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Solicitors

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1. INTRODUCTION

Welcome to our ever-popular Summer Review, which I am pleased to report, has now reached its decennial in what is my twentieth year with the firm.

Fenwick Elliott continues to grow, with many new clients to add to our existing distinguished list. We remain the single largest specialist construction firm in the UK. This years Review reflects the needs and demands of all our clients both at home and internationally.

It comes as no real surprise that adjudication remains a fast changing area of law and as with previous Reviews, this year's edition focuses upon its continuing impact. However whilst the law and process may be dynamic, the proposed government reforms, with which at a consultation level (under the banner "Improving payment practices in the construction industry") I have been involved through TeCSA, are yet to finally materialise. With our fifth minister for the construction industry in 5 years it is perhaps not top of her agenda right now.

At the DTI post-Consultation event on 14 February 2006, former TCC Judge Humphrey LLoyd QC said that "the courts have supported the intention of the legislation, although at times, not without taking a deep breath." We devoted attention to this very issue in our last Adjudication Update Seminar, when Karen Gidwani looked at whether the enforcement of an adjudicator's decision by the courts was a foregone conclusion.

Adjudication is not where all the action is. Our international work continues to develop apace with a significant growth in the instructions we have received from across all parts of the globe. We have a very busy arbitration practice, not just in international work, and we have had many forays to the TCC this last year.

Plans are afoot to launch an International Dispatch to complement our very successful Dispatch, produced by my partner Jeremy Glover, which provides a monthly review of key legal developments. In fact the Dispatch is rapidly approaching its 75th Issue, a testament to its popularity. This Review itself, once again, provides summaries of the more 'juicy' cases from the past 12 months, taken from the Dispatch, the Construction Industry Law Letter, (edited by Tony Francis and Karen Gidwani), and the articles our team prepare for the Building website.

In the year ahead, look out for Contracted Mediation/Project Mediation, one of the new methods of managing the risk of disputes during the delivery stage of a project. In short, the project participants contract to use mediation as the primary means of dispute resolution. This process is set to have great benefits throughout the industry.

This is undoubtedly a topic which will feature in our next Capital Projects in the Education Sector seminar. Victoria Russell has spoken at both previous seminars and her piece on the Duties of Construction Professionals provides a timely warning for those who work in-house. The success of and demand for these seminars reflects the continued growth of the projects side of our practice. The articles written by Matthew Needham-Laing and Jeremy Glover on Letters of Intent and Novation reflect some of the issues which crop up on a regular basis.

We however are at the beginning of a new age in our industry the like of which is seen perhaps, if lucky, once in each generation. I refer of course to the wind up for the 'Olympics' and 2012 in a market where building activity is already at an all time high in the UK. There will be many challenges and difficulties ahead. Although it is to be hoped that innovations such as DRB's and contracted mediation will keep disputes to a minimum, we are likely to see a dedicated court at the TCC. At the same time the construction courts have set up their own mediation facilities – a reminder to us all of the importance of ADR in its many forms which we practice with great success here. Indeed our Review this year includes a summary of the various dispute resolution procedures on offer.

Once again, we have had a successful, hardworking and enjoyable year. With my excellent team we look forward to the next one. It only remains for me to thank you, our clients, for the opportunities you have given us.

Simon J A Tolson
Senior Partner

2. ADJUDICATION

We continue to hold our regular Update Seminars. Our last seminar in May 2006 was our 12th and we were fortunate to have both HHJ Peter Coulson QC and Tony Bingham as our guest speakers.

One of the speakers from Fenwick Elliott was ***Karen Gidwani*** who, in the light of the most recent court decisions, asked whether enforcement was now a foregone conclusion.

Introduction

Is the enforcement of an adjudicator's decision a foregone conclusion? It can safely be said that the short answer to this question is "no". There are a number of decisions of the High Court refusing to enforce an adjudicator's decision, a recent example being *Capital Structures* v *Time and Tide Limited*. However, the more interesting issue that arises from this question is whether the enforcement of an adjudicator's decision has become more of a foregone conclusion. Or, to turn the question on its head, whether it is becoming increasingly difficult to enforce an adjudicator's decision.

The starting point on enforcement

The starting point is, of course, the case of *Macob Civil Engineering Limited* v *Morrison Construction Limited* in February 1999 where Mr Justice Dyson said the following:

> 14. The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement… The timetable for adjudication is very tight…Many would say unreasonably tight, and likely to result in injustice. Parliament must be taken to have been aware of this…But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved.

Following this was the case of *Bouygues UK Limited* v *Dahl-Jensen UK Limited* in December 1999. Here, Bouygues challenged the adjudicator's decision on the basis that a mistake had been made in the calculation of the sum due to Dahl-Jensen. Referring to the adjudicator's mistakes, Mr Justice Dyson stated:

> 25. …If the mistake was that he decided a dispute that was not referred to him, then his decision on that dispute was outside his jurisdiction, and of no effect… But if the adjudicator decided a dispute that was referred to him, but his decision was mistaken, then it was and remains a valid and binding decision, even if the mistake was of fundamental importance.

Mr Justice Dyson reiterated what he said in *Macob* and went on to say:

> It is inherent in the scheme that injustices will occur, because from time to time, adjudicators will make mistakes. Sometimes those mistakes will be glaringly obvious and disastrous in their consequences for the losing party. The victims of mistakes will usually be able to recoup their losses by subsequent arbitration or litigation, and possibly even by a subsequent adjudication. Sometimes, they will not be able to do so, where, for example, there is intervening insolvency, either of the victim or of the fortunate beneficiary of the mistake.

Mr Justice Dyson also said that where the adjudicator has gone outside his terms of reference, the court will not enforce his purported decision, not because it is unjust but because the decision is of no effect in law and that the court should give a fair, natural and sensible interpretation to the decision in the light of the disputes that are the subject of the reference.

Therefore it has been clear from the outset of adjudication that the High Court takes a robust view of arguments put forward by parties seeking to challenge the enforcement of adjudication decisions. *Bouygues* was referred to the Court of Appeal and the judgment of Mr Justice Dyson was upheld and his earlier judgment in *Macob* was approved.

However, this has not stopped parties challenging decisions and, since the inception of adjudication, scores of enforcement actions have been heard by the High Court and, occasionally, the Court of

Appeal. In turn, over the past 7 years, parameters have been set by which parties can ascertain the likelihood of successfully challenging an adjudicator's decision.

What is now becoming a matter of concern to lawyers, commentators and the industry generally now is whether these parameters, which were fairly restrictive to begin with, are becoming even more restrictive as time passes. This is particularly so in light of the recent decision of the Court of Appeal in *Carillion* v *Devonport Royal Dockyard* and the decision of Mr Justice Jackson in *Kier* v *City & General (Holborn) Limited*.

The grounds upon which to challenge an adjudicator's decision

As was made clear in *Macob*, just because an adjudicator has made a mistake does not mean that their decision is unenforceable. Provided that that mistake was made within the adjudicator's jurisdiction then it cannot be challenged.

There are a number of ways of challenging jurisdiction, however, and the best starting point is to ensure that the provisions of the Housing Grants Construction and Regeneration Act 1996 in relation to adjudication have been complied with.

For example, there must be a dispute for an adjudication to occur. Therefore the first method of challenging an adjudicator's decision is to argue that there is no dispute between the parties and therefore the adjudicator has no jurisdiction.

In theory, this is a fine legal argument. In practice, it is my opinion that it is very difficult to argue this ground successfully, particularly following the judgment of Mr Justice Jackson in *AMEC* v *Secretary of State for Transport*. The guidance given in that case was that the circumstances from which a dispute can emerge are variable; it is very much open to the courts to interpret negotiations or courses of dealing prior to adjudication as giving rise to a dispute. Accordingly one can rarely challenge a decision on this basis.

The second popular jurisdictional challenge is to state that the contract between the parties is not a construction contract for the purposes of the Housing Grants Construction and Regeneration Act or is not a contract in writing or evidenced in writing. The definition of "construction contract" is set out at s.104 of the Act which states that a construction contract is one for the carrying out of construction operations (a term also defined by the Act), for the arranging for the carrying out of construction operations by others and for the providing of labour or the labour of others for the carrying out of construction operations. Employment contracts are excluded from the definition as are various other types of contract, for example those for the development of land and PFI agreements.

The cases that have arisen in relation to whether a contract is a construction contract are not numerous and tend to be relatively straightforward on their facts. What has caused some difficulty is where a party challenges the adjudicator's jurisdiction on the basis that the construction contract is not in writing or not evidenced in writing. This is a requirement for statutory adjudication pursuant to section 107 of the Act. Initially the definition of "in writing" at section 107 of the Act was considered to be very wide.

However, in the case of *RJT Consulting Engineers Limited* v *DM Engineering (Northern Ireland) Limited*, the Court of Appeal applied a much stricter interpretation; holding that the whole of the agreement had to be evidenced in writing. In the recent case of *Stratfield Saye Estate Trustees* v *AHL Construction Limited*, Mr Justice Jackson followed the reasoning in the Court of Appeal and stated that:

> an agreement is only evidenced in writing for the purposes of section 107, subsections (2), (3) and (4), if all the express terms of that agreement are recorded in writing. It is not sufficient to show that all terms material to the issues under adjudication have been recorded in writing.

Therefore the parameters in this type of case have also been defined, discouraging parties from raising this argument as a challenge to an adjudicator's decision.

The third ground on which to challenge the enforcement of an adjudicator's decision is to challenge the decision on the basis that the adjudicator is in breach of the rules of natural justice. The common law rules of natural justice are twofold:

Firstly, every party has the right to a fair hearing – in practice this means proper notice and an effective opportunity to make representations before a decision is made.

Secondly, every party has the right to an unbiased tribunal.

Therefore natural justice encompasses allegations of impartiality and bias as well as procedural unfairness and a myriad of other issues of conduct which an Adjudicator might fall foul of.

Given the difficulty in challenging adjudicators' decisions on the other grounds set out above, a challenge on the basis of natural justice has been seen as the most likely challenge to be successful. Some examples of cases where the behaviour of the adjudicator was considered to be in breach of the rules of natural justice are as follows:

- *Discain* v *Opecprime* (August 2000). An adjudicator spoke to one party on the telephone without communicating the contents to the other.
- *Glencot Development and Design Co. Ltd* v *Ben Barrett & Son (Contractors) Limited* (February 2001). The adjudicator became involved in mediating some of the issues between the parties.
- *Balfour Beatty* v *Lambeth Borough Council* (April 2002). The adjudicator undertook delay analysis work without giving the parties the opportunity for further comment.
- *Shimizu Europe Limited* v *LBJ Fabrications Limited* (May 2003). The adjudicator rejected the position of both parties that they had contracted on the basis of a letter of intent, and did not give the parties the opportunity to make further submissions on the question of contract formation.
- *London & Amsterdam Properties Limited* v *Waterman* (December 2003). The Adjudicator allowed late evidence from the referring party.
- *Costain* v *Strathclyde* (December 2003). Strathclyde claimed that the adjudicator had obtained professional advice but failed to disclose the results to the parties.
- *Buxton Building Contractors Limited* v *Governors of Durand Primary School* (April 2004). The adjudicator failed to consider relevant information submitted in relation to a cross-claim.
- *A&S Enterprises* v *Kema* (July 2004). The adjudicator made adverse comments on the failure of an individual to attend a meeting.
- *Amec Capital Projects Limited* v *Whitefriars Estates* (February 2004). At first instance it was held that there was a real possibility that the adjudicator was biased. The adjudicator had obtained legal advice some of which he had not disclosed to the parties and another part of which (on jurisdiction) he had not disclosed until after he had decided the question of jurisdiction. This decision was overturned by the Court of Appeal in October 2004.
- *Ardmore Construction Limited* v *Taylor Woodrow Construction Limited* (January 2006). The adjudicator agreed to an alternative claim in relation to overtime working which he did not raise with the responding party.

The Carillion case

In April 2005, Mr Justice Jackson gave judgment in the case of *Carillion Construction Limited* v *Devonport Royal Dockyard*. Devonport Royal Dockyard Limited were engaged by the Ministry of Defence to carry out substantial refurbishment works to a number of docks at the Devonport Royal Dockyard in Plymouth. Devonport in turn engaged Carillion as a subcontractor.

In addition to the subcontract, Devonport and Carillion entered into an alliance agreement which made provision for payment to Carillion on a target cost basis with a pain share/gain share provision.

Substantial delays occurred during the course of the works as a result of design matters for which Carillion was not responsible and substantial delays and cost increases arose generally on the project as a whole. Disputes arose between Devonport and Carillion as to Carillion's entitlement to payment and in particular the operation of

the target cost provisions of the alliance agreement. Issues also arose as to defects in Carillion's works.

On 4 January 2005, Carillion served a notice of adjudication on Devonport claiming approximately £12 million plus interest. Devonport maintained that in fact Carillion had been significantly overpaid and that remedial works to the value of approximately £20 million were necessary and that they should also be taken into account.

Having considered the issues before him, the adjudicator awarded Carillion approximately £10.6m including interest. Devonport refused to pay Carillion and Carillion referred the matter to court for enforcement. One argument that Devonport raised was that the adjudicator's decision was made on an unfair basis in breach of the rules of natural justice.

In particular, Devonport contended that the adjudicator had not taken into account certain submissions that had been made on the target cost issues and, in relation to the defects claim, that he had not considered Devonport's expanded defects claim, simply the original defects claim, that he had not given the parties the opportunity to comment on the 20 per cent deduction he made on the original defects claim and finally he had given no or no adequate reasons for his decision.

Mr Justice Jackson held that the adjudicator's decision was not in breach of the rules of natural justice and, after considering the relevant cases on natural justice, restated four basic principles as follows:

> 1. The adjudication procedure does not involve the final determination of anybody's rights (unless all the parties so wish).
>
> 2. The Court of Appeal has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law: see **Bouygues**, **C&B Scene** and **Levolux**.
>
> 3. Where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural justice, the court will not enforce his decision: see **Discain**, **Balfour Beatty** and **Pegram Shopfitters**.
>
> 4. Judges must be astute to examine technical defences with a degree of scepticism consonant with the policy of the 1996 Act. Errors of law, fact or procedure by an adjudicator must be examined critically before the Court accepts that such errors constitute excess of jurisdiction or serious breaches of the rules of natural justice: see **Pegram Shopfitters** and **Amec**.

The Judge then set out five propositions which bear upon the consideration of natural justice in the enforcement of adjudicators' decisions. Of note are the following principles:

- If an adjudicator declines to consider evidence which, on his analysis of the facts or the law, is irrelevant, that is neither (a) a breach of the rules of natural justice nor (b) a failure to consider relevant material. If the adjudicator's analysis of the facts or the law was erroneous, it may follow that he ought to have considered the evidence in question. The possibility of such error is inherent in the adjudication system. It is not a ground for refusing to enforce the adjudicator's decision.

- It is often not practicable for an adjudicator to put to the parties his provisional conclusions for comment. Very often those provisional conclusions will represent some intermediate position, for which neither party was contending. It will only be in an exceptional case such as *Balfour Beatty* v *the London Borough of Lambeth* that an adjudicator's failure to put his provisional conclusions to the parties will constitute such a serious breach of the rules of natural justice that the Court will decline to enforce his decision.

- If an adjudicator is requested to give reasons pursuant to paragraph 22 of the Scheme, a brief statement of those reasons will suffice. The reasons should be sufficient to show that the adjudicator has dealt with the issues remitted to him and what his conclusions are on those issues. It will only be in extreme circumstances that the court will decline to enforce an otherwise valid adjudicator's decision because of the inadequacy of the

> reasons given. The complainant would need to show that the reasons were absent or unintelligible and that, as a result, he had suffered substantial prejudice.

This case was appealed and in November 2005 the Court of Appeal heard an application for permission to appeal. On the natural justice issues, the Court of Appeal refused permission to appeal. The judgment was delivered by Lord Justice Chadwick who indicated Court of Appeal's broad agreement to the propositions set out by Mr Justice Jackson who went on to say:

> 85. The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator. The courts should give no encouragement to the approach adopted by [Devonport] in the present case…
>
> 86. It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels "excess of jurisdiction" or "breach of natural justice". It must be kept in mind that the majority of adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case. Parliament may be taken to have recognised that, in the absence of an interim solution, the contractor (or subcontractor) or his sub-contractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting the legitimate cash-flow requirements of contractors and their subcontractors. The need to have the "right" answer has been subordinated to the need to have an answer quickly…
>
> 87. In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator…

Whilst it has always been acknowledged by those who use adjudication that the courts do not like challenges to an adjudicator's decision, this judgment in such strict terms from the Court of Appeal can only further restrict the ability of parties to successfully challenge an adjudicator's decision. This now seems to be likely.

When Mr Justice Jackson gave judgment in *Carillion* at first instance he stated that the principles that he had set out were reconcilable with the decision in *Buxton* v *Governors of Durand Primary School*. You may recall that that was the case where the adjudicator failed to take into account the counter claim and set-off argument made by the school in defence to a claim for retention from Buxton. HHJ Thornton QC held that the adjudicator was in breach of the rules of natural justice and the decision was not enforced. In the Court of Appeal judgment in *Carillion*, Lord Justice Chadwick cast doubt over whether the decision in Buxton was right at all.

This point has now been followed up. In March 2006, Mr Justice Jackson delivered judgment in the case of *Kier Regional Limited (t/a Wallis)* v *City & General (Holborn) Limited*.

The Kier case arose from one of a number of disputes in relation to works carried out by Kier for City & General at the site of the former Patent Office Library in London. The parties have adjudicated on more than one occasion and this case relates to adjudications two and three.

In adjudication number two, the adjudicator awarded Kier an extension of time of 28 weeks in addition to an extension of time of 31 weeks previously granted by the Contract Administrator, AYH. Based on that adjudication award, Kier made a further application for loss and expense of approximately £1.3m. AYH's Interim Certificate number 32 included no further amounts for loss and expense than had been awarded previously. Kier commenced adjudication number three on the loss and expense claim.

City & General served an adjudication Response advancing various lines of defence

and including two experts' reports which neither Kier nor the Contract Administrator had seen before. Kier invited the adjudicator to ignore the evidence of the two new reports on the basis that they constituted new evidence.

On 28 October 2004 the adjudicator published his decision in Kier's favour. In relation to the two experts, reports, the adjudicator agreed with Kier that the reports were not before the Contract Administrator when he produced valuation number 32 and that they were therefore not relevant to the way in which he prepared his valuation. The adjudicator stated that he was required to decide whether the Contract Administrator was right in all the circumstances known to him at the time to reject Kier's claim. The adjudicator found that the new reports were new evidence not known to the parties at the time the dispute crystallised and that he should therefore not take them into account in the adjudication.

City & General refused to pay the adjudicator's award, stating that the adjudicator had wrongly refused to pay any regard to the two experts' reports and as a result the process leading to his decision was manifestly unfair and the decision a nullity.

Before turning to Mr Justice Jackson's judgment, I pause here to say that the argument put forward by City & General was not without authority. In addition to the Buxton case, there is the case of *William Verry* v *Furlong Homes*, which was decided by HHJ Peter Coulson in January 2005 and the case of *Quietfield* v *Vascroft* decided by Mr Justice Jackson in February 2006. In *William Verry*, Furlong in its response to a final account adjudication submitted that it had a claim for a longer extension of time than had previously been applied for and submitted evidence to that effect. The adjudicator took that evidence into account and his decision was enforced. In *Quietfield*, Vascroft defended a liquidated damages claim with an extension of time submission, some of which had been seen before in a previous adjudication and some of which was new information. The adjudicator refused to take into account the extension of time submission on the basis that the first adjudication had already dealt with the matter of the extension of time. When the Adjudicator issued an award in Quietfield's favour, Vascroft challenged the award. The Judge held that as Vascroft's defence included new evidence, it was on different grounds than those previously considered in the first adjudication. He therefore refused enforcement.

In *Kier* v *City & General*, Mr Justice Jackson held that the failure by the adjudicator to take into account the two experts' reports was not enough to render his decision a nullity. The decision was therefore enforced. Counsel for the parties made submissions to the Judge in relation to *Buxton*, *William Verry*, *Quietfield* and *Carillion*.

Mr Justice Jackson considered the cases of *Buxton* and *Carillion* and said firstly that it is now unclear whether or not *Buxton* was rightly decided and secondly that in light of *Carillion* the passages in which the judge asserted that the adjudicator's failure to consider the school's evidence rendered the adjudicator's decision unenforceable must now be regarded as incorrect. In relation to *Quietfield*, Mr Justice Jackson categorised this as one of the "plainest cases" referred to by the Court of Appeal in *Carillion*.

Mr Justice Jackson concluded his judgment by saying that whilst he saw considerable force in the contention that the adjudicator ought to have taken the two expert reports into account, it was not necessary finally to decide this point for one simple reason: that the error allegedly made by the adjudicator is not one which could invalidate his decision. The adjudicator considered each of the arguments advanced by City & General in its Response. At worst, the Judge concluded, the adjudicator made an error of law which caused him to disregard two pieces of relevant evidence, but in the light of the Court of Appeal's decision in *Carillion*, that error would not render the Adjudicator's decision invalid. Further and in any event, this case was not one of "the plainest cases" of breach of natural justice referred to in *Carillion*.

Conclusion

The lifeblood of the construction industry is cash flow and adjudication and the provisions of the Housing Grants Construction and Regeneration Act 1996 are aimed at enhancing cash flow to help the industry operate as efficiently as possible. When parties challenge adjudicators' decisions they are doing so because they are

dissatisfied with the outcome. This is in contradiction to the principle of "pay now and argue later".

Over the past seven years, the courts have closed various doors to challenging adjudication decisions. For example, the decision in *Bouygues* in relation to errors and the attitude of the court in relation to potential insolvency. *Carillion* and *Kier* are examples of another such door closing which impacts on every type of challenge, not just those relating to natural justice.

In the cases reported between May 2004 and 2005 approximately two-thirds were enforced and one-third successfully challenged. The effect of the *Carillion* case, therefore, will only be known over the next few months.

Whatever the effect of that case may be, it is certainly one of the issues that will be discussed at our next Adjudication Seminar.

3. DISPUTE RESOLUTION PROCEDURES

Adjudication is, of course, only one type of dispute resolution. In a paper prepared for the RICS, ***Nicholas Gould*** outlines the various options and suggests some of the advantages and pitfalls offered by them.

Introduction

Arbitration was for many years the traditional method for the final resolution of construction disputes. That position has changed for a number of reasons. First, the increasing use from 1990 onwards of a range of ADR techniques, primarily mediation, and then the introduction of adjudication introduced on 1 May 1998.[1] Arbitration and litigation have also been the subject of review. A new Arbitration Act was introduced in 1996, and litigation procedures were also reformed during that year.

This article outlines the range of dispute resolution techniques that are now available in the construction industry. It considers the main driving factors for choosing any particular route and considers the practical applications of the principal techniques.[2]

Arbitration

Arbitration is a private dispute resolution process, in which the parties to the dispute agree to have it settled by an independent third-party arbitrator and to be bound by the decision that he or she makes. The agreement could be entered into after the dispute has arisen, or, as is more common, an agreement could be included within the contract. JCT forms of contract include an arbitration provision as does the ICE and indeed many of the other standard forms.

The arbitrator could be chosen by agreement between the parties, or appointed by a nominated body identified in the contract, such as the Royal Institution of Chartered Surveyors. The jurisdiction of the arbitrator is fixed by the terms of the arbitration agreement and the scope of the dispute referred to the arbitration in the notice of arbitration. The Arbitration Act 1996 states in section 1(a) that "the object of arbitration is to obtain a fair resolution of disputes by an impartial tribunal without unnecessary delay or expense". The Act allows the parties to agree how the dispute is to be resolved, subject to public interest safeguards.

The arbitrator is to act fairly and impartially between the parties, giving each of them an opportunity to put their case. The arbitrator should also adopt procedures which are suitable for the particular case and avoid unnecessary delay or expense, and to provide a fair means for resolving the dispute.

Three of the primary reasons why arbitration is selected in preference to litigation are:

- Privacy and confidentiality. Arbitration is generally private and exclusive. It is only in a small number of cases in which a right of appeal by the courts is accepted that the issues between the parties are made public.
- Choice of arbitrator. The parties can choose the arbitrator or arbitration panel, but are unable to select a particular judge.
- Flexibility. Arbitration is generally a more flexible and versatile process than litigation. For example, the parties could agree that an arbitrator could

[1] Section 108 of the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA").
[2] For a more detailed discussion of each technique see N Gould, et al (1999) *Dispute Resolution in the Construction Industry*, Thomas Telford, London.

make a decision based upon commercial principles rather than being restrained by the strict application of the law.

Time and cost have also been considered an advantage, although many have complained that arbitration is a costly and time-consuming process. More recent experience has suggested that some arbitrators have reformed the process, most notably because of their experience with the rapid process of adjudication. Some arbitrators have brought their adjudication experience into arbitration and are able to deal with arbitrations in a more efficient and cost-effective manner.

100-day arbitration

Two separate 100-day arbitration procedures have been produced. CIMAR produced an optional 100-day arbitration procedure requiring the parties to:

- Serve a claim, if not already served, within 14 days;
- Serve a defence within 21 days;
- Serve a reply (and any defence to a counter-claim) within 14 days;
- Subject to each of the above serve all documents, witness statements and experts' reports;
- No further documents can be served unless requested by the arbitrator.

The hearing should not exceed 5 days, and the arbitrator is required to provide his or her award within 18 days of the hearing.

On 1 July 2004, the Society of Construction Arbitrators issued its 100-day arbitration procedure. The arbitrator has an overriding duty to make his award within 100 days from delivery of the defence to the arbitrator or the arbitrator's direction. As a result, the 100-day procedure does not start until all of the defences have been served. It could therefore take some time to reach that point. However, once the pleadings are completed there is then the benefit of concluding the arbitration within 100 days.
There appears to be very little experience of the 100-day procedure currently, although it is hoped that more parties will, in the interests of saving costs, adopt the 100-day procedure for those disputes that cannot be finally resolved by way of adjudication, or some other form of ADR.

Mediation and Conciliation

ADR is usually taken to mean "alternative dispute resolution", or "appropriate dispute resolution". The most frequently encountered ADR technique is mediation or conciliation. There is little difference between the processes; however, a distinction that can be drawn is that in the construction industry conciliation might be more evaluative. An example of this is the ICE conciliation procedure. If the parties cannot agree a settlement then the conciliator will make a binding recommendation. On the other hand, CEDR promote a process of mediation whereby the mediator does not make a recommendation.

Mediation is essentially an informal process in which the parties are assisted by one or more neutral third parties in their efforts towards settlement. Mediators do not judge or arbitrate disputes. They advise or consult impartially with the parties in order to try to find a mutually agreeable resolution to the dispute. Normally, a mediator cannot and does not impose a decision on the parties, but assists them through their own settlement.

This does not mean that mediation is a soft option. Mediators should and do use a variety of techniques to explore the basis of the dispute and seek a resolution. This can often mean that the parties need to make some tough decisions during the course of the mediation. Essentially, the parties must reach an agreement, and so need to take a sensible and pragmatic view about the issues in dispute. In some respects, the soft option is to allow the judge or arbitrator to make that decision for them. In many mediations, the parties need to make some difficult decisions about whether to pursue or abandon parts of their claim.

The main benefits of mediation are:

- Speed. The average mediation lasts 1-2 days. Complex multi-party, multi-million-pound disputes can be resolved in this period. There is of course a short period of time leading up to the mediation during which the parties

exchange relevant documents and outline their position.

- Costs. Clearly a short mediation is far cheaper than a lengthy trial or arbitration.

- Confidentiality. The proceedings are, like mediation, confidential.

Mediation has grown steadily in the UK since 1990, and is now used in a wide range of disputes, especially construction and engineering disputes.

Expert Determination

Expert determination is a process in which the parties instruct a third-party expert to decide their dispute. The parties agree in their contract (or once a dispute has arisen) that an expert will decide a technical or valuation issue. It is frequently encountered in rent reviews and company valuations. Expert determination is also encountered in multi-stage dispute resolution procedures, whereby an expert might determine a valuation or technical matter, while disputes about the legal meaning of the document are referred to arbitration or the courts.

Providing that the expert considers the question put to him or her, then a decision cannot be appealed. In the case of *Nikko Hotels (UK) Ltd* v *NEPC Ltd*[3] the judge considered that provided the expert asked the correct question, then the decision will be binding, even if the decision seemed entirely incorrect. However, if the expert answered the wrong question the decision would be a nullity.

Adjudication

A contractual adjudication procedure was included in the now out-of-date domestic forms of subcontract. However, it was rarely used in practice, and the powers of an adjudicator were quite limited. A statutory backed adjudication procedure was introduced on 1 May 1998 under section 108 of the HGCRA. This built upon one of the recommendations of the Latham report.

Under Part II of the Act, a party to a construction contract has the right to refer "at any time" a dispute arising under the contract to adjudication. The Act only applies to "construction contracts" which are defined within sections 104 and 105 of the Act. However, this covers most of the construction operations carried out in the UK, as well as appointments of construction professionals, such as surveyors. Providing that the construction contract complies with the minimum requirements of section 108 of the Act, then the contract can set out any supplementary adjudication procedures. The eight minimum requirements of section 108 are:

- There must be a right to serve a notice "at any time" of an intention to refer a dispute to an adjudicator;

- adjudicator should be appointed within 7 days of the notice;

- An adjudicator is to reach a decision within 28 days;

- The time for the giving of the decision may be extended by a further 14 days if the referring party agrees;

- The adjudicator must act impartially;

- The adjudicator may take the initiative in ascertaining the facts and the law;

- The decision of an adjudicator is binding; and

- An adjudicator has immunity, unless acting in bad faith.

An adjudicator's decision is binding and must be complied with, unless or until the matter is resolved in litigation or arbitration, or the parties settle their differences by consent.

A large number of adjudications have now been carried out, and the general consensus appears to be that the procedure is very successful. The cases that have been reported can be seen at the Adjudication Society's website.[4] The DTI has recently consulted the industry about some amendments to adjudication legislation, and although some improvements would certainly be welcome, it seems that any changes to the legislation will be minimal.

[3] [1991] 2 EG 86

[4] www.adjudication.org

Dispute boards[5]

Dispute boards cover the concepts of dispute review boards "DRB" and dispute adjudication boards "DAB". DRBs initially developed in the USA. DRBs comprise three independent people who evaluate disputes during the course of the project and make settlement recommendations to the parties. The recommendations are not binding.

Each party selects a board member and the parties may then agree on the third, or if they cannot agree the two board members will select the third board member. The DRB then periodically visits the site to gain familiarity with the project and the individuals working on the project. This means that if a dispute arises the board members understand the project and have already built some rapport with the individuals working on the project. They can then deal with disputes by hearing presentations from the parties and suggest solutions.

The term DRB can be misleading, as many contracts that include a DRB now provide for the DRB to make binding decisions. One should therefore carefully check the contracts in order to see what it is the DRB is actually doing.

More recently, a DAB process has been included in the 1999 FIDIC suite of standard form contracts. The key distinction between a DRB and a DAB is that a DAB considers submissions from the parties and then issues a written binding decision. The parties are obliged to comply with the decision, and unless they issue a notice of dissatisfaction within 28 days of the giving of the decision, the decision becomes final and binding.

The FIDIC form of contract provides a period of 84 days from the notice of dispute to the giving of the decision. The FIDIC contract is relatively widely used on substantial international projects. If FIDIC were to be used in the UK, then the DAB procedure would not comply with the HGCRA (because the decision is not given within 28 days) and so the parties will be able to refer a dispute to adjudication under the Scheme for a decision within 28 days. However, FIDIC is used on large international projects where the UK legislation does not apply. Further, the 84-day period is more appropriate for international projects where the DAB members will probably need to travel from various parts of the world in order to meet up and review the projects. Coordinating DAB meetings therefore takes time.

Project mediation

Project mediation attempts to fuse team building, dispute avoidance and dispute resolution into a single procedure. A project mediation panel is appointed at the commencement of a project. It comprises usually a lawyer and one commercial expert who are additionally trained as mediators. There is an initial meeting at the start of the project in order to familiarise the project team with the procedures.

The panel visits the project during the course of construction. They become familiar with the project and the individuals working on the project. The project mediators are then available to resolve any differences, hopefully before they escalate. Project mediation is, therefore, very much a dispute avoidance technique, although with the ability to hold informal or formal 1-day mediations during the project to resolve any issue that might arise.

It is a recent development and has only been used on a small number of occasions. However, it does offer some distinct advantages:

- Economy

  It is far more economic than a DRB or DAB, and is therefore available for use on many small and medium-sized contracts. A single project mediator could of course be used on a smaller project.

- Dispute Avoidance

  Many in the construction industry now place great emphasis upon dispute avoidance and are more willing to face up to and deal with disputes in a commercial manner.

  Project mediation allows such players in the industry to avoid and resolve disputes more economically.

[5] For further information on DRB's see Nicholas' article below.

- Confidential

  It is confidential and effective.

The author has drafted a project mediation procedure that CEDR is hoping to launch later this year. A standard procedure will be available for those would like to use project mediation on their projects.

Conclusion

There is clearly a wide range of dispute resolution techniques available to those working within the construction industry. Many of the standard forms will dictate the applicable dispute resolution technique for a particular project. Care is therefore needed when putting together contract documents. Thought should be given to the most appropriate dispute resolution technique for a particular project, or better still a dispute escalation clause should be included which provides for disputes first to be considered by senior managers before progressing to mediation and then either litigation or arbitration.

If the Housing Grants Act applies, then adjudication will always be available "at any time". In respect of arbitration, thought should be given to whether the 100-day procedure is an appropriate one that could be adopted for the project. For lower-value projects the 100-day procedure should certainly be seriously considered; however, for larger projects it is perhaps less desirable.

4. INTERNATIONAL ARBITRATION – Determining the Procedural Law

As Simon Tolson indicated in his introduction, Fenwick Elliott is becoming increasingly involved in international work. We have been involved in cases across the globe during the past 12 months. One of the advantages Fenwick Elliott can offer is that London is one of the leading locations for international arbitration. Indeed, the location of an arbitration can be one of the key factors in determining the procedural law governing an international arbitration.

As ***Yann Guermonprez*** explains, the procedural or "curial law" which governs an international arbitration can have a tremendous impact on the proceedings as the arbitral tribunal will turn to it in order to decide any number of key matters ranging from whether or not the dispute is actually capable of being referred to arbitration, to whether or not to order interim measures, to the final judgment itself.

The purpose of Yann's note is both to review the existing theories concerning how arbitral tribunals should determine the procedural law and to look at the question as to how one determines the seat of an arbitration in the absence of agreement.

Influence of the seat of the arbitration

English law clearly favours the orthodox theory whereby the law of the seat is necessarily the procedural law governing the arbitration. Authority for this was confirmed in *Channel Tunnel Group Ltd* v *Balfour Beatty Construction Ltd* [1993] AC 334 where the court held that the presumption in favour of the law of the "seat" was "irresistible" in the absence of an explicit choice of some other law.

This position is also supported by the New York Convention (Article V.I(d)) which provides that an award may be set aside by the courts of the country where enforcement of an arbitral award is sought if "the arbitral procedure was not in accordance with the agreement of the law of the country where the arbitration took place".

In England, the 1996 Arbitration Act has further greatly diminished the prospect of an arbitration being governed by the procedural law of another state. As noted by Mustill:

> Given that the Act is the parliamentary expression of a national policy concerning the arbitral process it seems unlikely that even an express choice of foreign law in relation to an arbitration with a seat in England could have any impact on the mandatory provisions of the Act, and equally that anything other than such an express choice in writing could enable the rules of the foreign law of arbitration to take precedence over the non-mandatory provisions of the English Act.

Swiss law, like English law, is particularly clear on the link between the curial law and the seat of the arbitration. Article 176(1) of Loi Fedérale sur le Droit International Privé provides that:

> The provisions of this chapter [on International Arbitration] shall apply to

> any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time when the arbitration agreement was concluded, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.

The seat of the arbitration is therefore significant, as, under most legal systems, it will determine the procedural law, which will apply to an international arbitration. However, most does not mean all. The same approach is not evident in all jurisdictions.

Fouchard Gaillard and Goldman are advocates of the position that the seat of the arbitration will not necessarily determine the curial law. In their textbook on International Commercial Arbitration, they state:

> It is nowadays generally accepted that the law governing the arbitral procedure will not necessarily be the same as that governing the merits of the dispute, or indeed that of the seat of the arbitration. The only rules that will prevail over those of the law which otherwise governs the procedure will be the mandatory procedural rules of law of the jurisdiction where any action to set aside or enforce the award is heard.

In support of this position, the authors also refer to Article 19 of the UNCITRAL Model Law, which, they argue, opts for a considerably reduced role of the seat in determining the law applicable to the procedure. Article 19 (Determination of Laws of Procedure) states, at paragraph 1, that subject to the mandatory provisions of the Model Law:

> the parties are free to agree on the procedure to be followed by the arbitral tribunal … failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such a manner as it considers appropriate.

They submit that international arbitration practice has moved away from applying the law of the seat of the arbitration in the absence of a contrary intention of the parties. Instead, it now allows the arbitrators complete freedom in choosing the applicable procedure or, instead, resolving procedural issues as and when they arise. They refer in particular to the 1976 case of *Texaco Overseas Petroleum Co & California Asiatic Oil Co.* v *Government of the Libyan Arab Republic*, 17 I.L.M. (1978) which applied rules of international law and not the law of the seat. According to the authors, this award reflects the dominant trend now found in international case law.

Therefore depending on the nationalities of the parties on the other side and their legal advisors, you may come up against the argument that the seat does not automatically determine the procedural law of the arbitration.

“Seat” is a juridical rather than geographical concept

The English Arbitration Act applies to arbitrations whose “seat” is in England. The Act does not explain the term “seat of arbitration” other than stating at section 3 that “seat of arbitration” means the “juridical and not the geographical seat of the arbitration”, and it may be “designated” in various ways by the parties, by an institution or person “vested” with powers to designate or by the Tribunal if authorised by the parties.

The concept of the seat of the arbitration means the place and country which the parties have expressly or impliedly chosen as the centre for arbitration. It is quite common for parts of the proceedings to be held in countries other than the seat for the convenience of the parties. This does not, however, mean that the seat has changed. If, therefore, an arbitration clause nominates Amman, Jordan as the seat of the arbitration, the parties might still agree to hold certain hearings in London or Paris. For enforcement purposes under the New York Convention (see Article VI(d), the seat will however remain Amman.

This has important practical implications as otherwise state courts may have jurisdiction to intervene in all arbitrations, which are only adventitiously taking place on their home soil.

When the parties do not agree on a seat

It is very often the case that the parties will choose a neutral seat for the arbitration, i.e. a place where neither of the parties conducts business. This has the practical implication that the curial law will often differ from the substantive law.

The question arises, however, as to what is the position if no seat is chosen by the parties? If the arbitral proceedings are governed by rules selected by the parties, then these rules will decide how the seat is chosen. For example, under ICC Rules, Article 14.1 provides that the place of the arbitration shall be fixed by the ICC Court unless agreed upon by the parties.

Similarly, under the LCIA Rules, Article 16.1 provides that if the parties do not agree the seat of the arbitration, it shall be London, United Kingdom, unless and until the LCIA Court determines in view of all the circumstances, and after having given the parties an opportunity to make a written comment, that another seat is more appropriate.

In an ad hoc arbitration, for example one using the UNCITRAL Rules, the decision will be made by the arbitrators if so authorised. Article 16(1) of the UNCITRAL Rules provides that unless the parties have agreed upon the place where the arbitration is held, such place shall be determined by the Tribunal, having regard to all the circumstances of the arbitration.

If there is no authorised third party (such as an institution) and the Tribunal does not have the authority to decide on the seat of the arbitration and the parties cannot agree, the matter may need to be decided by the courts. For example, if the parties need to establish whether Part I of the English Arbitration Act applies at all or if one of the parties wishes to make an application to the courts in respect of a power given to them by Part I (for example, an application to the courts for an order requiring a party to comply with a peremptory order made by the Tribunal), it is likely that a determination will have to be made by the courts on the issue.

Conclusion

Whilst identifying the seat might not always be straightforward, it is of paramount importance that the seat must be identified by the time the award is made. Any award is required to state the seat (for example, section 52 of the English Arbitration Act) and without that, it may be impossible to enforce.

5. INTERNATIONAL ARBITRATION – Dispute Boards

Nicholas Gould in an extract from a paper given to the DRBF 6th Annual International Conference in Budapest on 6–7 May 2006 discusses the establishment of dispute boards and focuses on selecting, nominating, appointing and establishing dispute boards. Consideration is given not just to the legal issues and standard form provisions available, but also to the practical issues and difficulties of identifying and appointing board members for international projects.

From a practical perspective, the challenge for the parties is to establish a dispute board at the outset of the project, rather than waiting for a dispute to arise. There is a need to identify, consider and agree the identity of appropriate individuals for the project, as well as to consider independence and impartiality, and establish, and be seen to establish, a level playing field for the contractor and employer or owner.[6] The identification of individuals with appropriate skills, experience and qualifications, especially in relation to the dispute board chair, can be difficult and time consuming. However, the parties must overcome these issues in order to appoint a dispute board (DB).[7]

Those who do not appoint their DB at the outset, or in the early stages of the project, find that it is far more difficult to identify, agree upon and appoint a board once a dispute has arisen. Nonetheless, many DBs are appointed once a dispute has arisen, which in many instances is too late for the board to be effective in the management and resolution of disputes during the course of the project.

A brief overview of dispute boards

The use of the term "dispute boards" (DBs) is relatively new. It is used to describe a dispute resolution procedure which is normally established at the outset of a project and remains in place throughout the project's duration. It may comprise one or

[6] In this paper the term employer is used to refer to the employer, owner or purchaser of the works (thus adopting FIDIC terminology).

[7] The term "DB" has been used to refer collectively to dispute boards, dispute adjudication boards, combined dispute boards or dispute resolution boards.

three members who become acquainted with the contract, the project and the individuals involved with the project in order to provide informal assistance, provide recommendations about how disputes should be resolved, and provide binding decisions. The one person or three person DBs are remunerated throughout the project, most usually by way of a monthly retainer, which is then supplemented with a daily fee for attending site visits and dealing with issues that arise between the parties by way of reading documents and attending hearings and producing written recommendations or decisions if and as appropriate.

The term has more recently come into use because of the increased globalisation of adjudication during the course of projects, coupled with the increased use of Dispute Review Boards (DRBs), which originally developed in the domestic USA major projects market. DRBs were apparently first used in the USA in 1975 on the Eisenhower Tunnel. As adjudication developed, the World Bank and FIDIC opted for a binding dispute resolution process during the course of projects, and so the Dispute Adjudication Board (DAB) was borne from the DRB system; the DRB provides a recommendation that is not binding on the parties.

The important distinction then between DRBs and DABs is that the function of a DRB is to make a recommendation which the parties voluntarily accept (or reject), while the function of a DAB is to issue written decisions that bind the parties and must be implemented immediately during the course of the project. The DRB process is said to assist in developing amicable settlement procedures between the parties, such that the parties can accept or reject the DRB's recommendation. Genton, adopting the terminology of the International Chamber of Commerce (ICC), describes the DAB approach "as a kind of pre-arbitration requiring the immediate implementation of a decision".[8] He goes on to state that:

> the DRB is a consensual, amicable procedure with non-binding recommendations and the DAB is a kind of pre-arbitration step with binding decisions.[9]

Building upon this distinction, the ICC has developed three alternative approaches:

- Dispute Review Board – the DRB issues recommendations in line with the traditional approach of DRBs. An apparently consensual approach is adopted. However, if neither party expresses dissatisfaction with the written recommendation within the stipulated period then the parties agree to comply with the recommendation. This recommendation therefore becomes binding if the parties do not reject it.
- Dispute Adjudication Board – the DRB's decision is to be implemented immediately.
- Combined Dispute Board ("CDB") – this attempts to mix both processes. The ICC CDB rules require the CDB to issue a recommendation in respect of any dispute, but it may instead issue a binding decision if either the employer or contractor requests and the other party does not object. If there is an objection, the CDB will decide whether to issue a recommendation or a decision.

The "standard form" procedures that are available have principally arisen from the sequential development of adjudication:

- 1970: A contractual adjudication process was introduced into the domestic subcontractor standard forms in the UK in order to primarily resolve set-off issues between the contractor and main contractor.
- 1994: Latham issues his final report reviewing procurement and contractual arrangements in the construction industry.
- 1995: FIDIC introduced a DAB in its Orange Book.
- 1996: FIDIC introduced as an option the DAB in the Red Book.
- 1996: The Housing Grants, Construction & Regeneration 1996 ("HGCRA") included

8 Pierre N. Genton (2003) Dispute Boards.
9 Ibid., para. 7-029.

adjudication provisions in Section 108. Legislation introduced on 1 May 1998.

- 1999: FIDIC adopted a DAB/Dispute Review Expert (DRE) procedure in favour of the additional approach of relying upon the engineer acting as the quasi-arbitrator as well as an agent of the employer or owner. The DAB procedure became mandatory rather than an option.

- 2000: The World Bank introduced a new edition of Procurement of Works which made the "Recommendations" of the DRB or a DRE mandatory unless or until superseded by an arbitrator's award.

- 2002: ICC Task Force prepared draft rules for dispute boards (DBs).

- 2004: The World Bank, together with other development banks, and FIDIC started from May working towards a harmonised set of conditions for DAB.

- 2004: ICE published a DB procedure. Designed to be compliant with the HGCRA.

FIDIC DAB (Clause 20)

Clause 20 of the FIDIC form deals with claims, disputes and arbitration. Emphasis is placed upon the contractor to make its claims during the course of the works and for disputes to be resolved during the course of the works. Clause 20.1 requires a contractor seeking an extension of time and/or any additional payment to give notice to the engineer "as soon as practicable, and not later than 28 days after the event or circumstance giving rise to the claim".

Some have suggested that the contractor will lose its right to bring a claim for time and/or money if the claim is not brought within the timescale.[10] Under UK law this seems unlikely given that timescales in construction contracts are generally directory rather than mandatory,[11] and also because Clause 20.1 does not go on to clearly state that the contractor will lose its right in the event of a failure to notify within a strict timescale.[12] Nonetheless, a contractor would be well advised to notify in writing any requests for extensions of time or money claims during the course of the works and within a period of 28 days from the event or circumstances giving rise to the claim.

The benefit then of the DAB is that it should be constituted at the commencement of the contract, so that its members will visit the site regularly and be familiar not just with the project but with the individual personalities involved in the project. They should, therefore, be in the position to issue binding decisions within the period of 84 days from the written notification of a dispute pursuant to Clause 20.4.

The DAB is appointed in accordance with Clause 20.2. It could comprise individuals who have been named in the contract. However, if the members of the DAB have not been identified in the contract then the parties are to jointly appoint a DAB "by the date stated in the Appendix to Tender". The DAB may comprise either one or three suitably qualified individuals. The appendix to the FIDIC contract should identify whether the DAB is to comprise one or three people.

The appendix does not provide a default number, but Clause 20.2 states that the parties are to agree if the appendix does not deal with the matter. If the parties cannot agree, then the appointing body named in the appendix will decide if the panel is to comprise one or three members.[13] The default appointing authority is the President of FIDIC or a person appointed by the President of FIDIC. The appointing authority is obliged to consult with both parties before making its final and conclusive determination.

[10] Christopher Seppala "Claims of the Contractor", a paper given at The Resolution of Disputes under International Construction Contracts, ICC, Paris, 6-7 February 2003.

[11] *Temloc v Errill Properties* (1987) 22 BLR 30, CA

[12] *Bremer Handelsgesellschaft mbH v Vanden Avenue-Izegem PVBA* (1978) 2 Lloyd's Rep 109, HL. C/f *City Inn Limited v Shepherd Construction Limited* (2002) SLT 781, Second Division, Inner House, Court of Session.

[13] Clause 20.3.

On most major projects a DAB will comprise three persons. If that is the case, then each party is to nominate one member for approval by the other. The parties are then to mutually agree upon a third member who is to become the chairman. In practice, parties may propose a member for approval, or more commonly propose three potential members allowing the other party to select one. Once two members have been selected, it is then more common for those members to identify and agree upon (with the agreement of the parties) a third member. That third person might become the chairman, although, once again with the agreement of all concerned, one of the initially proposed members could be the chairman.

The terms of the General Conditions of Dispute Adjudication Agreement are incorporated by reference on clause 4 of the Dispute Adjudication Agreements. The retainer fee and daily fee of each member is set out in both the Dispute Adjudication Agreements. The employer and contractor bind themselves jointly and severally to pay the DAB member in accordance with the General Conditions of the Dispute Adjudication Agreement. Details of the specific FIDIC contract between the employer and contractor also need to be recorded, as it is from this document that the employer and contractor agree to be bound by the DAB and it is also from this document that the DAB obtains its jurisdiction in respect of the project.

Selecting the board members

The appendix to the FIDIC General Conditions of Dispute Adjudication Agreement provides a tripartite General Conditions of Dispute Adjudication Agreement. It is tripartite in the sense that it is entered into between the employer, Contractor and the sole member or three members of the DAB.

The engagement of a member for the DAB is a personal appointment. If a member wishes to resign then a member must give at least 70 days' notice. Members warrant that he or she is and shall remain impartial and independent of the employer, contractor and engineer. A member is required to promptly disclose anything which might impact upon their impartiality or independence.[14]

The general obligations of a member of the DAB are quite extensive. Clause 4 requires that a member shall:

- Have no financial interest or otherwise in the employer, the contractor or the engineer;
- Not previously have been employed as a consultant by the employer, contractor or engineer (unless disclosed);
- Have disclosed in writing any professional or personal relation-ships;
- Not during the duration of the DAB been employed by the employer, contractor or engineer;
- Comply with any Procedural Rules;
- Not give advice to either party;
- Not whilst acting as a DAB member entertain any discussions with either party about potential employment with them;
- Ensure availability for a site visit and hearings;
- Become conversant with the contract and the progress of the works;
- Keep all details of the Contract and the DAB's activities and hearings private and confidential; and
- Be available to give advice and opinions if and when required by the employer and contractor.

From the Agreement and the general obligations it is possible to identify key considerations in respect of each potential individual board member. These include:

- Neutrality
- Impartiality

[14] Clause 3, Warranty.

- Independence
- Disclosure
- Qualifications
- Experience
- Availability
- Confidentiality

To take one of these, impartiality: undoubtedly, when a contractor and an employer put forward potential DB members they will already know, and perhaps have some form of relationship with, those candidates. The question then of whether those candidates are neutral, or to be more precise, impartial, can be reduced to a question of a perception of bias. The leading case under English law is the House of Lords Decision in *John Magill* v (*1) David Weeks (2) Dame Shirley Porter*[15].

In that case an auditor found two councillors guilty of wilful misconduct by devising or implementing a policy of targeting designated sales of council property. The key question to consider, according to the House of Lords, was not whether the councillors were in fact biased, but whether at the time the decision maker in question gives a decision that a fair-minded and independent observer having considered the facts might conclude that there was a real possibility that the decision maker was biased. The test is a useful one in that it draws a distinction between the need to prove actual bias and the appearance of a potential bias based upon the circumstances at the time when the decision was made. In practice, this means that the judge or judges considering the issue of impartiality have to decide whether an independent and fair-minded observer would consider the decision maker biased, but of course based upon the judge or judges' perceptions.

Magill v *Porter* related to council members. It is equally applicable to tribunals. In respect of judges, any test for apparent bias is whether the circumstances would lead a fair-minded and informed observer to come to the conclusion that there was a real possibility that the tribunal was biased.[16] If the principle of judicial impartiality had been, or would be, breached, then the judge would be automatically disqualified from hearing a case or dealing further with the case.

In the infamous case involving General Augusto Pinochet, the House of Lords ruled that the links between Lord Hoffman – who sat on the original panel that ruled to allow General Pinochet's extradition – and the human rights group, Amnesty International, were too close to allow the original panel's verdict to stand.[17] Lord Hoffman had failed to declare his links with Amnesty International before ruling in the original hearing. Lord Hoffman was a chairman and a director of Amnesty International Charity Limited. Lord Hope stated that in view of Lord Hoffman's links "he could not be seen to be impartial". Although it was not suggested that Lord Hoffman was actually biased, his relationship with Amnesty International was seen to be such that, he was, in effect, acting as a judge "in his own cause".

In respect of adjudication, this approach has been applied in the case of *Amec Capital Products Limited* v *Whitefriars City & Estates Limited*[18] In that case, Amec applied under Part 8 of the Civil Procedure Rules to enforce an adjudicator's decision. The JCT 1998 Edition with Contractor's Design provided for the appointment of a named adjudicator.

The issues that arose at the Court of Appeal were:

1) The scope of the appointment clause in the contract;

2) Whether there was a breach of natural justice by the adjudicator deciding something that he had already decided;

3) Whether there was an appearance of apparent bias carrying forward legal advice from the first decision to the second;

[15] [2001] UKH 67

[16] *Taylor* v *Lawrence* (2002) EWCA Civ 90, (2000) QB 528.

[17] *R* v *Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* (House of Lords, 24 March 1999)

[18] [2004] EWHC 393 (TCC)

4) Whether the adjudicator had failed to deal with an issue in respect of Clause 27 in his decision;

5) Whether a telephone conversation amounted to an appearance of bias;

6) Whether advice in respect of his jurisdiction amounted to an appearance of apparent bias; and

7) Whether the possibility of a claim against the adjudicator could amount to the appearance of bias on behalf of the adjudicator.

The carrying forward of a decision in respect of principally the same dispute (albeit that the first decision was a nullity) did not in itself create an appearance of bias. At paragraph 19 Lord Justice Dyson stated:

> The question that falls to be decided in all such cases is whether the fair-minded and informed observer would consider that the tribunal could be relied on to approach the issue on the second occasion with an open mind, or whether he or she would conclude that there was a real (as opposed to fanciful) possibility that the tribunal would approach its task with a closed mind, predisposed to reaching the same decision as before, regardless of the evidence and arguments that might be adduced.

He held, at paragraph 20, that:

> In my judgment, the mere fact that the tribunal has previously decided the issue is not of itself sufficient to justify a conclusion of apparent bias … It would be unrealistic, indeed absurd, to expect the tribunal in such circumstances to ignore its earlier decision and not to be inclined to come to the same conclusion as before, particularly if the previous decision was carefully reasoned. The vice which the law must guard against is that the tribunal may approach the rehearing with a closed mind … He will, however, be expected to give such reconsideration of the matter as is reasonably necessary for him to be satisfied that his first decision was correct.

The adjudicator had considered the matter again, and therefore was not biased.

The legal advice that he had received in the first decision did not deal with Clause 27, and therefore an informed third party would not consider that the adjudicator was biased because the issue of Clause 27 was not dealt with in the initial legal advice. Further, the adjudicator did not deal with Clause 27 in his decision and therefore there was no basis upon which any bias could be founded. Whitefriars had not made any submissions on Clause 27 during the adjudication and so could not raise the issue now.

The allegation that the note of the telephone conversation between the adjudicator and legal advisers for AMEC was incomplete could not be supported as there was no evidence. The Court of Appeal stated that telephone calls should be avoided, but the telephone call in this case did not present a problem.

Of particular interest is the decision in respect of the application of natural justice to the adjudicator's conclusion that he did or did not have jurisdiction. As the adjudicator did not have jurisdiction to rule on his own jurisdiction, natural justice was not applicable. This was because the court was to decide whether the adjudicator had jurisdiction, and the conclusion reached by the adjudicator could not affect a party's rights. In this respect Lord Justice Dyson at paragraph 41 stated:

> A more fundamental question was raised as to whether adjudicators are in any event obliged to give parties the opportunity to make representations in relation to questions of jurisdiction. The reason for the common law right to prior notice and an effective opportunity to make representations is to protect parties from the risk of decisions being reached unfairly. But it is only directed at decisions which can affect parties' rights. Procedural fairness does not require that parties should have their rights to make representations in relation to decisions which do not affect their rights, still less in relation to "decisions" which are nullities and which cannot affect their rights. Since the "decision" of an adjudicator as to his jurisdiction is of no legal effect and cannot affect the rights of the parties, it is difficult to see the logical justification for a rule of law that an adjudicator can only make a "decision" after giving the parties an opportunity to make representations.

Finally, the Court of Appeal considered whether the threat of a claim against the adjudicator for continuing with the adjudication when perhaps the adjudicator did not have jurisdiction might support an allegation of bias. Lord Justice Dyson

referred to paragraph 26 of the Scheme stating that the adjudicator was immune from a claim, save in respect of bad faith. He therefore concluded that a fair-minded third-party observer would not consider that a threat of litigation against the adjudicator would make the adjudicator biased because the adjudicator enjoyed immunity from litigation save in respect of certain circumstances.

The Dispute Resolution Board Foundation provides some guidance for DB Members during the course of their service or serving on the DB and then must not:

a. Be employed, either full-time or as a consultant, by any party that is directly involved in the contract, except for service as a DRB member on other contracts.

b. Be employed, either full-time or as a consultant, by any party that is indirectly involved in the contract, unless specific written permission for the other party is obtained.

c. Participate in any discussion regarding future business or employment, either full-time or as a consultant, with any party that is directly or indirectly involved in the contract, except for services as a DRB member on other contracts, unless specific written permission from the other party is obtained.

How are board members selected in practice?

It may be cynical to suggest that the selection of board members in practice is somewhat limited by the sphere of appropriate individuals known to the key decision makers and the perception that a board member should be disposed towards the party nominating him or her. Some employers and contractors consider that the member nominated by them should perhaps decide all issues in their favour, or even act as an advocate "on the inside".

An informed employer would consider the issues raised above, and when considering a nomination identify a series of attributes that should be displayed by any potential candidate. Some of these attributes should apply to all DB members, whilst others would be project dependent. So, for example, all potential DB members should be impartial (although a nominating party may hope for impartiality), while the type of project and construction techniques will dictate the final profile of the individual sought.

A list of potential attributes based upon the above factors, and a list provided by the Dispute Review Board Foundation, should include:

- Complete objectivity, neutrality and impartiality as a fact;
- Independence (in the objective, freedom from financial ties sense);
- No conflict (in other words, passing the "perception of bias" test, which could be said to be distinct from the fact position in 1 and 2 above);
- Experience in the type of project (for example, hydro-electric power station, as distinct from other forms of power station);
- Experience with the types of construction technique (which may be peculiar to that particular project);
- Experience with interpretation of contract documentation, the standard forms that might be applicable and sufficient legal understanding to deal with bespoke forms or amendments or interpretation issues;
- Experience in the substantive law (desirable, although not necessary for all members of the panel);
- Experience with the procedural rules of the DB;
- Experienced training and understanding of the DB process;
- Experience with the resolution of construction disputes;
- Availability;
- A dedication to the objectives of the DB process; and
- Well-developed communication skills, both orally and written.

In addition, the potential chairperson should be selected perhaps because they have chaired DBs before, but predominantly because they have experience in dealing with adversarial situations, the ability to run meetings effectively, and, in particular, conducted meetings in difficult circumstances.

Identifying potential board members

Potential board members could be identified from:

- Existing DB members or other appropriate professionals who might be able to serve as DB members identified by the employer or employer or the project team;
- Requests to the employer, or project team organisations in order to see whether any individuals may have experience of appropriate DB members. This may result in a recommendation, which may be that such a person is appropriate or, indeed, inappropriate;
- Contacting one's own professional institution, whatever that may be;
- Considering formal published lists from the DRBF, ICC, FIDIC or the ICE has recently begun to form a list of potential DB members.

The process of selection

Ideally, any party nominating a range of DB members for selection and then appointment should thoroughly and carefully investigate those individuals. Any potential DB members who are not appropriately qualified or would in any event be rejected because of a perception of bias, should have been identified and eliminated from the list.

The ideal situation is for the employer and contractor to agree upon all three members. This would usually require both the employer and contractor to identify a shortlist of individuals and exchange that shortlist in order to select and appoint a panel of three. In an ideal world, at least one of the names on the shortlist would be the same, such that that person could be perhaps the chairperson, and two further "wing members" could then be agreed from the remaining individuals. This is rarely the case in practice.

Selecting the chair

The chairperson could therefore either be identified by the agreement of the parties, or by agreement by the first two DB members nominated, or by agreement between the three appointed DB members.

Ideally, the chairperson should have DB experience, although the majority of DB members acting as chairman have most frequently obtained their dispute resolution experience by acting as arbitrators.

Conclusion

In order to establish a DB, it will be necessary to identify potential appropriate candidates, to nominate them and then to appoint them. Contractors and employers tend not to focus on disputes at the start of projects. DBs are therefore frequently not appointed and established at the commencement of projects. In those projects where a dispute subsequently arises, the contractor and employer will then struggle to agree upon and establish their DB. It is perhaps arguable that the benefits of it are substantially reduced by not having those individuals available at the commencement of the project.

Ideally, the DB should be established before work starts on the site. The DB can then follow the project and deal with any issues that might arise. The identification of appropriate DB members is crucial. Those members will need to be impartial and experienced in a wide range of matters, such as the type of construction in question, interpretation of contract and legal issues. In addition, they will need to have excellent management and communication skills, and be sufficiently available for the duration of the project, and sufficiently available to deal promptly with any disputes that might arise.

6. CAPITAL PROJECTS IN THE EDUCATION SECTOR

Following the success of our inaugural Capital Projects in the Education Sector seminar, Fenwick Elliott held our second on Tuesday 1 November 2005.

The seminar was chaired by Lord O'Neill of Clackmannan, and focused on the successful delivery of major capital education projects in the education sector. The speakers included Phil Preston, Head of Education Asset Management, London Borough of Newham; Malcolm Reading, MD, Malcolm Reading Associates; as well as Victoria Russell, Matthew Needham-Laing and Jon Miller, whose first-hand experience of negotiating the pitfalls which can beset these projects, from inception to delivery and beyond, was set out in their papers which can be found on our website, www.fenwickelliott.co.uk.

The following two papers, by Victoria Russell on the duties of in-house construction professionals and by Matthew Needham-Laing on the potential pitfalls of letters of intent, are typical of the topics addressed at these seminars.

Our next seminar will be held on 7 November 2006 and will be chaired by David Adamson, the former Estates Director of Cambridge University and currently a director and executive officer of Smarter Construction a division of the OGC. For further information please contact Marie Buckley.

7. DUTIES OF IN-HOUSE CONSTRUCTION PROFESSIONALS

Many articles have been written about the duties and potential liabilities of all those involved in construction projects, but very little has been written about the duties of the in-house professional. As ***Victoria Russell*** explains, that of course does not mean that no such duties are owed.

The common law recognises that there is implied into any contract of service a promise on the part of the employee (a) that he is reasonably competent to fulfil the role to which he is appointed and (b) that he will exercise reasonable skill, care and diligence in the performance of his duties.

For all practical purposes, it is immaterial whether the employee is engaged in skilled or unskilled labour but the observations of Willes J in *Harmer* v *Cornelius* are particularly relevant:

> When a skilled labourer, artisan, or artist is employed, there is on his part an implied warranty that he is of the skill reasonably competent to the task he undertakes, spondes peritiam artis. Thus, if an apothecary, a watchmaker or an attorney be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts … An express promise or express representation in this particular case is not necessary.

Want of competence and/or a failure to act competently will expose an employee to liability for breach of his contract of employment. He will also incur liability in tort if negligence or deliberate failure to exercise reasonable skill in the performance of his duties results in loss or injury, whether to his employer or a third party. Even if such liability will usually be covered by an employer's insurance policy that, of itself, will not absolve the employee of liability.

The required level of competence is not to be judged by reference to some unreasonable abstract standard but in the light of the knowledge and expectation of the parties to the employment contract. In any given case, just what the required standard may be and whether the employee's performance has fallen short of this standard will depend entirely on the circumstances and the context in which these issues fall to be addressed. In civil actions for negligence or breach of contract of employment or in unfair dismissal proceedings, for example, it may be necessary to pray in aid a variety of sources ranging from express contractual provision to job descriptions, Codes of Practice, protocols, British or other industrial standards, legislative requirements and expert opinion to establish whether there has been a "want of due care" or that the employee is simply not up to the job.

In the context of internal disciplinary/ capability proceedings or of assessing the fairness of dismissal for incompetence, the employer need only have an honest and reasonable belief in the employee's shortcomings. So long as there are reasonable grounds for that belief an employment tribunal is not going to challenge the employer's findings although questions may still be asked as to the reasonableness and propriety of any sanction imposed by the employer.

It is certainly the case that an employer's professional staff may be expected to

possess and to exercise the skill and experience necessary to undertake to a reasonable standard the responsibilities they have agreed to discharge. Condition 10 (1) of the General Conditions for the Appointment of Consultants - GC/WORKS/5 (1998) - offers a succinct exposition of an external consultant's contractual duty of care in terms that would be implied into the service contracts of in-house professional staff:

> The Consultant shall perform the Services in accordance with all Statutory requirements and with the reasonable skill, care and diligence of a properly qualified and competent consultant experienced in performing such Services on projects of similar size, scope, timescale and complexity as the Project.

The Codes of Professional Conduct of professional institutions such as the RICS and RIBA will also have a bearing on the quality and levels of service reasonably to be expected of employees. They set general standards of behaviour and are intended to regulate the relationship between members, their professional organisation and their clientele.

In discharging their duties in-house staff must demonstrate the same level of care and competence that is reasonably to be expected of all those practising in their chosen disciplines. In that respect their position is no different to that of the qualified external consultant. The standard of care is constant though its demands will vary according to the nature and circumstances of any given task in which they are involved.

Breach of this duty of care – falling below the requisite standard – may expose in-house construction professionals to:

- tortious liability to third parties and both tortious and contractual liability to their employer for any damage attributable to their breach of duty;
- internal disciplinary and/or capability proceedings that could jeopardise their livelihoods;
- disciplinary action by the relevant professional and/or regulatory bodies.

Breach could also give rise in certain circumstances to criminal liability, e.g. under health & safety legislation.

In light of the case of *Harmer* v *Cornelius*, if someone applies for a position as an in-house construction professional, they are offered the job and then accept it, it is then the case that they have warranted to their employer that they have the necessary skills to carry out that job.

If an employee omits to do something which is patently necessary in order for the work properly to be done, the employer can rely by way of benchmark on the standard sets of duties which apply to the profession which the particular individual practises, e.g. architecture, engineering, etc. What the particular employee has done, or has omitted to do, will be judged by the standard of the "reasonably competent" professional. Part of the test will be looking at whether or not there was a "norm" to be followed, in particular whether or not the work to be carried out was what one might expect as normal work, within the usual range of reasonable competence, or whether it was something exceptional.

Accordingly, the in-house employee will be measured by what is normally expected of a reasonably skilled worker in the circumstances in which that employee operates.

8. LETTERS OF INTENT: Principles and Pitfalls

Letters of intent will always be a topic of interest to the construction industry. There are times when you cannot avoid them. Indeed they have been described by some as a necessary evil. In a recent case[19], HHJ Coulson QC indicated that a letter of intent could be appropriate when:

- the contract scope and price were either agreed or there was a clear mechanism in place for the scope and price to be agreed;
- the contract terms were, or were very likely to be, agreed;

[19] *Cunningham & Others v Collett & Farmer*

- the start and finish dates and the contract programme were broadly agreed; and
- there were good reasons to start work in advance of the finalisation of all the contract documents.

In an article explaining some of the pitfalls concerning letters of intent, ***Matthew Needham-Laing*** starts by considering the key points everyone should consider before signing a letter of intent.

It can take a long time for the formalities of a professional appointment, building contract or subcontract to be concluded, and time is money for all parties involved in construction. Employers and contractors want to get started on a project as soon as possible, consequently they frequently resort to sending letters expressing their intention to enter into a formal contract for the entirety of the works in due course. There are a variety of reasons why such letters are resorted to, and why both parties to a contract find them acceptable for their respective purposes.

In the case of the employer, they may wish to get the development started early to reduce the borrowing costs or bring forward the date when the development produces an income, rather than delay the design or commencement of construction until the formal contract has been signed.

In the case of the contractor or sub-contractor, frequently they want some form of letter before commencing work so they have some comfort, whether it is illusory or real, that they will be paid for the work they are about to embark upon.

It therefore suits both parties to send or receive a letter expressing their intention to enter into a formal contract in due course. Letters of intent come in a variety of forms, but generally they can be categorised into three main types:

1. The most common arrangement is that where the contractor agrees to start work without any agreement to do the whole works. The contractor can thus call a halt at any time to the works. The arrangement is simple and contractual. Usually the letter is sent from the employer, and is either countersigned or accepted by conduct by the contractor. There is usually (but not always) a payment on a cost reimbursement basis, and sometimes employers seek to put a limit on their liability to pay the contractor, by expressly stating that the letter only authorises expenditure up to a certain amount. The contractor may not be obliged to complete the work at all, and may not be required to complete it by any particular time, but there will be an implied term as to the quality of whatever work the contractor does. This type of letter of intent is frequently described as "an if contract" following the case of *British Steel Corporation* v *Cleveland Bridge Engineering Company Limited*. ([1983] BLR 95).

2. Alternatively, and less frequently, the letter of intent is expressed as the contract for the whole of the works, frequently referring to the terms and conditions, and the various contract documents which are to be incorporated into the formal contract once signed.

3. Finally, there is a "Letter of Comfort" which is no more than an expression of the parties' intentions, and creates no legal relationship at all. If a contractor or consultant carries out work pursuant to this letter, then any entitlement to payment for what he does would be on a restitutionary, quantum meruit basis.

In the majority of cases where parties have resorted to issuing a letter of intent, they subsequently finalise their negotiations for the entire contract, and the letter of intent arrangements are superseded by execution of the contract, which then governs all the works being carried out. It is only when those negotiations fail to conclude a formal contract, that letters of intent are exposed to judicial scrutiny. The optimism with which the parties agree to carry out the works pursuant to the letter of intent is exposed to the uncompromising law of contract formation as formulated by the courts over a century ago.

In order to determine whether a contract has been concluded in the course of correspondence, one must look at the correspondence as a whole.

Even if the parties have reached agreement on the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled.

Alternatively, they may intend that the contract shall not become binding until some further term(s) have been agreed.

Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled.

If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.

Parties often enter into letters of intent without fully appreciating what their rights and liabilities are. As a minimum, the following three points should be considered before signing a letter of intent:

Is the letter of intent to form a binding contract? Whether it does or does not depends on the construction of the communications which have passed between the parties and the effect, if any, of their actions pursuant to such communications.

If a contract is found to exist, then it will determine the parties' obligations or, alternatively, if no contract is found to exist, the letter of intent will have no contractual effect.

In drafting letters of intent, it is therefore vital for the parties to state clearly whether or not the letter of intent is to form a binding contract. If work is done pursuant to a contract, then the contractor will have obligations as regards the workmanship and time for completion. Conversely, if there is no comprehensive contract, then there can be no such contractual obligations, although there may be obligations for negligence as regards workmanship.

If materials are purchased or bought pursuant to the letter of intent, how are these to be paid for?

Whether or not the letter of intent is legally binding on the person carrying out work under it, they will almost certainly be entitled to be paid for their work. The letter of intent should therefore state the basis of such payments. If the letter of intent is to be contractually binding, then payment schedules should be inserted. If no provisions are inserted, then a reasonable rate will be implied.

If a letter of intent is not legally binding, the contractor will almost certainly be entitled to payment on a quantum meruit basis, i.e. the contractor is entitled to be paid a reasonable sum for the labour and materials supplied by him.

The letter of intent should state that if a contract is subsequently entered into between the parties, then any payments made under the letter of intent form part of the Contract Sum, thus avoiding potential overpayment problems (see *Boomer* v *Muir* [1933] 24 P.2d 570).

Of course in an ideal world there would be no letters of intent. All parties would agree the terms of their contracts, and execute formal Contract Documentation before commencing work.

There have been two recent cases which demonstrate some of the pitfalls discussed above.

9. LETTERS OF INTENT: Some Recent Examples

As ***Jeremy Glover*** says, Matthew Needham-Laing concluded that, notwithstanding HHJ Coulson QC's words of comfort, in an ideal world, there would be no letters of intent. One of the reasons for this was demonstrated by the recent case of *ERDC Group Limited* v *Brunel University* where a dispute arose as to the basis upon which the contractor should be paid for works carried out under a letter of intent.

ERDC submitted a tender for works to provide sporting facilities which were to be carried out on the basis of the JCT Standard WCD Contract, 1998 Edition. Brunel decided to appoint ERDC, although the formal execution of the contract documents was deferred until after the grant of full planning permission. ERDC agreed to progress the works under a letter of intent. Four further letters of intent were issued and the authority under the final letter of intent expired on 1 September 2002. ERDC continued with the works after that date. The majority of the works were completed

by November 2002 but the contract was not executed. ERDC said that the work content of the project had changed significantly and that accordingly they were not prepared to sign the contract documents. ERDC also said that they were entitled to be paid upon a quantum meruit basis. Brunel said that the work executed both prior to and post 1 September 2002 was to be valued according to the JCT contract as provided for by the letters of intent.

The key provisions of the letter of intent were as follows:

> We write to inform you that your adjusted tender for the above works in the sum of £1,238,635.00 has been recommended for acceptance. However, the University are not in a position to award a contract until certain planning conditions are discharged.
>
> In the meantime in order to enable you to deliver the works in line with the Construction Programme of 8 weeks design/mobilisation period and 18 weeks construction, the University is prepared to issue this letter of appointment pending the execution of the Formal Contract subject to the following terms and conditions:
>
> 1 You are hereby authorised to carry out design, planning and procurement works as necessary to make a full and proper start to the works once full planning permission has been received subject to satisfactory insurances and liaison with the University Authorities which shall comprise some or all of the following but not restricted to the following…
>
> Work shall be paid for in accordance with the normal valuation and certification rules of the JCT Standard Form of Building Contract With Contractors Design to a maximum of £15,000.00 until the issue of a further letter of intent and agreed revised sum or signing of the contracts.
>
> However such payment will not include any entitlement for loss or profit on any works not carried out.
>
> No expense shall be incurred in excess of the above sum or agreed revised sum until such time as the formal Contract Documents have been signed…
>
> 2 Until formal execution of the Contract your appointment will be governed by the terms of this letter … However upon the execution of the Contract performance by you of the works authorised by this letter shall be deemed to have been carried out under the Contract and according to its terms and conditions…
>
> 6 Subject to your acceptance of the foregoing terms and conditions, Brunel University hereby confirms that it will pay you up to the sum of fifteen thousand pounds (£15,000.00) in respect of the provision of the works required under the terms of this letter…
>
> 7 … This letter constitutes an instruction to you to commence work only as necessary for you to ensure that the agreed construction programme is met…
>
> Please confirm by return that the above terms are acceptable to you by countersigning and returning one copy of this letter.

HHJ LLoyd QC held that from the wording of the letters of intent, there had been a clear intention to create legal relations. The letters were contracts of the classic “conditional” variety. Although Brunel was not prepared to contract unconditionally for the whole of the works, it decided to offer ERDC a limited contract on the understanding that when it was able to conclude the full contract that was contemplated, that contract would take effect retroactively.

Therefore the letters created a contract, one term of which was that the work carried out before 1 September 2002 was to be valued in accordance with the JCT contract, in other words not on a quantum meruit basis but by applying the tender rates and prices.

That left the question of how the work carried out after the letters of intent expired was to be valued. Both parties agreed this should be on a quantum meruit basis. However, as the Judge noted, the courts have not laid down any hard and fast rules limiting the way in which a reasonable sum is to be assessed. The contractor should be paid at a fair commercial rate for the work done. However, what was that rate? ERDC said the works should be valued on a costs plus profit basis, whereas Brunel said they should be valued in the same way as the works carried out under the letters of intent.

Brunel relied on the judgment of Mr Records Reece QC in *Sanjay Lachani* v *Destination Canada (UK) Ltd* (1997) 13 Const LJ:

> A building contractor should not be better off as a result of the failure to conclude a contract than he would have been if his offer had been accepted, i.e., in practical terms, in a case such as this, the price which the building contractor thought he was to get for the works (because he thought his offer had been accepted) must be the upper limit of the remuneration to which he could reasonably claim to be entitled, even if at that level of pricing the building contractor would inevitably have ended up showing an overall loss.

In other words, whilst the contractor was entitled to a fair commercial rate or price for the work done, in determining the reasonableness of the valuation here, the court should take into account tender costs and even abortive pre-contract negotiations as to price.

Thus the assessment should be made on ERDC's tender rates and prices since they had been used by the parties throughout the works and they were reasonable commercial rates. Indeed, ERDC had continued to work for a considerable time after 1 September 2002 as if the previous arrangements were still in existence. Yet on the other hand, the circumstances in which ERDC worked were no longer those contemplated by the contract.

Ultimately, the Judge came to the conclusion that, on the facts of this case it would not be right to switch from an assessment based on ERDC's rates to one based entirely on ERDC's costs. ERDC did not make its position clear straightaway, only doing so when all the main elements of work were substantially complete. ERDC applied for payment (and was paid until December 2002) on the basis of the principles set out in the first letter of intent, i.e. in accordance with the JCT Valuation Rules.

One of the quantity surveyor witnesses noted in evidence that:

> a price or rate that was reasonable before 1 September, in my opinion, did not become unreasonable after 1 September simply because the authority in the letter of appointment expires.

It was shown that the conditions under which the remaining work was carried out did not differ materially from those that had been originally contemplated. It was also demonstrated that ERDC's tender was not abnormally low. Accordingly, as the conditions under which the latter work had been carried out did not differ materially from the conditions under which the rest of the work had been carried out, the appropriate way to value this work was by reference to the original ERDC contract rates and not on a cost plus profits basis.

The second case, as ***Jeremy Glover*** again discusses, involved the extension of a letter of intent. In this case of *Skanska Rasleigh Weatherfoil* v *Somerfield Stores Limited* problems emerged as a consequence of work commencing without a clear contract being entered into and the parties subsequently failing to agree and sign up to a contract.

Here Somerfield sought tenders to carry out maintenance works at their stores. Skanska were one of the successful tenderers and on 17 August 2000, Somerfield sent Skanska a letter confirming they had been appointed to provide the maintenance services in three regions. The letter was stated to be subject to contract and enclosed a draft facilities management agreement. The letter further stated:

> Whilst we are negotiating the terms of the Agreement, you will provide the Services under the terms of the Contract from 28 August 2000 ... until 27 October 2000.

On 21 November 2000, Somerfield extended this period until 26 November 2000. On 22 December 2000, Somerfield wrote another letter to Skanska, again said to be subject to contract, which further extended the working period. This time until 21 January 2001. The letter said that Somerfield were not prepared to give any further extension to this letter. That deadline passed. Skanska continued to perform the maintenance services.

By the end of 2002, a dispute had arisen over whether Skanska were entitled to be paid for a number of jobs which were stated to be "timed out" because an invoice had not been submitted within the period required by the draft facilities management agreement.

Before Mr Justice Ramsey, Somerfield argued that all of the terms of the facilities management agreement were incorporated including the "timed out" provisions.

Skanska said that the terms of the agreement were incorporated only to the extent that they defined the services which Skanska were required to provide. Skanska also argued that the agreement expired on 21 January 2001. Therefore, there was no agreement as to the contractual relationship and in particular any time limit on the submission of invoices.

The Judge said that that letter of 17 August 2000 was intended to give rise only to an interim arrangement pending the negotiation of an acceptable facilities management agreement. The use of the phrase subject to contract, for example, demonstrated that the parties were not to be bound by the full terms of such an agreement until all necessary matters had been finally negotiated. However, Somerfield's immediate requirement for maintenance works could not await the outcome of the negotiations.

The Judge further held that the obligation to provide the services "under the terms of the contract" could not be read as including all the terms of the facilities management agreement. However, equally it could not be read as including none of those terms. The intention of the parties could not have been to incorporate the terms of the draft agreement attached to the letter, because these were the terms which the parties were negotiating and which were therefore not necessarily acceptable.

Therefore, the Judge said that the parties intended to incorporate the terms of the facilities management agreement only to the extent that they were necessary to define the services which Skanska was to provide.

In answer to the question as to whether or not any binding agreement continued beyond 21 January 2001, the Judge looked at what happened in the period from 17 August 2000. This was the period during which the interim arrangements were to apply pending the negotiation of the mutually acceptable contract.

Somerfield said that the parties operationally carried on as before after 21 January 2001. Skanska said that they carried out work after that time only in response to Somerfield's faxed requests.

The Judge considered that whilst the wording of correspondence in this period made it clear that Somerfield were reluctant to extend the interim period, it did not contemplate that the terms of the contract (as expressed in the 17 August 2000 letter) would not continue beyond 21 January 2001. Phrases used were by way of exhortation to meet a deadline for the performance of certain obligations (i.e. negotiate the contract), they were not unless or definitive deadlines, which could not be extended.

The question for the court was whether the parties continued to operate on the basis of the original contract after 21 January 2001. Perhaps the most important fact as far as the Judge was concerned was that the parties continued to conduct themselves as they had before with the pre-existing agreement. Nothing really happened contractually after 21 January 2001. Therefore, the original August 2000 contract continued.

This meant that no binding agreement had been reached about the alleged timing out at any period. No supplementary agreements were made. The purpose of the meetings that took place in relation to them was to negotiate the finalisation of the facilities management agreement. These meetings were at all times carried out subject to contract-type basis. That one of the parties had taken legal advice and made incorrect assertions as to what contract position applied did not matter.

The fact that the parties continued to conduct themselves as before in circumstances where they had a pre-existing contractual arrangement was the most important factor which influenced the court. Skanska continued to provide services in the same way as they envisaged under the August 2000 letter.

Thus the contract continued on that basis well into 2003 when Skanska ceased performing the services. It may not have been what the parties intended. However, that was the consequence of the parties' failure to regularise their contractual relationship.

10. PRE-ACTION DISCLOSURE

One of the major criticisms of the Woolf reforms to the litigation procedure was the front-loading of costs brought about by the pre-action protocols. One part of this new regime is the increasing need for pre-action disclosure. ***Victoria Russell*** discusses below what this can mean.

The framework for pre-action disclosure is established by section 33(2) of the Supreme Court Act 1981, and Rule 31.16 of the Civil Procedure Rules.

Rule 31.16 provides:

> (1) This rule applies where an application is made to the court under any Act for disclosure before proceedings have started.
>
> (2) The application must be supported by evidence.
>
> (3) The court may make an order under this rule only where –
>
> (a) the respondent is likely to be a party to subsequent proceedings;
>
> (b) the applicant is also likely to be a party to those proceedings;
>
> (c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and
>
> (d) disclosure before proceedings have started is desirable in order to –
>
> (i) dispose fairly of the anticipated proceedings;
>
> (ii) assist the dispute to be resolved without proceedings; or
>
> (iii) save costs.

The operation of Rule 31.16(3)(d) was considered by the Court of Appeal in *Black* v *Sumitomo Corporation* [2001] EWCA Civ 1819; [2002] 1WLR 1562. At paragraphs 79-83, Rix LJ said this:

> 79. This is a difficult test to interpret, for it is framed both in terms of a jurisdictional threshold (only where) and in terms of the exercise of a discretionary judgment ("desirable").
>
> 80. Three considerations are mentioned in paragraph (3)(d): disposing fairly of the anticipated proceedings; assisting the dispute to be resolved without proceedings; and saving costs. The first of this trio obviously contemplates the disposal of proceedings once they have been commenced – in that context the phrase dispose fairly is a familiar one (see e.g. RSC Ord 24, r 8); the second as clearly contemplates the possibility of avoiding the initiation of litigation altogether; the third is neutral between both of these possibilities.
>
> 81. It is plain not only that the test of "desirable" is one that easily merges into an exercise of discretion, but that the test of "dispose fairly" does so too. In the circumstances, it seems to me that it is necessary not to confuse the jurisdictional and the discretionary aspects of the paragraph as a whole. In *Bermuda International Securities Ltd* v *KPMG* [2001] Lloyd's Rep PN 392-397 para 26, Waller LJ contemplated that paragraph (3)(d) may involve a two-stage process. I think that is correct. In my judgment, for jurisdictional purposes the court is only permitted to consider the granting of pre-action disclosure where there is a real prospect in principle of such an order being fair to the parties if litigation is commenced, or of assisting the parties to avoid litigation, or of saving costs in any event. If there is such a real prospect, then the court should go on to consider the question of discretion, which has to be considered on all the facts and not merely in principle but in detail.
>
> 82. Of course, since the questions of principle and of detail can merge into one another, it is not easy to keep the two stages of the process separate. Nor is it perhaps vital to do so, provided however that the court is aware of the need for both stages to be carried out. The danger, however, is that a court may be misled by the ease with which the jurisdictional threshold

> can be passed into thinking that it has thereby decided the question of discretion, when in truth it has not. This is a real danger because first, in very many if not most cases it will be possible to make a case for achieving one or other of the three purposes, and secondly, each of the three possibilities is in itself inherently desirable.
>
> 83. The point can be illustrated in a number of ways. For instance, suppose the jurisdictional test is met by the prospect that costs will be saved. That may well happen whenever there are reasonable hopes either that litigation can be avoided or that pre-action disclosure will assist in avoiding the need for pleadings to be amended after disclosure in the ordinary way. That alternative will occur in a very large number of cases. However, the crossing of the jurisdictional threshold on that basis tells you practically nothing about the broader and more particular discretionary aspects of the individual case or the ultimate exercise of discretion. For that, you need to know much more: if the case is a personal injury claim and the request is for medical records, it is easy to conclude that pre-action disclosure ought to be made; but if the action is a speculative commercial action and the disclosure sought is broad, a fortiori if it is ill-defined, it might be much harder.

In *XL London Market Ltd* v *Zenith Syndicate Management Ltd* [2004] EWHC 1182 (Comm) Mr Justice Langley made an order for pre-action disclosure in litigation between the managing agents of various Lloyd's syndicates.

In relation to the test of fairness, Mr Justice Langley said this at paragraph 31:

> In general, where the relevant information is held by the respondent and not otherwise available to the applicant, I think it is likely that if the first two tests are passed so will be the test of fairness. To determine if they have a claim and to formulate it, XL London and Brockbank need access to the second category of documents. I also think that disclosure will save costs. It will enable further investigation of the reserves to be focused rather than random. If a claim is made it can be expected to be presented with particularity.

In *Briggs & Forrester Electrical Ltd* v *The Governors of Southfield School for Girls* [2005] BLR 468 Judge Coulson QC ordered pre-action disclosure of quantum documents (but not the other documents sought) in relation to a claim for asbestos contamination. The Judge took the view that such disclosure would assist settlement negotiations and save costs.

In *First Gulf Bank* v *Wachovia Bank National Association* [2005] EWHC 2827 (Comm) Mr Justice Christopher Clarke refused to make an order for pre-action disclosure in relation to a prospective claim for fraud concerning letters of credit. The Judge was particularly influenced by the fact that the applicant had obtained much relevant information from the pleadings, evidence and skeleton argument in related litigation. In the concluding section of his judgment, Mr Justice Christopher Clarke said this:

> 24. I have reached that conclusion as a result of a combination of reasons. Firstly I remind myself that such an order, even if not exceptional, is unusual. Secondly, as I have said, this is not, in my view, a case in which First Gulf cannot start proceedings without pre-action disclosure and in which the court should, on that account, be disposed to assist them to do so. On the contrary they would, as a result of the previous litigation, appear to enjoy a number of advantages over the ordinary litigant. Thirdly, I take the view that a reconciliation between the concerns that Rix LJ identified and to which I refer in paragraph 18 above, is most appropriately met by requiring First Gulf to plead such case as they can rather than requiring pre-action disclosure without any pleading at all. Such a course would indicate what is alleged without allowing dishonesty “to spread its cloak over the means by which it can be detected and revealed”. Fourthly, I think that I should be tipping the balance unduly in First Gulf's favour if I were to order pre-action disclosure, in circumstances where FUNB themselves have what appear to be legitimate claims for disclosure, so that the parties will not be on an equal footing...
>
> 26. I am equally not persuaded that it is desirable that I should make an order

> for pre-action disclosure for the purpose of assisting the dispute to be resolved without proceedings or of saving costs, or that, if there is a prospect of achieving either of those results, so that the jurisdictional threshold is crossed, it is sufficiently enticing to justify making the order sought. The reality of the present case appears to me to be that there is very little prospect of it being disposed of without pleadings and standard disclosure being given by both sides in the ordinary way. There seems to me equally little prospect that the giving of the disclosure sought before an action is brought is likely to produce a significant saving in costs in comparison with the costs that would be involved if discovery was given after the proceedings were commenced. Any saving that might arise because pre-action disclosure might avoid the need to amend the proceedings sub-sequently appears to me to be of marginal significance in the context of a claim of this nature.

These cases were all analysed recently in the judgment by Mr Justice Jackson in the case of *Birse Construction Ltd* v *HLC Engenharia e Gestao de Projectos SA* [2006] EWHC 1258 (TCC) (2 May 2006). Mr Justice Jackson said:

> 25. … In many TCC cases, disclosure is a labour-intensive exercise and a major head of costs. Therefore, disclosure before the proper time is not something which should be lightly ordered. On the other hand, the court encourages the early and candid exchange of information in the hope that this will promote settlement before excessive costs are incurred. Alternatively, it is hoped that the parties may at least narrow the issues between them. This is part of the philosophy which underlies the Pre-action Protocol for Construction and Engineering Disputes. It should be noted that this is the only pre-action protocol which requires a meeting between the parties before they resort to litigation.
>
> 26. In any given case it must be a matter for close and critical analysis whether the early disclosure by one party of certain categories of documents really does bring the prospect of (1) disposing fairly of the anticipated proceedings; or (2) assisting the dispute to be resolved without proceedings; or (3) saving costs. The answer to this question must be heavily fact-sensitive. No rule of thumb can assist. This question is the jurisdictional threshold. If the answer is no, the application fails.
>
> 27. If the answer to the first question is yes, the next matter to consider is whether pre-action disclosure is desirable in order to achieve those of the specified purposes which are achievable. The third question to consider is whether the court should exercise its discretion in favour of making the order. As Rix LJ pointed out in Black, those two questions tend to merge into one another, but the judge must bear in mind each of the separate tests which he is required to perform.
>
> 28. The test of "desirable" and the exercise of discretion are particularly important in this context because of the relative ease with which the jurisdictional threshold can be crossed (see Black at paragraphs 82 and 83). In the TCC context, the judge may be assisted by having regard to any correspondence written pursuant to the Protocol. The judge should also have regard to the importance of limiting (a) pre-action costs and (b) the pre-action expenditure of resources (including management time) to a level which is reasonable and proportionate.
>
> 29. Christopher Clarke J observed in First Gulf Bank that to require pre-action disclosure is an order which, even if not exceptional, is unusual. I agree with that observation. Given the level of co-operation between opposing parties, which is a normal feature of TCC litigation, I would not expect an order for pre-action disclosure to be appropriate in most cases which come before this court.

The Judge examined whether the parties were likely to be the parties to the proposed litigation and then went on to look at whether the documents sought by Birse fell within the ambit of standard disclosure. Birse accepted that their application was too wide, and it was amended accordingly. The Judge then came to the next question he had to answer, namely whether pre-action disclosure was “desirable in order to (1) dispose fairly of the anticipated proceedings; (2) assist the dispute to be resolved without proceedings; or (3) save costs”.

He decided that if the documents identified in the amended application were disclosed, then there was "a real possibility that the parties will resolve their present dispute without recourse to litigation". He said:

> "Both HLC SA and Birse are commercial entities. If they are both able to make an informed assessment of their case on the basis of the critical documents, there must be a serious possibility of compromise".

He also said:

> It also seems to me that pre-action disclosure of categories (a) to (e) will promote the fair disposal of the anticipated proceedings. It is not a level playing field if, at the outset of the litigation, one party is obliged to plead its case in ignorance of certain basic facts. If pre-action disclosure is not ordered, I anticipate that in due course Birse will need to make substantial amendments to its pleadings. Such amendments will be causative of delay and wasteful of costs. I therefore conclude that the jurisdictional threshold set out in rule 31.16(3)(d) has been passed in all three ways that are possible.

Having considered all the circumstances of the case, he was "quite satisfied that it is desirable and that it is a proper exercise of this Court's discretion to make an Order for pre-action disclosure … all the various tests set out in rule 31.13(3) are satisfied". In future cases, it will be important that these principles are given careful consideration.

11. NOVATION: Principles & Pitfalls

Novation is one of those issues, where care is always required. ***Matthew Needham-Laing*** sets out some of the points to look at for. To begin with, it is necessary to distinguish between three concepts: sub-contracting, assignment and novation.

(a) Sub-contracting

In many contracts it is immaterial as to whether a party to the contract performs his obligations himself or those obligations are performed by someone else (the sub-contractor), vicariously on behalf of the original party. The original contractor remains liable for his obligations under the contract because the burden or performance of a contract may not be assigned.

(b) Assignment

This consists of the transfer from B to C of the benefit of one or more contractual obligations that A owes to B. It is not the obligation to perform which is assigned, but the benefit of the performance. The original contract between A and B remains in existence and is unchanged. Consent is not required to give effect to an assignment. Once A has received notice of the assignment, A is bound by it, therefore if the benefit B assigns to C is the money A owes to B for B's performance of the contract between A and B, then A is bound to make payment to C in respect of the notice of assignment.

(c) Novation

This is the process by which a contract between A and B is transformed into a contract between A and C. It can only be achieved by agreement between all three of them, A, B and C. Unless there is such an agreement, neither A nor B can rid himself of any obligation which he owes to the other under the contract. This is commonly expressed in the proposition that the burden of a contract cannot be assigned, unilaterally. If A is entitled to look to B for performance of the contract, he cannot be compelled to look to C for performance instead, unless there is a novation.

In recent years employers have attempted to have the best of both worlds by engaging their own consultants prior to the appointment of the design and build contractor. These consultants are then novated to the design and build contractor who accepts entire responsibility for the design including any design carried out by the consultants prior to their appointment. This gives rise to a situation which has obvious differences from the classic novation. The employer and the contractor have different interests in the development. The employer does not drop out of the picture, as in the classic novation, but instead retains its interest in the project. The obligations of the consultant change, even if the novation does not expressly state this. The services the consultant would have performed for the employer will differ from those required by the contractor.

A number of issues arise as a result:

1 What is being novated?

2 What is the consultant's liability?

3 Problems of conflict of interest.

All the above problems are amply illustrated in the case of Blyth & Blyth Limited v Carillion Construction Ltd [2001] 79 Con LR 142. In this case, involving the design and construction of a leisure development in Edinburgh, a novation agreement, which purported to place upon the consultant responsibility for all services performed prior to the novation as services performed for the contractor. The consultant commenced proceedings against the contractor for non-payment of fees. The contractor counter-claimed for breaches of contract which occurred prior to the novation. The court decided that the contractor could not bring proceedings against the consultant, because the contractor had suffered no loss for which the consultant owed a duty to the contractor.

The novation agreement in *Blyth & Blyth* contained, (and Carillion relied upon), the following clauses to argue that the scope of the consultant's duty was owed to them rather than the original employer:

> The liability of the Consultant under the Appointment whether accruing before or after the date of this Novation shall be to the Contractor and the Consultant agrees to perform the Appointment and be bound by the terms of the Appointment in all respects as if the Contractor had always been named as a party to the Appointment in place of the Employer.
>
> Without prejudice to the generality of clause 3 of this Novation the Consultant agrees that any services performed under the appointment by the Consultant or payments made pursuant to the Appointment by the Employer to the Consultant before the date of this Novation will be treated as services performed for or payments made by the Contractor and the Consultant agrees to be liable to the Contractor in respect of all such services and in respect of any breach of the Appointment occurring before the date of this Novation as if the Contractor had always been named as a party to the Appointment in place of the Employer.

Carillion's claims based on the above clauses were firstly that the contract was in effect re-written with the word "Employer" being substituted for "Contractor". This, as the Judge pointed out, led to nonsensical results, and conflicts of interest would arise advising on the one hand an employer and on the other hand a contractor. As a consequence the Judge considered it inherently unlikely that the intention was to "re-cast the duty owed and performed to the employer as being a duty owed to the contractor retrospectively".

Carillion's counsel accepted this must be so, and therefore Carillion relied upon their second argument namely that the consultant had breached the terms of its appointment by failing in duties that it owed to the Employer, these breaches being deficiencies in the Employer's Requirements which led to Carillion's tender being too low, and as Carillion had accepted responsibility for the design of the Employer's Requirements they had to bear this loss. However, this argument was doomed if the consultant's duties were not re-cast retrospectively.

The decision leaves contractors in a difficult position as they are being required to take liability for the design of the works without having recourse to the designers who have prepared the design. The problem can be overcome by the designer acknowledging that it knew the contractor would rely upon its design in the preparation of its tender prices, but potentially this exposes the consultant to a conflict of interest and is, in any event, resisted by the Professional Indemnity insurers.

This case has now led to the publication of two standard forms. The first is the City of London Law Society (Construction Committee) standard form which has been published with its guidance notes which include a broad discussion of the need, timing and content of a Deed of Novation. It also includes a clause similar to Clause 4 which deals with Blyth & Blyth issues. The second is issued by the CIC which has moved away from a novation *ab initio* which the CIC think is a fiction, to an arrangement where the consultant warrants the pre-novation services to the Contractor, as well as promising to perform the post-novation services.

Step-in, Novation or Quasi-Novation Provisions

Collateral warranties contain step-in, novation or quasi-novation provisions of the kind familiar to users of the BPF funder warranty. The clauses usually contain a provision which applies if the agreement between the funder and the employer for financing the works (the "finance agreement") has been terminated. The funder gives notice of this to the contractor.

The contractor is entitled (and should perhaps be required) to rely on the funder's notice as evidence of termination of the finance agreement. Typically the grounds for termination of a finance agreement by the funder are the failure to fulfil any precondition, serious and uncorrected breaches by the employer, and the employer's insolvency.

The second provision applies if the contractor wishes to determine his employment under the building contract, or to treat the building contract as having been repudiated by the employer. In either case the contractor must give notice to the funder, who may (within an agreed period) give a counter-notice to the contractor; and meanwhile the contractor must stay his hand.

In either case, that is, whether the funder gives the contractor (a) notice of termination of the finance agreement or (b) a counter-notice in response to the contractor's notice of intention to determine or to treat the building contract as repudiated, the funder's notice or counter-notice will require the contractor to accept the instructions of the funder "or its appointee" to the exclusion of the employer in respect of the works upon the terms and conditions of the building contract.

It is debatable whether or not this mechanism constitutes a novation of the building contract. Under a straightforward novation, a new building contract would come into being in place of the original one; the new contract would be between the funder and the contractor, and would be deemed to have existed *ab initio*. However, the funder's notice does not appear to bring about any such new contract; nor does it discharge the original contract. In fact there are frequently provisions which preserve the contractor's liability to the employer for any breach of the original building contract, and make it clear that the original building contract continues in full force and effect.

To complicate matters further, there is frequently a proviso which says that nothing shall relieve the contractor of any liability he may have to the employer for any breach by the contractor of the building contract while at the same time making it clear that upon the issue of any notice by the funder the contractor shall be liable to the funder under the building contract in lieu of its liability to the employer. The intention appears to be that the contractor remains liable to the employer for any loss occasioned to the employer by the contractor's breaches of the building contract occurring before the funder's notice or counter-notice; and that the contractor becomes liable to the funder for breaches occurring after the notice or counter-notice.

What then happens if the funder's notice does not lead to a straightforward novation? Analysing the position, it would appear that the original building contract continues in force on the basis that the employer and contractor have given the funder, vis-à-vis all parties, full and irrevocable authority to issue instructions to the contractor as permitted by the contract, directly or via the architect or contract administrator. The contractor remains liable to the employer for any loss occasioned to the employer by the contractor's prior breaches. The contractor becomes liable to the funder, but not to the employer, for future breaches. The funder becomes liable to the contractor for all sums owed to the contractor by the employer, including sums outstanding at the moment of step-in.

The funder’s warranty therefore becomes supplemental (as well as collateral) to the building contract, and for interpretation of the building contract both agreements must be read together. The step-in rights in the warranty are thus not a true novation, which would involve the discharge of one contract and the formation of a new contract, but a quasi novation.

Conclusion

Novation only gives limited protection to the contractor against the risks that it takes when being responsible for the design prepared by the employer’s consultant.

The employer loses the benefit of the services of its consultant following novation and, indeed, the consultant may be required to act against the employer's interests.

Novation should, in theory, cause no problems for the consultant, providing the novation agreement does not cause any retrospective variation in the scope of its duties or conflicts of interests.

Following the *Blyth & Blyth* case, it is important for the parties to consider carefully the lists of services to be inserted in the appointment and exclude services or limit services to the pre-novation period which cannot be regarded as being performed for the contractor.

Novation of consultants and design and build contracts is now an accepted practice, and appears to benefit both the employer and the contractor provided its limitations are recognized and the novation is properly drafted.

12. FENWICK ELLIOTT NEWS

We are pleased to announce that on 1 April 2006, Karen Gidwani and Toby Randle became partners bringing the total number of partners to 12.

Karen has been with Fenwick Elliott since November 2000, whilst Toby has been with us for over two years. As you would expect they both regularly advise on a wide variety of both dispute-based and non-dispute matters and are experienced in all the different forms of dispute resolution techniques.

There have been a number of new members of staff to enhance our team:

David Bebb joined Fenwick Elliott in October 2005 from Network Rail. David, who trained with Taylor Joynson Garrett (now Taylor Wessing), has also worked in-house at the Canary Wharf Group plc.

In April 2006, David became an Associate joining Iftikhar Khan, who was appointed an Associate with effect from 1 September 2005.

In August 2006, Rebecca Saunders joined as an assistant from Fortune Manning in New Zealand.

In addition, Charlotte Fox was admitted as a solicitor in England and Wales in June 2006 thereby becoming dual qualified in both New Zealand as well as England.

Whilst, Yann Guermonprez has qualified as a French lawyer (avocat) and will be gaining full rights of audience in front of the French Courts in September 2006.

Nicholas Gould has recently accepted the position of chairman of the Society of Construction Law. In doing so he follows in the footsteps of Victoria Russell. In his term as chairman of the SCL he will be focussing on three notable areas: international connections, junior members and education.

Seminars

As can be seen from this year's Review, as well as running our ever popular Adjudication Update seminars and our new Capital Projects in the Education sector seminars, members of the firm regualrly speak at seminars both in England and abroad.

For example, Simon Tolson and Julian Critchlow chaired the Great Delay Analysis Debate held at King's College, London which was so popular that they ran it twice.

Richard Smellie spoke at both the 5th Caspian & Black Sea Oil and Gas Conference held in Ankara on 28 and 29 March and the 6th Annual Oil and Gas Pipelines in the Middle East Conference, held in Abu Dhabi 15 and 16 May. The four key topics he addressed were:

1. Contract clarity - is the contract right for you?
2. Know your contract – management tool or legal obscurity?
3. Use your contract – manage issues as they arise.
4. Successful dispute resolution – recent trends.

These are topics which relate to every construction project be they big or small. We also regularly come in and speak on an in-house basis. If you would be interested in our coming to talk to you, please contact Marie Buckley.

Website

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

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

13. CASE ROUND-UP

Our usual case round-up comes from three different sources.

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

Nicholas Gould produces a weekly legal briefing for the *Building* magazine website. Log on to www.building.co.uk for further details.

Finally, there is our long-running monthly bulletin entitled *Dispatch*, which is available in hard copy or electronic form, and is now rapidly approaching its 75th issue. This summarises the recent legal and other relevant developments. If you would like to look at recent editions, please go to www.fenwickelliott.co.uk. If you would like to receive a copy every month, please contact Jeremy Glover or Lisa Somers.

We begin by setting out the most important adjudication cases as taken from the D*ispatch*. Then we set out summaries of some of the more important other cases, starting with two from the *Building* website and then continuing with further cases from CILL. An index appears at the end of this Review.

Cases from the Dispatch

Allen Wilson Shopfitters Ltd v Buckingham

In this case, the defendant sought to stay or delay enforcement proceedings to allow the possibility of being able to use the outcome of a further adjudication to reduce his liability under the original decision. HHJ Coulson QC noted that:

> adjudicator's decisions are intended to be enforced summarily and a claimant, being the successful party in adjudication, should not, as a general rule, be kept out of his money.

He continued that pursuant to CPR 40.11, a judgment must be complied with within 14 days. The existence of a further adjudication, due to conclude sometime after that date, which might give rise to a set-off or counter-claim was "wholly irrelevant" to the question of any entitlement to judgment in the enforcement proceedings".

The Judge also considered the decision of Judge Thornton QC in *Verry* v *North West London Communal Mikvah* where Judge Thornton having given judgment to enforce an adjudicator's decision, said that that judgment would not be drawn up for six weeks to allow time for the defendant to start fresh adjudication proceedings and seek to have particular disputes resolved before the judgment was formally entered.

HHJ Coulson QC noted that the overriding reason for this conclusion was the fact that the adjudicator's decision, which he was asked to enforce, contained a number of admitted errors. One of those errors arose in a way that was actually unfair to the defendant.

Therefore, in those specific circumstances, the best way to do justice between the parties was to delay enforcement of the judgment so the defendant could attempt to have those points rectified. Such a decision was fair and unsurprising. The same principles did not occur here. Accordingly, if you think you have a potential claim of your own, it is important that you consider whether or not to take prompt action to counter-adjudicate.

Allen Wilson Shopfitters v Buckingham – Part 2

This case was decided before *Bryen & Langley* (see below). However, it has similar facts and HHJ Coulson QC reached the same conclusions as the CA.

The Judge was asked whether there was a written contract in respect of the works that were the subject matter of the adjudication. He found that there was because the letter of intent incorporated the JCT 1998 Private Without Quantities Contract. The works performed were carried out pursuant to the contract set out in the letter of intent. Therefore the JCT adjudication provisions applied and it was from these that the adjudicator derived his jurisdiction.

In general terms, the parties to a construction contract confer the necessary jurisdiction on an adjudicator in one of two ways. They can agree a contract which contains express written provisions concerning the resolution of disputes by adjudication. Alternatively, if they have a construction contract in, or evidenced in, writing, with no express adjudication provisions then the adjudication provisions set out in the HGCRA will be incorporated and apply.

Further, the Judge decided that the agreement to adjudicate was not unfair and thus contrary to the Unfair Terms in Consumer Contracts Regulations 1999. The adjudication agreement would be unfair if:

(i) It was not individually negotiated;

(ii) It was contrary to the requirement of good faith;

(iii) It caused a significant imbalance in the parties' rights and obligations arising under the Contract, to the detriment of the individual as a consumer; and

(iv) It was unfair, taking into account the nature of the goods or services for which the contract was concluded, by referring at the time of the conclusion of the contract to every circumstance attending the conclusion of the contract and all the other terms of the contract.

Ardmore Construction Ltd v Taylor Woodrow Construction Ltd

In this Scottish case, TW resisted payment of part of an adjudicator's award alleging breaches of natural justice. In the adjudication notice, Ardmore claimed they were instructed by a letter of 2 July 2003 to undertake overtime working. The adjudicator, in his decision, found that there was additional written evidence that amounted to verbal instructions or evidence that TW had requested and therefore agreed to the overtime working. TW said that, at no time prior to the issuing of the decision was the alternative overtime claim raised or discussed before the adjudicator. They therefore had not had the opportunity to respond to these suggestions.

Lord Clarke noted that it was settled law that adjudicators must observe the principles of natural justice. However, he accepted that the courts had taken a "realistic and pragmatic approach to such questions by emphasising that the nature of the process, and in particular the strict time limits within which the adjudicators are constrained to operate, require that in substantial or technical, breaches of natural justice should not be taken merely to delay or avoid payment."

Therefore the taking of such points should not be encouraged by the courts. That said, the integrity of the adjudication system would be best protected by the courts ensuring that "broad standards of fair play operate in relation to the making of decisions".

A key principle of fair play was that each side is made aware of the case that has been made against them and has an opportunity to respond to it. Here, the Judge was satisfied that no prior notice was given on any case beyond the construction and effect of the July letter. TW were not in a position to investigate these matters prior to the hearing. They were not given the opportunity to place evidence before the adjudicator prior to his issuing the decision.

Therefore even though the court should generally be "resistant to invitations to pick over adjudicator's decisions and to analyse over closely, and critically, their procedures", there had been a clear and substantial breach of natural justice here.

Bryen & Langley Ltd v Boston

At first instance, HHJ Seymour QC declined to enforce an adjudicator's decision in favour of B&L on the basis that the JCT Standard Form of Contract had not been incorporated into the contract. As the Judge had found that the contract did not incorporate any adjudication provisions, the adjudicator accordingly had no jurisdiction.

The CA has now reversed that decision. Mr Justice Rimer held that the surveyor engaged by Mr Boston to prepare the tender, invited tenders on the basis that the contract would incorporate the JCT Form, which, of course, includes adjudication provisions. Further, he wrote a letter to B&L confirming that the contract would be executed under the JCT Standard Form.

The fact that a letter giving instructions to proceed envisaged the execution of further documentation, did not preclude the conclusion that a binding contract had been entered into, provided all the necessary ingredients for a valid contract were present.

The CA also considered the argument that the adjudication provisions were unfair terms for the purposes of the Unfair Terms in Consumer Contract Regulations 1999. If this was right, then this would mean that the adjudication provisions were not binding on Mr Boston. It was accepted that the relationship between the building contractor (B&L) and the employer (Mr Boston) were supplier and consumer for the purposes of the Regulations.

The Judge said that in assessing whether a term which has not been individually negotiated is unfair, it is necessary to consider not merely the commercial effects of the term on the relative rights of the parties, but also whether the term has been imposed on the consumer in circumstances which justify a conclusion that the supplier has fallen short of the requirements of fair dealing. Mr Boston had the services of professional advice. Indeed further, here, the relevant adjudication conditions were not imposed upon Mr Boston by B&L but through Mr Boston's own agent, who specified them in the original invitation to tender.

Capital Structures Plc v Time & Tide Construction Ltd

T&T resisted an enforcement claim on the basis that the adjudicator had no jurisdiction. The reason given was that the agreement between the parties came about as the result of economic duress and that that agreement had been avoided before the adjudicator assumed jurisdiction.

Capital were a subcontractor to T&T in respect of the supply, delivery and installation of structural steelwork and cladding. After disputes arose, a settlement agreement was signed. The agreement was in full and final settlement of all existing and/or future claims. It included a clause providing that if a dispute arose under it, then that dispute could be referred to adjudication.

T&T said that they had only agreed to the settlement because they had no choice. The adjudicator rejected the claim of economic duress. A claim of economic duress is a difficult one to make. To demonstrate and prove actual duress

(i) there must be pressure the practical effect of which is that the “victim” is compelled or had no choice but to agree;

(ii) that pressure must be illegitimate; and

(iii) that pressure must be a significant cause in inducing the “victim” to sign the contract. Relevant factors might include whether the victim has any practical alternative, protested at the time, and whether the victim affirmed or sought to rely on the contract.

HHJ Wilcox noted that the courts, in adjudication enforcement cases, must be wary of encouraging complex satellite litigation. He therefore cautioned against “imaginative and strange interpretation of the facts and events arising in the commercial rough and tumble of the construction industry”. This should not be allowed to found weak challenges to jurisdiction.

The Judge first considered the suggestion that even if economic duress was proven, the adjudications provision of the contract would have survived. He said that where there had never been a contract because it had been avoided on the grounds of duress, it logically followed that any adjudication provision also became void. Here, the Judge felt there was, just, an arguable case as to the economic duress. As this was a claim for summary judgment, this was all T&T had to show.

Accordingly, T&T were given leave to defend and summary judgment was refused. If economic duress was proven and if T&T had taken proper steps to avoid the settlement agreement which was the subject of adjudication, then the adjudicator would not have had jurisdiction.

Carillion Construction Ltd v Devonport Royal Dockyard Ltd

At first instance, Mr Justice Jackson set out four basic principles which apply to any attempt to enforce an adjudicator's decision. These general principles were upheld by LJ Chadwick. In fact, the CA did not give permission to appeal in respect of the majority of the areas sought by Devonport. For example, LJ Chadwick said it would be inappropriate for him to express any view as to whether or not the Adjudicator was correct (as a matter of law) to adopt the approach he did. Decisions must be enforced, even if they result from errors of procedure, fact or law. LJ Chadwick concluded:

> In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he is ordered to pay by the Adjudicator. If he does not accept the Adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the Adjudicator’s decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense…

However, the CA did consider the question of interest. Mr Justice Jackson had decided that paragraph 20(c) of the Scheme conferred a free-standing power to award interest. Whilst LJ Chadwick disagreed with that, he did agree that, in the circumstances of this adjudication, interest should be awarded. Devonport had not disputed that there was power to award interest if the adjudicator found monies to be outstanding under the agreement. Its position was that the question of interest did not arise because there were no monies outstanding. If Devonport had intended to take the point that interest had not been within the scope of the adjudication, particularly given the extent of representations which were made, it should have said so.

Interserve Industrial Services Ltd v Cleveland Bridge UK Ltd

Can a losing party in an adjudication withhold payment on the basis that it expects to recover an equivalent or larger sum in a subsequent adjudication?

The parties were engaged on works to refurbish and strengthen the Tinsley viaduct. Disputes arose and there were a series of adjudications carried out in accordance with the CIC Model Adjudication procedure. Adjudication number two lasted for some 21 weeks. On 24 November 2005, the adjudicator held that Interserve's works had been delayed for 38.8 weeks. Of this, 12.8 weeks were attributable to Interserve and 26 weeks to Cleveland. In addition, the adjudicator ordered that Cleveland pay Interserve the sum of £1.35 million.

Cleveland did not pay. As the extension of time award expired on 27 April 2005, it claimed substantial loss and expense and/or damages for the period 1 May to 31 October 2005. Interserve brought enforcement proceedings commencing on 6 December 2005. The application for summary judgment was held on 3 February 2006. Judgment was given on 6 February 2006.

However, in the interim, on 22 December 2005, Interserve sent a letter of claim to Cleveland claiming further extensions of time and additional loss and/or expense. In addition, on 6 January 2006, Cleveland served its own adjudication notice. The Interserve claims were not part of this adjudication.

At midday on 3 February 2005, midway through the enforcement application, the adjudicator's decision in adjudication number three was delivered. Interserve was

entitled to a further extension of time until 1 June 2005 but was held to be responsible for any delays which occurred after that. Therefore Interserve's liability to Cleveland was held to be some £1.4 million. This was due to be paid by 17 February 2006. Notwithstanding this, Interserve submitted they were entitled to an immediate judgment on the sums awarded in adjudication number two which ought to have been paid by 28 November 2005.

Cleveland said that the sums awarded in adjudication number three ought to be set off against the Interserve award. Alternatively, there should be a stay of execution pending enforcement of the third adjudication.

Mr Justice Jackson specifically agreed with the conclusions of HHJ Gilliland QC in *Gleeson* v *Devonshire Green* and *McLean* v *The Albany Building* where the Judge held that payment ordered by an adjudicator could not be withheld on the basis of a claim which accrued after the adjudication had commenced and that a party could not set off a claim for damages against an adjudication decision.

Here, a decision had been given in the second adjudication in November 2005. At the end of every adjudication, unless the contract says otherwise or there are some other special circumstances, the losing party must comply with the adjudicator's decision. The losing party cannot withhold payment on the basis of an anticipated recovery in a future adjudication based upon different issues. Cleveland should have paid on 28 November 2005. That situation had not been changed by the decision in the third adjudication. Payment in that adjudication was required on or before 17 February 2005. There was no obligation to pay at the time the enforcement decision was given.

Mr Justice Jackson said that if the existence of a claim could be relied upon as a reason to withhold payment, then you may have a situation where there would be a series of consecutive adjudications with the result that no adjudicator's decision is implemented. Each award would take its place in the running balance between the parties.

Accordingly the answer to the question as to whether a losing party could withhold payment on the basis that it expected to recover an equivalent or larger sum in a subsequent adjudication was no.

Therefore, if you do think you have a cross-claim, you must start your own adjudication as quickly as possible.

John Roberts Architects Ltd v Parkcare Homes (No.2) Ltd

The question at issue was whether or not an adjudicator had the power to award costs where a referring party had withdrawn its claim. HHJ Havery QC said that he could not. The case went to appeal and the CA disagreed.

The parties had agreed that any adjudication would be subject to the CIC Model Adjudication Procedure with the following amendment:

> The Adjudicator may in his discretion direct the payment of legal costs and expenses of one party by another as part of his decision.

The CA said that although it was possible, or indeed sensible, for a contract to provide that each side in any adjudication dispute should bear its own costs, this was not what the contract said here. The CA also noted that if the first instance decision was followed then either side could abandon its contentions at the last minute with no costs consequences. This was not so sensible.

Looking at the wording of the amendment, the CA said that "as part of his decision" meant no more than "as part of what he may decide". Accordingly, the adjudicator had power to make an award of costs. There are two key points here. First there was no provision in the contract that each party bear its own costs. Second, it was the contract which made provision for adjudication. There was no statutory right to adjudicate under the HGCRA. This case is therefore more likely than not to be confined to its specific facts.

Kier Regional Ltd (t/a Wallace) v City & General (Holborn)Ltd

This adjudication enforcement case centred on the decision of an adjudicator to disregard two expert reports submitted by the responding party. The adjudicator's reasoning was that the reports were not before the contract administrator when he

produced the valuation which was the subject of the adjudication. They were not therefore relevant to the way in which that valuation was prepared. C&G took the view that this meant the adjudicator's decision was unlawful and refused to pay the sums ordered. C&G said that the refusal to consider the reports led to a decision which was manifestly unfair.

In the course of his judgment, Mr Justice Jackson considered the relevant authorities. One of those cases was *Carillion* v *Devonport Royal Dockyard*. One line of defence there was that the adjudicator had failed to consider relevant evidence submitted to him.

The position adopted by the TCC and the CA was that if an adjudicator declines to consider evidence which, on his analysis of the facts or law, is irrelevant, this is not necessarily a breach of the rules of natural justice. It may be that the adjudicator's analysis in reaching that conclusion was wrong. However, the making of a mistake by an adjudicator was not enough to overturn a decision. Unless it was plain that the question which the adjudicator answered was not the question referred to him or that the manner in which he had gone about his tasks was obviously unfair, then the courts should not intervene.

Mr Justice Jackson did see considerable force in the contention that the adjudicator here ought to have taken the two expert reports into account. However, he thought that it was not necessary finally to decide this point for one reason. This was because the error allegedly made by the adjudicator was not one which could be said to invalidate his decision. The adjudicator considered each of the arguments advised by C&G. At worst, and the Judge did not say this actually happened, the adjudicator made an error of law which caused him to disregard the two expert reports. Following the CA decision in *Carillion*, that error would not render the decision invalid as it could not be said that the facts here represented a plain case of a breach of natural justice.

Lafarge (Aggregates) Ltd v Newham London Borough Council

Lafarge applied to the court under section 67(1)(a) of the 1996 Arbitration Act seeking a determination that an award had been made without jurisdiction. The award related to a preliminary issue where an arbitrator determined he had jurisdiction to hear a claim commenced by Newham. The dispute had been referred to an adjudication and, following the adjudication, Newham sought to arbitrate the matters in dispute.

On 13 August 2004, the adjudicator sent an email attaching a letter and document entitled "Adjudicator's Decision". This was dated but not signed. The signed decision was sent in hard copy to the parties on 13 August 2004. Newham said that they did not receive it until 17 August 2004. On 11 November 2004, legal advisers for Newham sent a Notice to Concur to Lafarge. Pursuant to the contract, the Notice needed to be served within three months of the adjudicator's decision. The letter was received on Friday, 12 November 2004.

The arbitrator found that the adjudicator had given his decision on 13 August 2004, the date when it was sent and received by email, and not 17 August 2004, the date the copy was received by Newham. The arbitrator also noted that under the contract, service was not effected until the expiry of two working days after the letter had been sent. However, the arbitrator then found that Saturday was a working day for the purposes of the contract. Therefore, the Notice was to be treated as served on Saturday, 13 November 2004, i.e. within the three months time limit.

Cooke J agreed that the adjudicator's decision was given on 13 August 2004. It also held that it was plain that whatever method of service was adopted (sending a notice by post or leaving the notice at a registered office), under the contract “notice shall be deemed to be served two working days following service”.

There were practical reasons for this - i.e. the inevitable delay if the Notice was sent by post before it came to the attention of the person dealing with the matter. Further, the server of a Notice knows that he must adopt one of the prescribed forms of service at a time which allows two working days to follow before the expiry of any relevant time limit.

Newham argued that the contract provided for permitted working hours, including Saturday. Lafarge argued that what

mattered was office working hours. Cooke J looked at the permitted working hours. The contract excluded weekend working in residential areas. The Judge held that in ordinary parlance, working days are Mondays to Fridays, excluding Christmas, Easter and Bank Holidays. Saturday, 13 November 2004 was not a working day. The earliest date service could have been effective was 15 November 2004. As a consequence, the arbitrator had no jurisdiction.

Michael John Construction Ltd v Golledge & Others

MJC sought to enforce an adjudicator's decision. In his judgment, HHJ Coulson QC noted that a point that often arises as part of any jurisdictional dispute is the suggestion by the unsuccessful party that the matters referred comprised more than one dispute. In such cases, the courts have adopted a robust approach to this and have utilised what has been called a “benevolent interpretation of the notice”.

The defendants said the notice to refer was invalid because it asked the adjudicator to decide at least two disputes. The two disputes were, the correct identity of the employer and how much that employer owed. The Judge noted that this point has never yet been decided in favour of an unsuccessful defendant. He made it clear he was not going to create any such precedent here. This would be untenable as a matter of commercial sense.

The matter referred was one dispute: “How much, if anything, did the employer owe?” The Judge also rejected the suggestion that the dispute that arose was one that arose not under the contract, but in connection with that contract. Again, the matter at issue was, what was the claimant owed under the contract?

An application was also made for a stay on the “Hershel” principles. However, it was plain on the evidence that MJC was not in a significantly worse financial position now than it was at the time the contract was entered into. Further, to the limited extent that MJC's financial condition had deteriorated, this was due, at least in part, to the failure by the defendants to honour the adjudication.

Quietfield Ltd v Vascroft Contractors Ltd

This case relates to two adjudications between Vascroft and Quietfield before the same adjudicator. The first was a dispute about whether Vascroft was entitled to an extension of time on the basis of matters they had set out in two letters dated 2 September 2004 and 22 April 2005. This claim was dismissed on the basis that Vascroft had failed to discharge the burden of proof necessary to demonstrate that they were entitled to an extension of time.

As a consequence of this decision, Quietfield then began their own adjudication, claiming LADs from Vascroft. Quietfield relied upon the adjudicator's decision the first time round. Vascroft's defence included a 400-page document which sought to trace the critical path and analyse the delays to completion caused by a number of relevant events. Some of this information had been produced for the adjudicator in the first adjudication, but significant amounts of the information were new.

The adjudicator refused to consider the extension of time defence saying that this matter had already been determined in the first adjudication. He went on to order that Vascroft pay both the liquidated damages and his fees. Vascroft did not pay saying that the adjudicator should have considered their defence. Quietfield decided to commence enforcement proceedings.

Mr Justice Jackson said that there were four principles which applied when there are successive adjudications about extension of time claims and/or the deduction of damages for delay:

(i) Where the contract allows the contractor to make successive applications for extensions of time on different grounds, either party, if dissatisfied with the decisions made, can refer those matters to successive adjudications. The difference between the contentions of the aggrieved party and the decision of the contract administrator will constitute the “dispute”;

(ii) If the contractor makes successive applications for extension of time on the same grounds, the contract administrator will usually reiterate

his original decision. The aggrieved party cannot refer this matter to successive adjudications;

(iii) Subject to paragraph (iv) below, where the contractor is resisting a claim for liquidated and ascertained damages in respect of delay, pursued in adjudication proceedings, the contractor may rely by way of defence upon his entitlement to an extension of time;

(iv) However, the contractor cannot rely by way of defence in adjudication proceedings upon an alleged entitlement to extension of time which has been considered and rejected in a previous adjudication.

Accordingly, Mr Justice Jackson held that as Vascroft's defence included new evidence, it was on different grounds than those previously considered in the first adjudication. Therefore he refused the enforcement application.

Wimbledon Construction Company 2000 Ltd v Vago

Vago engaged WCC to carry out extension and refurbishment works at his house. Disputes arose and WCC commenced an adjudication. The adjudicator awarded WCC the sum of £122,923.34. This was not paid and WCC commenced enforcement proceedings. At about the same time Vago commenced arbitration proceedings to challenge many of the adjudicator's findings. In the court proceedings, Vago consented to judgment being entered and offered to pay the sum of £122,923.34 into court. That offer was refused. Vago then sought an order that enforcement be stayed, pending the outcome of the arbitration proceedings, on the grounds of WCC's uncertain financial position.

In addition, WCC sought summary judgment for £6,507.97, being the agreed value of post-contract works carried out at the property. This was not disputed but Vago maintained that he had a set-off and/or counter-claim in respect of alleged defects in the heating and ventilation works which, it was said, operated as a complete defence to this element of the claim. WCC complained that the nature of the counter-claim was extremely vague. There was no attempt to identify how and why the items could be said to constitute a breach of contract.

HHJ Coulson QC said that the uncertainty within Vago's own evidence as to what the proposed cross-claim might be worth typified the fact that next to no analysis and/or particularity had been provided in respect of this proposed claim. Therefore on the basis of the scant information available to him he concluded that Vago had no real prospect of successfully defending the claim.

The Judge then considered whether there should be a stay of the enforcement proceedings. In doing so, he set out the following principles:

(i) Adjudication is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.

(ii) In consequence, adjudicators' decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money.

(iii) In an application to stay the execution of summary judgment arising out of an adjudicator's decision, the court must exercise its discretion under CPR 47.

(iv) The probable inability of the claimant to repay the judgment sum (awarded by the adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances within the meaning of CPR rule 47.1(1)(a) rendering it appropriate to grant a stay.

(v) If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted.

(vi) Even if the evidence of the claimant's present financial position suggested that it was probable that it would be unable to repay the judgment sum when it fell due, that

would not usually justify the grant of a stay if:

(a) the claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made; or

(b) the claimant's financial position is due, either wholly, or in significant part, to the defendant's failure to pay those sums which were awarded by the adjudicator.

On the basis of the evidence before him, the Judge considered that Vago had not demonstrated a probable inability on the part of WCC to repay the judgment sum, if that was the outcome of the subsequent arbitration process. WCC was making a modest profit and was not insolvent. The directors of WCC had made loans to the company. Whilst this may have been a legitimate concern, here HHJ Coulson QC said that the loans demonstrated a high degree of practical faith in the future of the company on the part of the directors, and that faith might be regarded as the best possible evidence that any sums, if they had to be, would be repaid.

In addition, the Judge was in no doubt that WCC's present financial position, and its likely position in a year's time, was the same or very similar to its financial position at the time when the contract was made. He also was of the view that part of WCC's particular financial difficulties was due, at least in significant part, to the failure on the part of Vago to honour the adjudication decision.

OTHER CASES

Building Magazine Legal Briefing

Full Metal Jacket Ltd v Gowlain Building Group Limited

Court of Appeal, May LJ, Arden LJ
Sir Peter Gibson, [2005] EWCA Civ 1809
Judgment delivered 09 December 2005

The Facts

Gowlain Building Group Limited ("Gowlain") entered into a contract to do some building works at a school. Part of the work included re-roofing a boiler house, which Gowlain intended to subcontract to Full Metal Jacket Ltd ("FMJ"). Accordingly, Gowlain supplied FMJ with a simple drawing of the roof and requested FMJ to quote for the relevant work. In response FMJ submitted an initial quotation, which, because FMJ had mistakenly under-priced, was subsequently withdrawn by FMJ.

Prior to receipt of FMJ's revised quotation, Gowlain faxed FMJ a second drawing of the roof, which showed the roof in more detail than the previous drawing that had been submitted by Gowlain. FMJ subsequently submitted a revised quotation, which was accepted by Gowlain. FMJ ignored the second drawing when actually completing the works and as a result the completed roof had to be redone.

FMJ requested payment for the works it had undertaken. Gowlain refused to pay FMJ for the works and counter-claimed for breach of contract. FMJ commenced an adjudication and the adjudicator found in favour of FMJ. However, summary judgment to enforce the adjudicator's award was refused and the matter went to trial. The trial judge held that the contract required the work to be completed in accordance with the second drawing and therefore Gowlain was entitled to succeed on its counter-claim. The Judge gave judgment for Gowlain and ordered FMJ to pay the costs of the claim and the counter-claim.

The issues

The principal issue was whether the contract between FMJ and Gowlain required FMJ to comply with the second drawing.

The decision

The Court of Appeal held that there was no room for misunderstanding - the contract comprised the work shown on the second drawing. Accordingly, the trial judge had correctly construed the contract and reached the correct result.

Comment

The case demonstrates the importance of ensuring that contractual obligations are properly understood before submitting quotations and/or commencing work.

In this particular case FMJ had not provided a proper quotation on the first drawing, yet

Gowlain had issued a second drawing. In such circumstances it is perhaps easy to see how confusion may have arisen.

Kanoria & Others v Guinness

Court of Appeal, Lord Phillips LCJ
Sir Anthony Clarke MR, May LJ
[2006] EWCA Civ 222

The facts

The respondent, Guinness, was the majority shareholder in a UK company, CPL. The appellants, Kanoria, commenced arbitration proceedings in India against Guinness and CPL, claiming that CPL had failed to pay a sum of money to Kanoria under a business agreement subject to Indian law.

At the time Kanoria commenced arbitration proceedings, Guinness was seriously ill and unable to attend the arbitration hearing. During the arbitration hearing, Kanoria made allegations of fraud on the part of Guinness as justification for holding Guinness rather than his company personally liable. However, no notice was given to Guinness about the allegation of fraud.

In the arbitration award, the arbitrator directed Guinness to pay the sum of money owed by CPL to Kanoria. Kanoria sought to enforce the arbitration award in the UK under the Arbitration Act 1996. Guinness relied on clause 103(2)(c) of the 1996 Act, which provides that enforcement may be refused if the party to an arbitration "was not given proper notice of… the arbitration proceedings or was otherwise unable to present his case".

The issue

Had Guinness been properly informed of the case against him?

The decision

The court decided that a party to an arbitration is "unable to present his case" if he is never informed of the case that he is called upon to meet. The allegation against Guinness appeared to be that he was personally liable for the debt of the company. However, it subsequently turned out that the case Guinness had to meet was in fact fraud and he was never given notice of it. The court therefore held that this was a breach of natural justice and an order enforcing the award was refused.

Comment

The court made it clear that not every case where facts have not been brought to the attention of someone who had not turned up to arbitration proceedings would escape enforcement. However, this was an "exceptional" case where no notice was given of an allegation of fraud leading to an extreme case of potential injustice. Nonetheless, the case underlies the general importance of giving proper notice of what your case is, in order to give the other side a fair chance to respond to your case and thereby avoiding future difficulties.

Construction Industry Law Letter

Bernuth Lines Ltd v High Seas Shipping Ltd

Commercial Court
Christopher Clarke J
Judgment delivered 12 December 2005

The facts

In this case, a question that came before the Commercial Court was the validity of service by email in arbitration cases. Notice of arbitration and pleadings had been served on Bernuth by email to an address listed in the Lloyd's Maritime Directory and on Bernuth's website. It was not an email address that had been notified to High Seas in any previous communication. While the emails had been received, the address was a cargo bookings address and the emails had not been dealt with. Bernuth argued that service had not been properly effected and therefore that the arbitration had not been validly commenced.

Section 76 of the Arbitration Act 1996 deals with service in arbitration proceedings. The Court held that s.76 was drawn purposely wide and that it contemplated that any means of service would suffice provided that it was a recognised means of communication effective to deliver the document to the party to whom it was sent.

This is, of course, in contrast to the position under the CPR, which sets out

specific circumstances in which service by email may be effected. The Judge rationalized this on the basis that arbitration procedure tends to be used by businessmen represented by or with access to lawyers and that email is a habitual form of communication between businessmen, lawyers and civil servants. The CPR relate to all types of litigant, including those who are unrepresented.

The Judge stated that the email should not be rejected and that it should be dispatched to the email address of the intended recipient. However, in order for service by email to be effective, s.76 of the 1996 Act did not require the email address at which service was purportedly made to be notified to the serving party as an address to be used in the context of the relevant dispute. The Judge therefore held that service in this case had been effected.

Issues and findings

Was service by email to Bernuth's address proper service for the purposes of the Arbitration Act 1996?

Yes. The email was received at an email address that was held out to the world as the only email address of Bernuth and service was effectively made.

Commentary

Under the CPR, service by email is not allowed in the absence of express written confirmation and without the relevant email address being provided. It seems that the situation is different in arbitration. The Judge noted in this case that arbitration is usually conducted by businessmen with ready access to lawyers. Section 76 of the Arbitration Act is purposely wide and contemplates that any means of service will suffice provided it is a recognised means of communication and effectively delivers the document.

There was therefore no reason in this case why the use of email should be regarded as different from communication by post or fax.

Best Beat Ltd v Rossall

Chancery Division
Park J
Judgment delivered 10 March 2006

In this case, the issue that came before the court was the effect of an arbitration agreement where a winding-up petition had been served. Best Beat was the landlord and Rossall the tenant. Rossall served notice on Best Beat to request a new tenancy.

Best Beat objected. Rossall did not contest this but instead claimed compensation pursuant to statute. Best Beat did not pay that compensation, so Rossall issued a winding-up petition. Best Beat applied to stay the petition pursuant to s.9 of the 1996 Arbitration Act on the basis that there was provision for arbitration under the lease.

The Judge held that s.9(1) of the 1996 Act provided that a party is entitled to apply for a stay of proceedings if it was a party against whom legal proceedings had been brought either by way of a claim or counter-claim and that the claim had to be in respect of a matter that had been referred to arbitration. The Judge went on to hold that while a winding-up petition was a species of legal proceedings, it was not a claim or counter-claim and therefore Best Beat did not have the standing to invoke s.9(1) of the 1996 Act. Further and in any event, the lease did not provide for a compensation claim to be referred to arbitration.

Construction Partnership UK Ltd v Leek Developments Ltd

Technology and Construction Court, Salford District Registry
His Honour Judge Gilliland QC
Judgment delivered 26 April 2006

The facts

Leek Developments Ltd ("Leek") engaged Construction Partnership UK Ltd ("CPUK") to carry out refurbishment works in Macclesfield pursuant to a JCT Intermediate Form of Contract, 1998 Edition.

Clause 7.9.1 of the contract provided that if the employer was in default of the contract provisions in various specified ways, then notice could be given by the contractor specifying the default and if that default was not remedied by the employer within a certain timescale, further notice could be given by the contractor to determine the contract. This is a typical provision in a JCT standard form of contract.

The contract administrator issued two certificates, certificates 15 and 16, which were not paid by Leek. On 23 December 2005 CPUK gave Leek notice pursuant to clause 7.9.1 of the contract stating that Leek was in default. That notice was in the form of a letter which was sent by fax and post. On 17 January 2006 CPUK served the further notice necessary to determine under the contract.

Leek refused to pay the certificates and counter-claimed for liquidated damages. CPUK referred the matter to the High Court for summary judgment.

One issue that came before the Judge was whether or not the determination by CPUK of the contract was valid and lawful and in particular whether the notice given on 23 December 2005 failed to comply with the notice requirements of clause 7.1 of the contract which stated:

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

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

Issues and findings

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

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

Commentary

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

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

ERDC Group Ltd v Brunel University

Queen's Bench Division (Technology and Construction Court)
His Honour Judge Humphrey LLoyd QC
Judgment delivered 29 March 2006

The facts

Brunel University ("Brunel") required the design and construction of various sporting facilities. ERDC Group Ltd ("ERDC") submitted a tender for the works, including a detailed contract sum and analysis, which were to be carried out on the basis of the JCT Standard Form of Contract With Contractor's Design, 1998 Edition. On 5 February 2002 Brunel decided to appoint ERDC, although it was also decided that the formal execution of the contract documents be deferred until after the grant of full planning permission. It was agreed that ERDC would progress the design of the works under a letter of intent which was issued on 6 February 2002.

Four further letters of intent were issued extending the scope of works to be carried out and the financial authority. In all other

material respects the terms of the letters of intent remained unchanged, although the authority under the last letter of intent expired on 1 September 2002.

Notwithstanding this, ERDC continued working and the majority of the works were completed by November 2002 but contract documents were never executed and by a letter of 3 December 2002 ERDC wrote stating that as the work content of the project had changed significantly they were not prepared to sign the contract documents adding that in these circumstances they were entitled to be paid upon a quantum meruit basis. Brunel rejected this contention maintaining that work executed both prior to and post 1 September 2002 was to be valued on the basis of the JCT Standard Form of Contract as provided for by the letters of intent.

Issues and findings

What was the effect of the letters of intent?

The letters created a contract a term of which was that the works carried out up to 1 September 2002 were to be valued and paid on the basis of ERDC's proposed contract rates in accordance with the JCT Form of Contract.

On what basis was the work carried out by ERDC after 1 September 2002 to be valued and paid?

On a quantum meruit basis which in the circumstances of this case represented ERDC's proposed contract rates as opposed to cost plus.

Commentary

It is worth recording the Judge's comments to the effect that the phrase "letter of intent" is not a term of art and the legal implications of letters of intent will always depend entirely on the particular wording of the letter in question and the surrounding circumstances. This case contains a useful summary of a number of the more recent authorities addressing the thorny issue of how a contractor's entitlement to be paid upon quantum meruit should be assessed. Again, this will depend very much on the particular facts of each case, although certain principles of general application can be gleaned from the authorities referred to in the present case. In this case the circumstances were somewhat unique in that ERDC originally worked upon a contractual basis.

Accordingly, the Judge decided that the contractual rates which were considered reasonable should continue to be used as a measure of a reasonable sum, as opposed to a cost-plus basis, once the contract authority expired. The Judge also supported the proposition that ERDC was not to be put in a better position as a result of the failure to conclude the contract.

Kershaw Mechanical Services Ltd v Kendrick Construction Ltd

Technology and Construction Court
Mr Justice Jackson
Judgment delivered 2 March 2006

The facts

Kendrick engaged Kershaw as its mechanical subcontractor on a hospital project in Birmingham pursuant to a DOM/2 Form of Contract.

A dispute arose between the parties as to the meaning of a qualification in the contract relating to design information. That dispute together with others was referred to arbitration and in November 2005 the arbitrator delivered a partial award on the interpretation of the qualification and the amounts therefore due to Kershaw. Kershaw was not happy with the award, arguing that the arbitrator had erred in his interpretation of the qualification. Kershaw commenced proceedings in the High Court to appeal the arbitration award on a point of law.

Section 69(2)(a) of the Arbitration Act 1996 states:

> 69(2) An appeal shall not be brought under this section except –
>
> with the agreement of all the other parties to the proceedings …

The contract between the parties provided that either party could apply to the courts on any question of law arising out of an arbitration award; therefore this was an

appeal pursuant to s.69(2)(a) of the Arbitration Act 1996. At the hearing in front of Jackson J, the following issues were considered:

1. What was the correct approach of the Court to an appeal pursuant to s.69(2)(a) of the Arbitration Act 1996?

2. Which, if any, of the questions formulated by Kershaw were questions of law arising out of the award?

3. What were the answers to the questions which survived scrutiny?

Issues and findings

What evidence can the Court receive in an appeal pursuant to s.69 of the Arbitration Act 1996?

The court should receive a copy of the arbitral award and any document referred to in the award which the court needs to read in order to determine a question of law arising out of the award.

Is there a philosophy of non-intervention which should influence the court hearing an appeal under s.69(2)(a)?

There is no philosophy or ethos underlying the application of the Arbitration Act 1996 which should deter the court from answering the questions correctly.

What degree of deference should be shown to the arbitrator's decisions on questions of law?

The court should read an arbitral award as a whole in a fair and reasonable way. Where the arbitrator's experiences assist him in determining a question of law, the court will accord some deference to the arbitrator's decision on that question. The court will only reverse that decision if it is satisfied that the arbitrator, despite the benefit of his relevant experience, has come to the wrong answer.

How should he identify any questions of law arising out of the award?

The guidance given by Mustill J in *The Chrysalis* [1983] 1 Lloyd's Rep 503 and Steyn LJ in *The Baleares* [1993] 1 Lloyd's Rep 215 (CA) although relating to the Arbitration Act 1979 applies equally to appeals under s.69(2)(a) of the Arbitration Act 1996.

Commentary

This is a succinct exposition on the status of the law applying to arbitration appeals made pursuant to s.69(2)(a) of the Arbitration Act 1996. Of particular note are the comments made by the Judge on non-intervention by the courts in arbitration agreements made pursuant to the 1996 Act. This principle of non-intervention is expressly stated at s.1(c) of the 1996 Act. The Judge distinguished appeals under s.69(2)(a) from the principle of non-intervention. This is to be contrasted with the approach taken by the House of Lords in *Lesotho Highlands Development Authority* v *Impregilo SpA and others* [2005] CILL 2279.

The Judge reconciled this on the basis that the appeal in *Lesotho Highlands* was made pursuant to s.68 (serious irregularity) rather than s.69 of the Act, something practitioners and those entering into arbitration agreements should take into account when considering appealing an arbitrator's award.

Plymouth & South West Cooperative Society Ltd v Architecture, Structure & Management Ltd

Queen's Bench Division, Technology and Construction Court
His Honour Judge Thornton QC
Judgment delivered 10 January 2006

The facts

Plymouth & South West Cooperative Society Ltd ("Plymco") intended to carry out the redevelopment of its main store at Derry's Cross, Plymouth. Plymco engaged Architecture, Structure & Management Ltd ("ASM") for all necessary architectural, structural engineering and quantity surveying services including procurement services and procurement advice.

It was a priority of Plymco's that the cost of the work should not exceed £5.5m and ASM produced a budget estimate for the works in the sum of £5.65m, making it clear that appropriate savings could be made to meet with Plymco's budgetary

restraints. On the basis of this budget estimate Plymco decided to proceed with the development and commenced the task of securing tenants for the retail units.

On 10 October 1996 an agreement for lease was signed with Argos, which provided for completion by 21 April 1997. This resulted in a tight timetable for the works and their design and as a result of this, ASM proposed a two-stage tendering process for the appointment of the contractor.

Delays occurred to ASM's design with the result that at the conclusion of the two-stage tendering process of the preferred contractor tendered in the sum of £5,036,061, but in the region of 87% of this proposed contract was provisional relating to work which was described in the contract as "not detailed save in outline".

Prior to letting the contract, Plymco raised concerns about the high percentage of provisional sums but ASM convinced Plymco that the development could be completed within budget and on that basis Plymco let the contract.

The final cost to complete the works significantly exceeded the contract sum and Plymco alleged that some £2m of the overspend arose as a result of negligence on the part of ASM in the manner in which it had procured the building contract and the advice it gave to ASM in that regard. In particular, Plymco alleged that ASM should have advised that the works should have been procured in two distinct phases: one to carry out the building works for Argos and then the other to complete the remainder of the development.

Issues and findings

Was ASM in breach of its duty to act with all reasonable skill and care in relation to the advice it gave in respect of the procurement of the works?

Yes. ASM should have advised Plymco to carry out the works in two stages.

Commentary

When a project suffers significant time and cost overruns, perhaps not surprisingly employers will often ask questions in relation to any professional advice provided as to the appropriate procurement route. With the benefit of hindsight it may well be the case that a different procurement route could have delivered the project quicker and cheaper.

However, this in itself does not mean that any professional advice given at the outset as to the procurement route adopted was negligent. Claims in respect of potentially negligent procurement advice are notoriously difficult to establish and accordingly this case is of interest because it is one of the rare occasions when a consultant has been found to be negligent in the advice it gave and actions in relation to the procurement of a development.

R+V Versicherung AG v Risk Insurance and Reinsurance Solutions SA and Others

Commercial Court
Mrs Justice Gloster
Judgment delivered 27 January 2006

This was an insurance case involving certain issues of principle in relation to quantum following a hearing on liability in tort. One of the quantum issues was the recoverability of wasted staff costs. Gloster J considered and upheld the usual authorities.

R+V Versicherung, was claiming as damages internal management and staff costs and internal overheads. As a matter of principle, the judge held that the costs of wasted staff time were recoverable. However, the judge also stated that it had to be demonstrated with sufficient certainty that the wasted time had indeed been spent on such investigations and that such expenditure was directly attributable to the tort complained of.

In other words, to be able to recover, it had to be shown that there had been a significant disruption to business and that the staff had been deliberately diverted from their usual activities. If this was not done, then the alleged wasted expenditure on wages could not be said to be directly attributable to the tort. However, it was not the purpose of the hearing to decide whether the quantification of such expenditure had been proven with sufficient detail.

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