunction.

Commentary

Section 44 of the Arbitration Act concerns the Court's powers that are exercisable in support of arbitral proceedings but the underlying ethos of the 1996 Act is that intervention by the Court should take place only in limited circumstances. If it can be shown that the application is urgent, then under s.44(3) the Court may make such orders as it thinks necessary for the purposes of preserving evidence or assets. Conversely, if there is no urgency, then under s.44(4) a Court may only make an order with the permission of the Tribunal or with the agreement in writing of all other parties to the arbitration. Section 44(5) specifically limits the Court's intervention to situations in which the Tribunal or the arbitration institution has no power or is unable for the time being to act effectively.

Here where it seemed likely that D&S were teeing up a termination notice, then the Judge considered that the urgency criterion in s.44(3) was satisfied. However, he indicated that his decision may have been different had the subcontract incorporated the latest ICC Rules, as Art.25 provides for appointment of an emergency arbitrator.

Having established that s.44(3) was satisfied, the Judge applied the usual principles concerning the granting of injunctions. As the application was for a mandatory injunction requiring a positive act from D&S, Seele had to show not just that it had a good arguable case but that there was a high degree of assurance that it would be successful at trial. Here there was evidence before the Court that D&S had flatly refused access to

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confidential and sensitive documents which Seele owned so the Judge considered this test was satisfied. Given that the documents in question encompassed privileged information and commercially sensitive data that might prejudice Seele if it fell into the hands of third parties, the Judge concluded that damages would not be an adequate remedy where it would be difficult to assess the damages Seele would suffer if it were not granted access. Finally, where Seele had demonstrated that it needed the documents and since the documents were otherwise kept secure on site for the time being, the Judge considered that the balance of convenience favoured granting a mandatory injunction.

Indemnity costs – experts – unreasonable behaviour – failure to comply with Pre-Action Protocol

Courtwell Properties Ltd v Greencore PF (UK) Ltd

TCC; before Mr Justice Akenhead; judgment delivered 4 February 2014.

The facts

Courtwell was the sub-lessee of industrial premises in Salford. Its sub-sub-lessee was Greencore who in turn had sublet to Paramount Foods (“Paramount”). Greencore’s sub-subleases expired and in April 2010 Courtwell’s surveyors prepared schedules of dilapidations showing a total remedial work cost of £1,774,000. Greencore’s building surveyor, Mr Guy, visited the site and wrote to Courtwell’s surveyor in October 2010 noting that as Paramount appeared to have no intention of leaving the premises, Courtwell would have suffered no loss. Mr Guy requested confirmation of Courtwell’s intentions for the premises.

On 26 June 2012, Courtwell’s new solicitors sent a letter of claim purportedly pursuant to the Dilapidations Pre-Action Protocol (“the Protocol”) for £700k based on capital diminution rather than remedial costs. Greencore was unable to reply within the 56-day period required by the Protocol and in September 2012 asked for access to the site and suggested that the valuers should meet to narrow issues. Courtwell replied that a meeting would achieve little, given Mr Guy’s view that there had been no loss, and stated that in the absence of a reply under the Protocol, it would press forward.

In November 2012, Courtwell issued proceedings in the TCC and at the same time offered mediation. In July 2013, Mr Guy changed jobs and was replaced by Mr Thomas as Greencore’s building surveyor. Mr Thomas and Mr Firm met on the usual without prejudice basis but relations between them quickly soured and they were unable to produce a joint statement.

The case settled on 25 October 2013, just before trial, after Greencore accepted Courtwell’s Part 36 offer for £800k inclusive of interest. Courtwell’s offer had not been formally made until 15 October 2013. As this was less than 21 days before the start of the trial CPR 36.10(4) applied, meaning that the Court was not bound to assess costs on the standard basis. On 1 November 2013, Courtwell issued an application for indemnity costs and for an order that it could depart from its costs budget. Courtwell argued that it was entitled to indemnity costs on four grounds: (i) Greencore’s failure to comply with the Protocol; (ii) Greencore’s failure to mediate; (iii) Greencore’s maintaining of a no loss defence; and (iv) the conduct of Greencore’s experts.

Issues and findings

Were there grounds to justify an indemnity costs order against Greencore?

No. (i) Where both sides were at fault, having each shown inflexibility and lack of co-operation, it would be wrong to take into account non-compliance with the Protocol in deciding whether to award indemnity costs; (ii) in the light of the poor relations between the parties and their experts, it was unlikely that mediation would have succeeded and the failure to mediate was not a factor to justify the award of indemnity costs; (iii) the no-loss defence was not so implausible that no legal and professional team should have put it forward; and (iv) where only written evidence on the experts’ conduct was before the Court and where Courtwell’s allegations of misconduct were disputed,

In the light of the poor relations between the parties and their experts, it was unlikely that mediation would have succeeded and the failure to mediate was not a factor to justify the award of indemnity costs.

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it was impossible to come to a sensible and fair conclusion on whether or not Greencore's experts had behaved so unreasonably as to justify an order for indemnity costs.

Commentary

The usual rule is that where a Part 36 offer is accepted, then costs will be assessed on the standard basis if not agreed. However, CPR 36.10(4) provides an exception if the offer is made or accepted less than 21 days before the start of the trial, in which case the rule provides that the Court may "make an order as to costs" without the prescription that any assessment must be on the standard basis.

Whilst each case will turn upon its own facts, on an indemnity cost application generally speaking, the applicant will have to show that the conduct of the paying party has been unreasonable to a high degree. This case confirms that applications for indemnity costs should be proportionate and are only likely to succeed in circumstances where there is compelling evidence of extreme and unreasonable behaviour on behalf of the paying party.

Here, the Judge had little sympathy for Courtwell's application. Both sides bore some responsibility for the failure to mediate and for non-compliance with the Protocol. Where the no-loss defence advanced by Greencore had been put together by an expert valuer and an expert surveyor with advice from solicitors and Counsel, the Judge thought it implausible that all of these could have acted in concert or even individually in an unprofessional and dishonest manner. Moreover, it was arguable that a prudent landlord would refrain from repairing or reinstating premises where the tenant was likely to stay on, so the no-loss defence was not hopeless per se.

Courtwell's expert had submitted voluminous evidence including serious charges against Greencore's experts including unprofessional conduct and lack of honesty. As the allegations were disputed and had not been tested by cross-examination, the Judge was not satisfied that there was any compelling evidence of poor conduct on the part of Greencore's experts to even begin to justify indemnity costs. Reading between the lines of the Judge's comments, it seems more likely that the Judge thought that Courtwell's experts had been more unreasonable than Greencore's representatives.

Save in cases of direct and partisan intervention in the process by the lawyers (see *Robin Ellis Ltd v Malwright Ltd* [1999] BLR 81), it is unusual for the Court to be called upon to examine the conduct of experts at meetings and in discussions with their opposite numbers. For one thing, all such exchanges will ordinarily be without prejudice. In this case, neither side raised privilege, presumably because each thought that it was necessary to open up the experts' meetings process in order to substantiate their respective positions on the allegations of misconduct. We note that the Judge did not expressly rule out cross-examination of the protagonists had this been necessary to decide the issue. Experts should therefore bear in mind that their without prejudice exchanges may not be sacrosanct and the Judge stated that an assumption that these exchanges were unlikely to be scrutinised by the Court did not in itself excuse dishonesty, unprofessional conduct, intemperate comments or other unreasonable behaviour.

JCT Intermediate Form of Contract – meaning of "appropriate deduction" *Oksana Mul v Hutton Construction Ltd*

In the TCC; before Mr Justice Akenhead; judgment delivered 5 June 2014

The facts

Oksana Mul ("the Employer") owned and occupied a large property in Kent. By a JCT Intermediate Form of Contract, the Employer engaged Hutton to carry out substantial extension and refurbishment works. The contract sum was over £3 million. The defects liability period was 12 months. With regard to defects, cl. 2.30 said:

Experts should bear in mind that their without prejudice exchanges may not be sacrosanct and the Judge stated that an assumption that these exchanges were unlikely to be scrutinised by the Court did not in itself excuse dishonesty, unprofessional conduct, intemperate comments or other unreasonable behaviour.

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"2.30 Any defects, shrinkages or other faults in the Works or a Section which appear and are notified by the... Contract Administrator to the Contractor not later than 14 days after the expiry of the Rectification Period, and which are due to materials or workmanship not in accordance with this Contract, shall at no cost to the Employer be made good by the Contractor unless the... Contract Administrator with the consent of the Employer shall otherwise instruct. If he does so otherwise instruct, an appropriate deduction shall be made from the Contract Sum in respect of the defects, shrinkages or other faults not made good."

Practical completion was certified by the Contract Administrator ("CA") on 14 May 2010. Attached to the practical completion certificate was a substantial list of works that were said to be incomplete or defective. The Employer paid the contractor, subject to retention, the final sum certified by the CA, being £4,050,000. Substantial further works were then carried out by a number of other contractors engaged by the Employer. A dispute arose between the parties in relation to defects. The Employer issued proceedings on 17 October 2013 against the contractor. The defects claim came to over £1 million and primarily related to defects in the remedial works for which either had been or would be carried out by the Employer using other contractors or tradesmen.

In its Defence and Counterclaim, the contractor pleaded that it at all times had remained ready, willing and able to repair all defects as provided by cl. 2.30 of the Contract Conditions and even after the expiry of the Rectification Period. It therefore argued that all that the Employer was entitled to was an "appropriate deduction" under cl. 2.30 and that this was to be a "sum calculated by reference to the contract rates/priced schedule of works". In respect of defects notified after the expiry of the Rectification Period, the contractor argued that there had been a failure to mitigate, which would reduce the claim to nil or to what it would have cost the contractor to remedy. The meaning of the term "appropriate deduction" was referred to a preliminary issue hearing.

Issues and findings

In respect of a defect arising within the Rectification Period of the Contract, how should an "appropriate deduction" be calculated?

An "appropriate deduction" under cl. 2.30 of the Contract means a deduction which is reasonable in all the circumstances and can be calculated by reference to one or more of the following, amongst possibly other factors:

- (a) the Contract rates/priced schedule of works/specification;
- (b) the cost to the contractor of remedying the defect (including the sums to be paid to third party subcontractors engaged by the contractor);
- (c) the reasonable cost to the Employer of engaging another contractor to remedy the defect; or
- (d) the particular factual circumstances and/or expert evidence relating to each defect and/or the proposed remedial works.

Commentary

As the Judge recognised, there is no previous authority on what the term "appropriate deduction" means. The cases that are generally cited when considering this clause in the JCT contracts are *William Tomkinson and Sons Ltd v Parochial Church Commissioner and Pearce and High v Baxter*. Those cases suggest the proposition that if a contractor is not given a reasonable opportunity to return and remedy defects then there might be a failure to mitigate, resulting in a reduction in recoverable damages to the amount that it would have cost the contractor to rectify the works.

The essence of this judgment is that what constitutes an "appropriate deduction" will very much depend on the particular circumstances and is not confined to any one form of calculation or valuation. However, the Judge also confirmed that the failure to mitigate principle is still applicable and can be applied in circumstances where the employer acts unreasonably in not giving the contractor an opportunity to make good defects. In the context of cl. 2.30 the question that will then arise is: when is it unreasonable for the

What constitutes an "appropriate deduction" will very much depend on the particular circumstances and is not confined to any one form of calculation or valuation.

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employer to engage others without giving the contractor a chance to make good? This again seems to depend on the circumstances of the particular case (i.e. poor past performance on the part of the contractor may make such a decision reasonable). Therefore, whilst it is helpful that this clause has been considered in detail, there is still a considerable degree of latitude for parties implementing this clause.

Recovery of costs – date of service of Schedule of Costs – recovery of claims – consultants’ fees

Devon County Council v Celtic Bioenergy Ltd

In the TCC; before Mr Justice Stuart-Smith; judgment delivered 14 February 2014.

The facts

Devon engaged Celtic to design and construct an in-vessel composting facility. Disputes arose between the parties, leading to a number of adjudications.

Celtic was insolvent and had entered into a deed of assignment with Knowles Ltd under which Knowles had the right to receive all sums due to Celtic under the contract between the parties. Further, Knowles represented Celtic, charging for doing so, and provided experts to act for Celtic. On 6 December 2013, Celtic referred various matters to adjudication. This was the ninth adjudication between the parties. When the Notice was issued, Celtic had failed to pay the sum of £70k that was then due to Devon as a result of the previous adjudications. Devon said that the adjudicator did not have jurisdiction and issued an application for a declaration and for an interim injunction restraining Celtic from taking any further steps until it had honoured the previous adjudication decisions. The application was listed for hearing on 20 December 2013. The day before, for the first time, Celtic indicated that Devon had never submitted an invoice and, had it done so, then it would have been paid. At the hearing on 20 December 2013, the application was adjourned to allow Devon to issue an invoice. This was done and the invoice was paid.

Devon’s application for a declaration that the adjudicator did not have jurisdiction was then heard on 17 January 2014. Devon was unsuccessful in that application and the Judge ordered that Celtic pay Devon’s costs of the application for an interim injunction (“the Application on 20 December 2013”) and that Devon pay 70% of Celtic’s costs of the jurisdiction application (“the Application on 17 January 2014”).

The parties could not agree the amounts to be paid in respect of costs and, accordingly, the matter was referred to the trial Judge for determination. In particular, Devon made a number of objections to Celtic’s costs of the Application on 17 January 2014, the primary points of contention being proportionality and the amount of time and cost of claims consultants being claimed, as against solicitors’ time and cost.

Issues and findings

If claims consultants carry out work which could reasonably have been carried out by a solicitor, should more be allowed for costs than would have been allowed if the work had been carried out by solicitors?

No.

Commentary

The Judge’s comments are noteworthy in two respects. First, for the principle that where work could reasonably have been carried out by a solicitor, then it is wrong to allow recovery of a higher sum for claims for consultants’ fees than would have been allowed if the work had been done by solicitors. Here, Knowles’ headline rates outstripped Celtic’s solicitors’ rates by more than a third and were almost double Devon’s solicitors’ rates.

In addition the Judge also applied the general principle of proportionality, taking into account, amongst other things, the fact that the Application on 17 January 2014 only lasted half a day and reducing the amount claimed by Celtic by almost half, including a substantial reduction in Counsel’s fees. The message was clear: in the case of short applications the Court will not entertain high levels of costs.

If claims consultants carry out work which could reasonably have been carried out by a solicitor, should more be allowed for costs than would have been allowed if the work had been carried out by solicitors?

No.



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